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SUPREME COURT, U.S.

No. 74-1589

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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GENERAL ELECTRIC COMPANY,

*Petitioner,*

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*

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MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

*Petitioners,*

v.

GENERAL ELECTRIC COMPANY

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## JOINT PETITION OF ALL PARTIES FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Pursuant to Rule 20 of the Rules of this Court, Petitioners[1] pray that a writ of certiorari issue in advance of the judgment of the Court of Appeals for the

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[1] All parties to the suit in the court below join in petitioning for a writ of certiorari. In the event that certiorari is granted, the parties have agreed that, subject to the approval of this Court, General Electric Company shall be treated as petitioner with re-

Fourth Circuit to review a case pending in the latter court following a decision by the United States District Court for the Eastern District of Virginia.

An appeal to the Fourth Circuit from the district court's decision was perfected in May 1974 (*Martha V. Gilbert, et al., Appellees,* v. *General Electric Company, Appellant,* No. 74-1557, Fourth Circuit). On January 8, 1975, the case was argued before a panel of the court of appeals. However, on June 9, 1975, the court of appeals entered an order (App. A, *infra,* p. 1a) announcing that its decision in the case would be delayed pending this Court's decision in *Wetzel* v. *Liberty Mutual Insurance Company,* No. 74-1245, certiorari granted May 27, 1975.

## OPINIONS BELOW

The opinion of the district court (App. B, *infra,* pp. 2a-38a) was entered on April 13, 1974, and is reported at 375 F. Supp. 367. Earlier district court opinions with respect to procedural aspects of the case are reported at 347 F. Supp. 1058 (1972), at 59 F.R.D. 267 (1973), and at 59 F.R.D. 273 (1973).

## JURISDICTION

The judgment of the district court (App. C, *infra,* p. 46a), entered on April 13, 1974, was stayed in part by an order (App. E, *infra,* p. 50a) entered on May 8, 1974. On May 9, 1974, petitioner General Electric

spect to the briefing and oral argument in this Court as it was the moving party in the court below.

The parties are also prepared, if certiorari is granted, to follow whatever reasonably accelerated briefing schedule the Court may deem appropriate in order not to delay the Court's action in the pending *Wetzel* v. *Liberty Mutual Insurance Company,* No. 74-1245.



Company ("GE") filed a notice of appeal, and on May 15, 1974, the certified record from the district court was filed in the Court of Appeals for the Fourth Circuit. As stated, the court of appeals has not acted on GE's appeal. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), which provides for Supreme Court review of cases in the courts of appeals by writ of certiorari granted upon the petition of any party before or after rendition of judgment.

## QUESTION PRESENTED

The question presented[2] is whether an employer's exclusion of coverage for pregnancy-related disabilities from an employee disability income protection plan

[2] The subsidiary and related questions listed below were presented to the court of appeals. Question No. 1 is urged by the petitioner GE, and Questions Nos. 2-5 are urged by petitioners Gilbert, et al., as important and appropriate for decision by this Court in connection with the principal Question Presented. If certiorari is granted as to the principal question, but is denied as to any of the following questions, petitioners respectfully request that subsequent to decision by this Court, the case be remanded to the court of appeals for decision of such questions to the extent that they may remain relevant:

Questions urged by petitioner GE—

1. Whether the district court erred when:

   a. In defining the plaintiff classes on whose behalf the action could be maintained, it included females not employed in the same plant as the representative plaintiffs and/or who are not represented for purposes of collective bargaining by the same international union and/or the latter union's affiliated locals.

   (b) It directed that a Rule 23(c)(2) Legal Notice concerning the pendency of the action be posted in plants and facilities of GE, rather than requiring that individual notice be given to members of the plaintiff class. (Petitioners Gilbert, et al., do not believe that Question No. 1(b) is presented since the

constitutes sex discrimination proscribed by Title VII of the Civil Rights Act of 1964.

**STATUTE INVOLVED**

The relevant provisions of Section 703 of Title VII of the Civil Rights Act of 1964, (42 U.S.C. § 2000e-2) are as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

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district court certified the class under Rule 23(b) (1) and (2), F.R. Civ. P. Order of April 30, 1973).

Questions urged by petitioners Gilbert, et al.—

2. Where a discriminatory attitude by GE toward its female employees was a motivating factor in its exclusion of pregnancy-related disabilities from the coverage of its disability income protection plan, does such exclusion constitute sex discrimination proscribed by Title VII of the Civil Rights Act of 1964? (Petitioner GE disputes the predicates upon which this question is based, contending that a discriminatory attitude by GE toward its female employees neither existed nor was a motivating factor for GE's exclusion of pregnancy from coverage under its sickness and accident insurance See note 3, *infra*.).

3. Whether the district court improperly considered GE's defense of cost where GE did not plead business necessity as a defense.

4. Whether the district court erred in refusing to consider evidence of GE's discrimination in employment because of sex prior to 1964.

5. Whether the district court erred in receiving in evidence GE's Exhibit 12 which purported to be two letters written by the General Counsel of the EEOC dated respectively November 10 and 15, 1966, which were dates subsequent to his resignation and departure from EEOC, and which were never signed nor sent nor otherwise identified.



> to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . .
>
> * * * *
>
> (e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

**STATEMENT OF THE CASE**

This suit was filed in the district court by various present or former female employees of GE who had been absent from work because of pregnancy-related disabilities, on behalf of themselves and all similarly situated employees, and by the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC ("the IUE"), and its Local 161. The IUE is the bargaining representative of employees at certain GE plants (App. B, *infra,* p. 2a). The complaint alleged that GE discriminated against its female employees because of sex in violation of Title VII of the Civil Rights Act of 1964 by failing to pay them any sickness and accident benefits when absent from work because disabled by pregnancy, although such benefits are paid in the case of all other absences due to a disability (App. B, *infra,* pp. 2a-5a).

Several of the individual plaintiffs had filed appropriate charges with the EEOC, and had received notices from the EEOC authorizing the institution of

the suit (App. B, *infra,* p. 3a, 27a-28a.) While the suit was pending, the EEOC issued a decision that GE's sickness and accident benefit plan violated Title VII (App. D, *infra,* pp. 47a-49a).

The district court determined that the suit could be maintained as a class suit under Rule 23(b)(1) and (2), F.R. Civ.P., on behalf of all GE female employees, whether represented by the plaintiff unions, by other unions, or whether unrepresented (App. B, *infra,* p. 4a).

Preceding the trial in the district court, relevant facts were developed by interrogatories and answers thereto, pre-trial stipulations of facts, and the deposition of a medical expert (App. B, *infra,* pp. 5a-15a, 19a).

The case was tried before the district court on July 24, 25, and 26, 1973. Witnesses testified as to the plaintiffs' efforts to secure sickness and accident disability benefits for pregnancy-related disabilities (App. B, *infra,* p. 4a). GE's labor relations counsel testified as to the business considerations upon which GE based its policy of excluding pregnancy-related disabilities from coverage under GE's income protection plan (App. B, *infra,* pp. 23a-24a). Expert testimony and evidence was also received from physicians, actuaries, and a present and a former government official (App. B. *infra,* pp. 15a-19a, 21a-23a, fn.7, 24a).

The district court thereafter rendered an opinion, including extensive findings of fact and conclusions of law, in which the court found that GE's failure to pay sickness and accident benefits for pregnancy-related disabilities violated Title VII (App. B, *infra,*



pp. 15a-38a).[3] The district court entered an order, *inter alia,* enjoining GE from discriminating against its female employees by failing to pay weekly disability benefits for absences from work due to pregnancy-related disabilities, and stating that monetary judgments, in amounts to be determined by the court, would be entered in favor of the affected female employees (App. C, *infra,* p. 46a). On May 9, 1974, the district court entered an order (App. E, *infra,* p. 50a) staying enforcement of its injunction against GE pending a ruling by the court of appeals in the case.

## REASONS FOR GRANTING THE WRIT

This case presents the same question as is now before the Court in *Wetzel* v. *Liberty Mutual Insurance Co.,* No. 74-1245, certiorari granted May 27, 1975. The *Wetzel* case was decided in the district court on a motion for summary judgment, with a limited record,[4]

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[3] Petitioners Gilbert, et al., read the district court decision as including a finding that GE maintained a discriminatory attitude toward its female employees, and that such attitude was a motivating factor in GE's failure to pay sickness and accident benefits for pregnancy-related disabilities. See App. B, *infra,* p. 32a. Petitioner GE does not so read the district court's decision, see App. B, *infra,* pp. 29a, 37a, and GE contended in the court of appeals that such a reading not only distorts the language of the district court's decision but unfairly extends the decision's scope.

[4] In the *Wetzel* case, the district court thus commented on the record before it (372 F. Supp. at 1164):

> The remainder of Defendant's [the Company's] motion continues the argument that it is impossible for Defendant to present any statistical material of the cost of extending disability benefits to pregnancy because no statistics are available. Whether such statistics are available or not, the *Defendant made no attempt to produce any such evidence before this Court* . . . .
>
> Finally, the Defendant argues that "because employees can, in some situations, make as much or more money by receiving

and without prior ruling by the EEOC on the validity of the Liberty Mutual plan. We believe that this Court in deciding a question of as great importance as that presented in *Wetzel* will find it helpful to have before it the record in the instant case.

The petitioners by interrogatories and answers thereto, by the testimony of expert medical and actuarial witnesses, and a present and a former government official, and by statistical and other exhibits developed a complete record. The record in this case thus contains evidence with respect to each of the following matters:[5]

1. The types of medical problems presented by pregnancy and childbirth as compared with other disabling conditions.

2. The extent to which the reliability and availability of birth control and abortion place pregnancy and childbirth in the category of voluntarily incurred risks.

3. The likelihood of abuse through malingering or otherwise if sickness and accident benefits are available for pregnancy-related disabilities.

4. The practices of industry and government with respect to employment of women who are pregnant and their employment subsequent to childbirth.

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disability income it can be assumed that females on pregnancy leave of absence will remain at home longer than normal." *The Defendant presented absolutely no evidence to support this argument* . . . [emphasis added].

By contrast, the record in this case contains evidence with respect to these matters.

[5] Petitioners Gilbert, et al., do not agree that each of the listed categories of evidence is relevant.



5. The insurance industry practice and experience with respect to employee sickness and accident insurance coverage in the United States, including statistics regarding the extent of the coverage of pregnancy-related disabilities under the plans, and the length of the benefit periods provided for both maternity and non-maternity disabilities.

6. The duration of employee absences from work because of pregnancy-related and other disabilities, and the duration of maternity and other claims made under employee sickness and accident insurance plans.

7. The relative percentages of employees returning to work after having babies, and of those who recover from non-pregnancy-related disabilities.

8. Cost figures relative to employee sickness and accident insurance coverage for pregnancy-related disabilities.

9. Business considerations, such as relative cost factors, and employee return rates after pregnancy and delivery, upon which some employers rely in excluding pregnancy-related disabilities from coverage under employee sickness and accident insurance plans.

10. The incidence of pregnancy and the effect of lack of income or low income on the outcome of pregnancy.

11. The history and development of EEOC policy and guidelines with respect to pregnancy-related disabilities, with specific testimony by the General Counsel of the EEOC during a period in 1965 and 1966.

That certiorari was granted in the *Wetzel* case evidences the importance of the question presented there and in this case. The principle is established, more-

over, that certiorari to review a district court's judgment before decision by a court of appeals is appropriate in cases where there is pending in this Court another case, or other cases, presenting the identical issue. For example, *McElroy* v. *United States ex rel. Guagliardo,* 361 U.S. 281, 283 (1960); *Reid* v. *Covert,* 354 U.S. 1, 5 (1957); *United States* v. *Thomas,* 361 U.S. 950, 951 (1960). See also *Brown* v. *Board of Education,* 344 U.S. 1, 3 (1952); *Bolling* v. *Sharpe,* 344 U.S. 873 (1952). From a review of the reported cases, it cannot be ascertained whether the completeness of the records in the cases brought up after an earlier grant was a factor in the Court's subsequent grants of certiorari. Where, as here, there is a record of such completeness in a case pending in the court of appeals that it is likely to prove helpful to the Court in deciding a case already before it which presents the identical question, there is further good reason for the grant of certiorari.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 17, 1975

# APPENDIX

## APPENDIX A

### Order

(Filed June 9, 1975)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

74-1557

MARTHA V. GILBERT, *et al.*, *Appellees.*

v.

GENERAL ELECTRIC COMPANY, *Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND

FOR REASONS APPEARING to the court,

IT IS ORDERED that the decision in this case is delayed pending the decision of the United States Supreme Court in Wetzel v. Liberty Mutual Insurance Company.

For the Court-by Direction

/s/ WILLIAM K. SLATE, II
William K. Slate, II
*Clerk*

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION OF VIRGINIA, RICHMOND DIVISION

MARTHA V. GILBERT, *et al*

v.

GENERAL ELECTRIC COMPANY

Civil Action No. 142-72-R

**Memorandum**

(Filed April 13, 1974)

Plaintiff female employees of defendant General Electric Company (G.E.), which is an employer within the meaning of the appropriate section of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(b), seek class relief from alleged sex employment discrimination practices by that company in violation of Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 2000e, Plaintiff International Union of Electrical Radio and Machine Workers, AFL-CIO-CLC, is the recognized bargaining representative of a national collective bargaining unit composed of employees of defendant at plants throughout the United States. Included in said unit at various of the plants are a number of the named plaintiffs. Plaintiff, Local 161, is an affiliate of the International, concerned primarily with defendant's Salem, Virginia plant. Other groups or units of employees at defendant's plants and locations have designated other labor organizations, not parties hereto, as their exclusive representatives.

G.E., however, pursued a policy of negotiating a uniform health insurance benefits contract which applies equally to all unionized and non-unionized employees. The bargaining is conducted on behalf of the participating unions by a steering committee which includes plaintiff union. Representations which are uncontradicted were made to the Court



that all but 50 unionized employees are represented in the health plan negotiations by the plaintiff International (IUE) or some other member of the steering committee. The steering committee unanimously adopted a proposal under date of January 15, 1973, which promulgates the position espoused by the plaintiff union, hence the Court found it unnecessary to order joinder of the nonparty unions. See Memorandum of May 16, 1973.

Jurisdiction is invoked pursuant to 42 U.S.C. § 2000e-5 (f)(3). The employment practice complained of is G.E.'s denial of sickness and disability benefits to employees absent because of pregnancy.

The numerous pleadings, voluminous records and endless motions belie the underlying simplicity with which the issues herein may be stated. For these purposes it suffices to note that prior to hearing of this matter, the bulk of this litigation has been concerned with procedural questions of an often difficult nature, including venue, see 347 F. Supp. 1058 (Sept. 25, 1972); compliance with EEOC procedures, see memorandum of February 2, 1973; class determination and counter-claim, see F. Supp. (Apr. 30, 1973); and compulsory joinder, see memorandum of May 16, 1973, *supra*.

Once having traversed the thicket of procedural complexities, the issues presented are not difficult. Briefly stated, G.E. provides weekly non-occupational sickness and accident benefit payments (hereinafter "S & A") to all its employees in an amount equal to 60 percent of an employee's straight time weekly wage up to a maximum benefit of $150 per week for each week the employee is absent from and unable to work on account of any disability resulting from a non-occupational accident or sickness for a period up to and including 26 weeks for any one continuous period of disability or successive period of disability due to the same or related cause. Said coverage applies with one exception; sickness or other disabilities arising

from pregnancy, miscarriage or childbirth are not included.[1]

Each of the original named plaintiffs was a G.E. employee who became pregnant during 1971. Each made claims for S & A benefits and was denied same. Several of the plaintiffs filed charges with the Equal Employment Opportunities Commission and, upon waiting the requisite period, brought this suit with their local and national unions, which are co-plaintiffs. Pursuant to the Court's order of April 30, 1973, the original named personal plaintiffs were declared representatives of two classes:

I. With respect to declaratory relief concerning the issue of whether G.E.'s refusal to pay S & A benefits to pregnancy related cases is violative of law, said named plaintiffs represent a class of all females who are now or have been employed by G.E. on or after September 14, 1971, or who become so employed during the pendency of this action and also all female employees who became pregnant and were denied S & A benefits or will be denied S & A benefits therefore from September 14, 1971. This class numbers approximately 100,000 women at hundreds of G.E. plant locations nationally.

II. With respect to damages for those women actually denied benefits from September 14, 1971, the named plaintiffs represent all such women in this sub-class. The number of women in this class is uncertain at this stage, although during 1971 G.E. Received over 5,500 claims for maternity expenses * from women absent because of preg-

[1] Though not raised by the complaint, plaintiffs also challenge defendant's long term disability programs which exclude maternity benefits as well. The legal and factual issues being identical, the Court will deal primarily with the sickness and accident coverage, except where otherwise noted.

* By order of the court filed April 19, 1974 the phrase "S & A benefits" which appeared at this place in the memorandum opinion as filed on April 13, 1974, was deleted and the words "maternity expenses" substituted therefor.



nancy. [Interrogatory # 36] Pursuant to the Court's order of May 14, 1973, members of both the class and sub-class were given notice of the pendency of this action. FRCP 23 (e)(2) No request for exclusion as a class member was received by the Court.

The gravamen of plaintiffs' legal claim is that the challenged S & A policy is violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and EEOC guidelines issued thereunder by virtue of constituting illegal sex discrimination.[1a] In support of this claim, plaintiffs assert factually that there is no medical, economic or sociological basis for distinguishing pregnancy disabilities from other types of disabilities covered by G.E.'s S & A program. Defendants, in brief, argue that pregnancy may be distinguished on several accounts and that said distinctions justify G.E.'s S & A policy under Title VII.

## I. Stipulated Facts

Counsel have entered into a lengthy stipulation of facts which, in pertinent part, reads as follows:

* * *

1. The plaintiff International Union of Electrical, Radio and Machine Workers (AFL-CIO hereinafter called International Union, and the defendant General Electric Company, hereinafter called GE, on February 4, 1971, entered into a 1970 Settlement Agreement, a copy of which is attached hereto marked as Exhibit A, which by its terms was effective until May 26, 1973.

[1a] Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a):

"It shall be unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; . . ."

2. Part three of said 1970 Settlement Agreement is the 1970-1973 GE-IUE National Agreement, a copy of which is attached hereto marked Exhibit B. The foregoing 1970 Settlement Agreement has been recognized by International Union and GE as applicable to all the plants and classifications listed on pages 1 to 5, inclusive of the 1970-1973 GE-IUE (AFL-CIO) National Agreement, and also to certain additional plants and classifications for which the International Union has been certified subsequent to February 4, 1970.

3. At all times since January 26, 1970, pursuant to the 1970 Settlement Agreement and particularly to the provisions of the 1970-GE-IUE Pension and Insurance Agreement, GE has provided and does now provide non-occupational sickness and accident benefit payments to all of its employees represented by the plaintiff International Union and its affiliated IUE locals in an amount equal to 60 percent of an employee's normal straight time weekly earnings up to a maximum benefit of $150 for each week he or she is totally disabled as a result of a non-occupational accident or sickness for a period up to and including 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related cause, excepting therefrom absences due to pregnancy or resulting childbirth or to complications in connection therewith. The full terms and conditions governing the payment by defendant GE to such employees of weekly non-occupational sickness and accident benefits and medical expense benefits at all times since January 26, 1970, are set forth in the General Electric Insurance Plan with comprehensive Medical Expense Benefits, as amended January 26, 1970 (ERB 32D), a copy of which is attached hereto as Exhibit C.

• • •

5. At all times since January 1, 1970, pursuant to the 1970 Settlement Agreement, GE has maintained for hourly employees represented by the plaintiff International Union and its affiliated IUE locals the General Electric Long Term Disability Insurance Plan for Hourly Employees effective January 1, 1970 (ERB 135), a copy of which is attached hereto as Exhibit E.



6. At all times since January 1, 1970, pursuant to the 1970 Settlement Agreement, GE has maintained for salaried employees represented by the plaintiff International Union and its affiliated IUE local unions the General Electric Long Term Disability Income Plan for Salaried Employees, as amended January 1, 1970, a copy of which is attached hereto as Exhibit F.

7. At all times since January 26, 1970, pursuant to the 1970 Settlement Agreement, GE has maintained for the employees represented by the plaintiff International Union and its affiliated locals the General Electric Pension Plan, as amended January 1, 1970 (ERB-42E), a copy of which is attached hereto as Exhibit G.

8. At all times since January 1, 1970, GE has maintained for pensioners who retired from employment in which they were represented by plaintiff International Union and its affiliated IUE locals, the medical care plan for pensioners which is set forth in the aforesaid 1970 GE Insurance Plan with Combined Medical Expense Benefits (ERB 32D) . . . copy of a booklet entitled "General Electric Medical Care Plan for Pensioners" (ERB-107C), in which there is reproduced the medical care plan for pensioners set forth in such General Electric Insurance Plan.

9. At all times since January 1, 1971, pursuant to the 1970 Settlement Agreement, GE has maintained for all employees represented by the plaintiff International Union and its affiliated IUE locals the Individual Development Program, effective January 1, 1971 (ERB-161), a copy of which is attached hereto marked as Exhibit I.

10. The General Electric Insurance Plan with Comprehensive Medical Expense Benefits as amended July 26, 1970 (ERB-32D), a copy of which is attached hereto as Exhibit C, is made applicable to GE employees who are not represented by the plaintiff International Union and its affiliated IUE locals. As to those GE employees represented by unions other than plaintiff International Union and its affiliated IUE locals, the Plan is made applicable pursuant to collective bargaining agreements between GE and such unions.

11. At all times since October 3, 1966, and at the present time GE has been and is primarily responsible for the payment to its employees of the weekly sickness and accident benefits specified in the General Electric Insurance Plan then and now operative and was and is in effect a self-insurer. With respect to coverage outside of California during this period, GE has obtained an insurance policy covering weekly sickness and accident benefits, among others, whereunder a tentative initial premium was paid to Metropolitan Life Insurance Company (hereinafter "Metropolitan Life") subject to later adjustment in the light of actual experience. In California GE has made no arrangements with any insurance carrier with respect to its weekly sickness and accident undertaking under the Insurance Plan. With respect to weekly sickness and accident coverage under the Insurance Plan for employees in California, GE was and is a self-insurer in form and in effect.

12. The plaintiff International Union as one of its proposals during national bargaining negotiations with defendant GE in each 1955, 1963, 1966 and 1969 requested the deletion of the language then present and still present in the General Electric Insurance Plan, at p. 18 of Exhibit C attached hereto, which then provided and still provides that benefits under the Weekly Sickness and Accident Insurance Plan will not be payable for any absence due to pregnancy or resulting childbirth or to complications in connection therewith. During each of said negotiations the plaintiff International Union requested the defendant GE to pay weekly sickness and accident benefits for a maximum of six weeks for absences due to pregnancy or resulting childbirth but defendant GE refused to agree to make any payment of weekly sickness and accident benefits for absences due to pregnancy or childbirth. Exhibit H-2 attached hereto is a correct copy of the proposals for changes in the General Electric Insurance Plan which the plaintiff International Union presented to defendant GE on August 26, 1969.

• • •



23. The Employee & Community Relations Instructions bearing the issue date 2/1/68, Instructions No. ER-2.31 and ER-2.32, copies of which are attached hereto marked Exhibit U-1 and U-2, were issued to management personnel by defendant GE at its Salem, Virginia plant on the date indicated. The Employee Handbook, GE, Industrial Control Department, Salem, Virginia, attached hereto marked Exhibit U-3 was mailed to all non-supervisory employees of the Salem plant in May or June 1970 and was distributed to all new non-supervisory employees hired during the rest of 1970 and 1971 during the orientation sessions conducted by the defendant GE for new employees. Copies of said Employee Handbook were distributed to all new nonsupervisory employees until the supply of the handbooks was exhausted. No record is available as to the exact date on which the supply was exhausted but it is believed to have been exhausted towards the end of 1971. No new handbook has been distributed to non-supervisory employees at any time since 1970. At no time since 1968 has the defendant GE issued any written notice or written instructions to non-supervisory employees at the Salem plant that the policy respecting mandatory leave stated in such Employee Handbook is no longer in effect.

• • •

25. The defendant GE at its Salem, Virginia plant at all times here material has followed the practice and at the present time does follow the practice of notifying each female who is about to go on leave for purposes of childbirth that she is to phone the plant six weeks after her child is born.

• • •

28. Except as to plaintiff Doris Wiley, the defendant GE paid hospital bills for the childbirth or miscarriage of each of the individually named plaintiffs. As to those individually named plaintiffs represented by the plaintiff International and its affiliated IUE locals, such payments were made pursuant to the 1970 GE-IUE Pension and Insurance Agreement.

29. Exhibits PP, QQ, RR, SS, TT, UU, VV, and WW are true copies of the claims filed with the defendant GE by the plaintiffs Barbara C. Hall, Doris B. Wiley, Sharon E. Godfrey, Alberta B. Smith, Mary Williams, Johnnie E. Taylor, Martha V. Gilbert and Erma F. Thomas, respectively. The other employees listed below each filed a claim with the defendant GE for non-occupational sickness and accident benefits for all the period she was on pregnancy leave as shown in paragraph 41 herein, upon the form of claim supplied by GE, which was certified and signed by her personal physician and in which the question if the disability was caused by pregnancy was checked "yes" by her physician. Each of said claims was respectively denied by the defendant GE on the date listed opposite the employee's name. The sole ground stated for the denial in all cases was that the General Electric Insurance Plan provides that benefits under weekly sickness and accident insurance will not be payable for any absence due to pregnancy, resulting childbirth or to complications in connection therewith. In those instances in which the employees also processed a grievance to the Third Step, the National Docket Number of the grievance is stated and where a Third Step answer denying the grievance has been received the date of such denial is as stated.

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30. The plaintiff Brenda Christian applied to defendant GE at its Fort Wayne plant on July 17, 1972, for a form on which to apply for weekly sickness and accident benefits but defendant GE refused to give her a form. On July 19, 1972, Bob Wire, Business Agent of Local 901, IUE, wrote a letter to H. K. Reinking, Manager, Personnel Accounting and Banking, GE, Fort Wayne, complaining of the refusal of defendant GE to furnish the plaintiff Brenda Christian with a form, a copy of which letter is attached hereto marked Exhibit EE. Under Date of July 21, 1972, M. E. Hamilton, Manager Union Relations, GE, Fort Wayne, wrote the said Bob Wire a reply, a copy of which is attached hereto marked FF.



31. The plaintiff Emma Furch is employed at the Tyler, Texas plant of the defendant GE and has a seniority date of October 13, 1966. On April 5, 1972, she went on pregnancy leave and was hospitalized on April 7, 1972. On April 14, 1972, she delivered a stillborn baby. After returning home she was again hospitalized on April 21, 1972, due to a blood clot in the lung unrelated to her pregnancy or miscarriage. The plaintiff Emma M. Furch filed a claim with the defendant GE for weekly sickness and accident benefits, a copy of which is attached hereto as Exhibit XX. Her claim was returned attached to a letter dated June 6, 1972, signed by S. J. Przywara, a copy of which is attached hereto as Exhibit YY.

32. The defendant GE at all times here material has paid and is paying weekly sickness and accident benefits on the basis of each calendar day to that each day of entitlement is paid at the rate of 1/7 of the weekly rate. The defendant GE at all times here material has and is now using calendar days in determining the 8th day on which the benefits start when an employee is disabled for eight days without being confined in a hospital during these days.

33. The defendant GE has an established and uniform policy of paying weekly sickness and accident benefits to each employee on account of a qualifying sickness and accident for such period as the employee is authorized to be absent and for such extended period or periods as are certified by the employee's personal physician, except where the defendant GE by its own physician disputes the existence of a disability, limited, however, by the maximum period of 26 weeks for any one disability or sickness. On many occasions an employee who had received such payments for 26 weeks thereafter failed to return to work, either because of death, continuing disability, retirement, or, in relatively few cases, because of quitting. In the relatively few quitting cases where an employee does not return to work after receiving sickness and accident benefits, only where defendant GE has contended the amounts were fraudulently obtained, has the defendant GE attempted to recover any amounts so paid.

34. The claim for Weekly Sickness and Accident Benefits filed by the plaintiff Martha V. Gilbert was denied by a letter to J. O. Randall, Supervisor, General Electric Company, from N. E. Sarmiento, Assistant Supervisor, Group Health Claims, Metropolitan Life, dated December 17, 1971, a copy of which is attached hereto marked Exhibit GG. Copies of said letter were furnished to plaintiff Martha V. Gilbert and to plaintiff Local 161 on or about December 18, 1971. The claims of plaintiffs Alberta B. Smith, Johnnie Taylor and Doris B. Wiley for Weekly Sickness and Accident Benefits were each denied by a letter to J. O. Randall, Supervisor, General Electric Company from N. E. Sarmiento, Assistant Supervisor, Group Health Claims, Metropolitan Life, dated November 1, 1971, all of which were substantially similar with the aforesaid letter to plaintiff Martha V. Gilbert except for the name of the claimant. The claim of the plaintiff Barbara Hall for Weekly Sickness and Accident Benefits was denied by a letter to J. O. Randall, Supervisor, Group Health Claims, Metropolitan Life, dated November 1, 1971, a copy of which is attached hereto marked Exhibit HH. Copies of said letter were furnished to the plaintiff Barbara Hall and to plaintiff Local 161 on or about November 2, 1971.

35. The plaintiffs Martha V. Gilbert, Sharon E. Godfrey and Doris B. Wiley each filed a grievance challenging the denial of her claim for Weekly Sickness and Accident Benefits for the period she was disabled by pregnancy. In each instance the grievance was denied at the first and second step of the grievance machinery. The answer of the defendant GE at the first step of the grievance machinery was in each instance in the form of a statement written by a supervisor of GE on the bottom of the grievance form. The plaintiff Sharon E. Godfrey filed her grievance on December 8, 1971, and the answer written thereon by her supervsor state:

> "In accordance with the IUE-GE Pension and Insurance Agreement and page 18 of the Insurance Pension Booklet (ERB-32D) Weekly Disability Benefits are not payable for absence due to pregnancy or childbirth."



A copy of the grievance filed by the plaintiff Sharon E. Godfrey bearing thereon the denial by the defendant GE at the first step, is attached hereto marked Exhibit JJ. The grievances filed by the plaintiffs Martha V. Gilbert, Barbara Hall, Alberta B. Smith and Doris B. Wiley were each answered by the defendant GE at the first and second step in substantially the same words.

36. The grievances filed by the plaintiffs Sharon E. Godfrey, Barbara Hall, Alberta B. Smith and Doris B. Wiley were all sent to New York City for processing there at the third step in the grievance procedure in accordance with provisions of the IUE-GE National Agreement. These grievances were all presented to the defendant GE at the third step of the grievance procedure on May 25, 1972, and were all denied by the defendant GE by notification to the plaintiff IUE, entitled "Company Position, Roanoke, Virginia, L-161, meeting date May 25, 1972, New York," signed by B. Hindle, dated June 8, 1972, a copy of which is attached hereto marked Exhibit KK. The ground stated for the denial is as follows:

> "It is the Company position that the denial of sickness and accident benefits during a leave of absence for pregnancy is consistent with the terms of the Agreement negotiated between the Company and the Union and to which the Union is therefore a party."

37. In the instance of all claims filed by the individually named plaintiffs for weekly sickness and accident benefits and in the instances of all grievances filed by the individually named plaintiffs grieving the denial of their claims the defendant GE has never contested or admitted the fact that the grievant was disabled from work by pregnancy or childbirth, but has denied the claim and justified its rejection of the claim for Weekly Sickness and Accident Benefits solely on the ground that such benefits were not properly due when the absence was caused by pregnancy or childbirth.

38. The defendant GE has paid sickness and accident benefits for periods during which employees, whether male or female, are totally disabled because of

(a) sclerosis of the liver

(b) lung cancer

(c) emphysema

(d) injury incurred in auto accident

(e) injury incurred in sport activity of employee

(f) injury incurred in a fight

Also defendant GE has paid sickness and accident benefits for periods during which employees, whether male or female, are totally disabled because of the following causes (the number of total claims based on disabilities resulting from such causes is infinitesimal and claims for such disabilities rarely occur):

(g) following a program for the cure of alcoholism

(h) injury incurred in an attempted suicide

(i) drug addiction

(j) following a program for the cure of drug addiction

(k) sterilization

(l) elective surgical operations unrelated to pregnancy

(m) elective plastic surgery

(n) following a program of psychiatric treatment

39. The defendant GE has on occasion temporarily assigned to other suitable work an employee who is disabled temporarily from performing his or her regular job but is not disabled from performing other available work.

* * *

41. Each of the employees whose name is listed below has the seniority date stated following her name, and except for plaintiff Furch was absent for pregnancy, miscarriage or childbirth from the date stated in the column headed Date Went on Pregnancy Leave until the date listed in the column headed Date Returned To Work, at the time of leaving work to go on pregnancy leave had the straight time weekly earnings stated and



gave birth to a baby or miscarried on the date indicated: . . . .

42. During August 1971 Robert Friedman, Assistant General Counsel of the plaintiff International Union, telephoned E. S. Willis, the Manager of Employee Benefits at the national level for the defendant GE, during said telephone conversation Robert Friedman called the attention of E. S. Willis to EEOC Decision No. 71-1474, CCH-EECC Decision Para. 6221, issued March 19, 1971.

Other stipulations entered into with respect to GE's statistical experience with maternity leaves will be included *infra*.

II. Findings of Fact

A. Medical Questions.

Much evidence has been adduced addressed to the question of the voluntariness of pregnancy. That issue is raised by virtue of G.E.'s assertion that the alleged voluntariness of pregnancy justifies, under Title VII, the treatment of that condition in the manner challenged. (See Conclusions of Law, *infra,* for discussion of legal issues).

Dr. Hellegers, an expert called by plaintiffs, stated that although specific methods of contraception present difficulties,[2] that nevertheless medically the majority of conceptions are planned or accepted. As Dr. Hellegers noted, the number of annual pregnancies, about 4.2 million[3] (about 1 million of which are terminated by abortions) is

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[2] Oral contraceptives have a failure rate of 1%, which means one pregnancy will result from each 100 years exposure use; interuterine devices have a 2-7% failure rate; diaphragms present a 2-40% failure rate, depending on economic strata. Though approximately 1 million abortions per year are performed, they are not always advisable.

[3] Defendants have offered a somewhat higher figure for births, 3.6 million, for women between the ages of 17 and 47 (DX42).

relatively low when compared to the number of women capable of bearing children. Statistics submitted by the defendants, DX42, show that for women between the ages of 17 and 42, the total female population is approximately 74.5 million and annual births approximate 3.7 million; for working women, of a total population of 18.5 million there are 1.6 million births.[4] (DX42). An inference to be drawn from these statistics is that many women are able to prevent pregnancy, indicating that the condition of pregnancy may to a large degree be controlled. Yet ultimately, these figures show only that most women, through one means or another, are successful in avoiding pregnancy. While this might constitute circumstantial evidence as to the intent of those who do become pregnant, it is at best attenuated. Current conduct is not always indicative of long range intent. Neither negligence nor accident are foreign to human and legal experience. As stated above, the evidence is that one quarter of pregnancies are aborted.

At best, what these figures show is that with proper care, forbearance, and precaution, pregnancy can to a large extent be avoided. But "voluntariness" in this sense is meaningless. This standard is not applied to informal athletic injuries, most of which could also be avoided by appropriate preparation, forbearance and circumspect precaution. The most that can be said with certainty is that some pregnancies, perhaps a majority, are voluntary; others are not.[4a]

The great mass of expert testimony presented here on the subject merely confirms what appears obvious to any layman: pregnancy is not a disease, as that term is commonly understood; it is, however, at times, physically disabling, and the Court so finds. These broad findings, however, are susceptible to detailed qualification, highly germane to the issues presented here. While the Court finds that all the medical testimony is essentially in accord, the testimony of Dr. Hellegers is especially enlightening.

[4] See Appendix "A".

[4a] The failure to abort cannot, in the Court's opinion, be considered a necessary indication of prior intent to conceive.



The term "disease" is, according to Dr. Hellegers, subject to varied definitions, depending on the approach used. Four definitions so offered may be summarized as follows:

1) Disease may be defined as a statistical deviation from the average. The difficulty with this definition lies in defining what is "average" or "normal."

2) Disease may be defined in terms of difficulty in ability to function. The weakness in this definition is defining "function" in a non-relative social or medical sense.

3) Disease may be defined as a condition, which if not corrected, may lead to disability or death. In this connection the medical term "morbidity" is applied, said term meaning a process of deterioration leading to death.

4) The World Health Organization (WHO) defines health as total physical, psychological and social well-being. By inference, disease is the converse, or lack of these factors.

Pregnancy, *per se,* does not come within the meaning of any of these, with the possible exception, for stated periods of time, of 1 and 2. Nevertheless, certain conditions incident to pregnancy come within the meaning of "disease." These conditions are commonly referred to as "complications" and many are disabling.

First, approximately ten percent of pregnant women will miscarry, the great majority of these during the first trimester of pregnancy. A miscarriage is physically disabling, although is most cases only for a few days.

Second, of the remaining complications which occur in about 10% of pregnancies, there are two general types.

The first type includes those complications which are brought on by weight gain. They may be found in any person who suffers from underlying diseases which become more serious as a result of obesity. Examples of this category are hypertension and diabetes. For example, a person who has underlying diabetes may not normally be affected or disabled by same but upon gaining a large amount of weight in a short time experiences thereafter disabling symptoms. Pregnancy involves this sort of rapid weight gain, but the complications of this type suffered by a pregnant woman are of the same nature as she would suffer had she gained the same amount of weight in the same period and were not pregnant. Irrespective of the cause, treatment is essentially the same for pregnant and nonpregnant persons. In nonpregnant people these disabilities are termed diseases; for the reasons set forth they may properly be termed diseases in pregnant people as well. These diseases comprise approximately half of the complications.

The remaining complications are solely related to the physiology of pregnancy, dealing with problems of the placenta, uterus, etc. Two common examples are detachment of the placenta and mislocation of the placenta. Special procedures used only for pregnant women are employed in treatment. The aforesaid category may be described as pregnancy-related diseases.[5] All these complications may prove disabling; about half actually require hospitalization.

Where complications are absent, which occur in 90% of pregnancies that do not miscarry, the actual period of disability under normal conditions is short. A pregnant

[5] Other diseases as toxemia, edema and others are of unknown origin. Dr. Hellegers speculated that they may come from hormonal problems associated with weight gain. One other disease which may be technically pregnancy-related is ectopic pregnancy. Once diagnosed, ectopic pregnancy requires immediate surgery.



woman becomes progressively more disabled in the limited situations where girth is of importance. As Dr. Hellegers noted, for example, a woman pilot may have increasing difficulty through pregnancy in fitting between the pilot's seat and the control wheel of an airplane. There is, however, no evidence before the Court as to certain job requirements at GE which involve potential problems because of girth, and the parties have stipulated that job reassignments are made to accommodate disabilities. (St. p. 39).

Absent complications, there is no medical reason for not allowing a woman to work to the day before delivery or for limiting her activities prior to delivery. See deposition of Dr. Wilbanks, defendant's expert, at p. 8. There is no controversy as to this general medical principle.

Similarly, all experts agree that labor and delivery are disabling. The medical rule of thumb is that six weeks are required for recuperation from delivery. That figure is standardly used because healing should be at a certain medically definable stage by that time. A physician with a large practice thus would instruct his or her patients to return at the six week date for examination; if healing has not by that time conformed to the medical norm, corrective treatment is often required. While the recuperative process may be completed within two or three weeks, it is usually more practical to require a woman to return after six weeks than to have her examined numerous times from the third week on to determine when healing has progressed. Numerous visits may be common, however, when a physician deems it important for a woman to return to work as quickly as possible for psychological or economic reasons. Interestingly, the evidence discloses that housewives who perform daily household chores may find themselves back at the rigorous demands of family raising within a week or so.

In summary, the Court makes the following findings:

1. While pregnancy is perhaps most often voluntary, a substantial incidence of negligent or accidental conception also occurs.

2. Pregnancy, *per se,* is not a disease.

3. A pregnancy without complications is normally disabling for a period of six to eight weeks, which time includes the period from labor and delivery, or slightly before, through several weeks of recuperation.

4. Ten percent of pregnancies are terminated by miscarriage, which is disabling.

5. Five percent of pregnancies are complicated by diseases which are found in nonpregnant persons but which may have been stimulated by pregnancy. Five percent of pregnancies are complicated by pregnancy-related disease. These complications are diseases which may lead to disability.

B. The G.E. Experience

Much of the evidence before the Court concerns projected costs for maternity coverage under S & A. Included in same is a statistical analysis of G.E.'s past experience with its S & A plan and maternity leaves.

Counsel have entered into stipulation in this regard, which stipulations, dated July 24, 1973, read in part as follows:

143. During 1970, GE's experience, by sex, with respect to claims under its weekly sickness and accident disability insurance coverage was as follows:

| | Male | Female |
|---|---|---|
| No. of claims (new) | 19,045 | 15,509 |
| Average duration of claim | 48 days | 52 days |
| No. of new claims per thousand employees | 77 | 173 |



| | Male | Female |
|---|---|---|
| Average No. of employees covered | 246,492 | 89,705 |
| Total benefits paid | $11,279,110 | $7,405,790 |
| Average cost per insured employee of total benefits paid | $45.76 | $82.57 |

144. During 1971, GE's experience, by sex, with respect to claims under its weekly sickness and accident disability insurance coverage was as follows:

| | Male | Female |
|---|---|---|
| No. of claims (new) | 22,987 | 17,719 |
| Average duration of claim | 47 days | 52 days |
| No. of new claims per thousand employees | 99 | 217 |
| Average No. of employees covered | 231,026 | 81,468 |
| Total benefits paid | $14,343,000 | $9,191,195 |
| Average cost per insured employee of total benefits paid | $62.08 | $112.91 |

145. [GE statistics with respect to pregnancy-related absences. See Appendix B]

146. [GE statistics with respect to absences for ectopic pregnancies. See Appendix C]

147. [GE statistics with regard to absences for abortions and miscarriages. See Appendix D]

148. . . .

149. S & A benefits for pregnancy absences during the period approximately 1939-1948 were paid only to employees in certain GE plants. Records relating to coverage in those years are incomplete, but it is believed that the following plants were covered by those provisions: [List of 17 plants omitted]

During that period of time there was no company-wide GE group disability insurance plan and different company components were privileged to adopt insurance coverage as desired.

Upon trial, GE introduced the testimony of Paul Jackson, an actuary. Based upon the aforecited statistics and other data, Mr. Jackson calculated that GE's S & A plan costs 170% more for females than males and he projected that maternity coverage would yield a 300-330% greater cost. These projections were based upon an average maternity leave duration of 13 weeks. The Court notes, however, that prior to late 1971 GE had a mandatory six month rule requiring pregnant employees to leave after the sixth month of pregnancy, at its Salem, Virginia plant. The evidence before the Court indicates that said policy was also national. See, *e.g.*, PX51. No indication was given as to what extent the six month rule affected these statistics. Based upon the 13 week average, Mr. Jackson estimated that nationwide S & A maternity benefits for all women working in the national labor force and covered by S & A insurance would be $804 million. (DX42). Addition of maternity benefits to long term disability plans as well would cost an additional $1.35 billion, according to Mr. Jackson.

Mr. Jackson further testified that an inherent difficulty in writing S & A insurance generally is that, contrary to actuarial principles, the condition which gives rise to the insurance claim may not be beyond the control of the insured. Under S & A programs such as GE's, where benefits are paid for sickness leaves whether voluntary or not, costs tend to be high because of voluntary elements. Within this context, Mr. Jackson asserted that pregnancy leaves, which may be voluntary both in respect to the fact and duration of absence, cause insufferable actuarial problems.[6]

[6] GE pays S & A benefits for other voluntary sickness absences, see stipulated findings of fact, but according to Mr. Thomas Hilbert, GE's Labor Relations Counsel, these cases are minimal.



Although under the terms of GE's S & A plan a doctor's certificate is required to prove medical disability, Mr. Jackson stated that doctors might be willing to give said certificates to women who wish to malinger. Accordingly, he urged that claim abuse might be high. The medical evidence before the Court, however, is that pregnant women would not, *per se,* be inclined to malinger more than other persons and, indeed, might have more difficulty in sustaining a fabricated complaint by virtue of the ease of examination by a doctor of the usual pregnancy related complaints.

Mr. Jackson also testified that about 50% of women who leave work for reasons of pregnancy do not return, although at G.E. the figure is lower, about 40%, according to other testimony of G.E. officials. In this regard, the Court notes that G.E.'s policy is to terminate a woman who does not return to work within eight weeks after delivery unless she asks for an extension of time. Interrogatory No. 67.

The thrust of this evidence is that S & A pregnancy benefits will inordinately increase the costs of the S & A plan. While the Court for the reasons heretofore stated has doubts about the exact figures projected and about some of the statistical assumptions,[7] it does find that maternity S & A benefits will increase G.E.'s S & A costs by an amount which, though large, is at this time undeterminable.

It is because of these increased costs that G.E. has refused to grant maternity benefits. This is readily apparent from the reasons for G.E.'s policy as outlined by Mr.

[7] Evidence presented by Katherine East, Secretary to the presidential Citizen's Advisory Council on the Status of Women, suggests that S & A maternity costs may not be significantly more costly. See PX81, 121, cost estimates of the Aetna Insurance and Casualty Co. Also, according to Mrs. East, several companies, including Xerox, IBM and others, provide maternity benefits of varying types, but cost figures for same are not yet available.

Thomas Hilbert, G.E.'s Labor Relations Counsel. Those reasons may be summarized as follows:

1. The plan covers disabilities from sickness and accidents, of which pregnancy is neither.

2. The plan follows standard insurance practice, which still excludes pregnancy benefits.

3. Inclusion of pregnancy benefits in S & A is not a rational use of money, particularly as said inclusion may increase pregnancies and may be subject to claim abuse.

4. Pregnancy is completely voluntary.

5. Women utilize S & A more frequently than men under the present program and inclusion of pregnancy benefits would increase this unbalance.

6. Forty percent of G.E.s women employees who take maternity leave do not return. Accordingly, S & A maternity benefits would in a great number of cases be the equivalent of giving women termination pay benefits not available to nonpregnant employees.

7. If women received S & A pregnancy benefits, men would demand benefits for absence taken for child care.

Several of the aforementioned assertions are factually erroneous. For example, under the S & A plan men could not demand child care absence benefits without proving their work absence resulted from medical disability. The termination pay problem exists with *all* workers who do not return to work following sickness or accident. All the reasons proffered have to do with dollars and cents.

C. Socio-Economic Factors

Both sides have introduced numerous studies and testimony of a socio-economic nature. For example, Katherine East Secretary to the Citizens Council on the Status of Women, a presidentially appointed study group, testified that the Council determined that policies of the sort challenged here are discriminatory. G.E. asserts in a similar vein that provision of S & A benefits for pregnancy will encourage births, and that said encouragement is contrary to a national policy of limited population growth.[8] Much of this testimony is self-serving, conclusory or irrelevant.



The question before the Court is a narrow one of statutory interpretation and the Court gives no weight, except as specifically noted, to these broad social concerns, which are more appropriate for legislative consideration.

Some of the statistical studies introduced, however, contradict or supplement G.E.'s cost projection analysis. While the Court, for reasons previously stated, finds the various cost statistics to be of too speculative a nature to be probative of actual future costs, the general trends and weight of those figures is relevant. For purposes of the record, the Court has included in appendices E, F, and G certain statistics relevant to these matters.

Good Faith.

G.E. has sought to prove that its present legal position on the S & A maternity benefits question was arrived at by virtue of good faith reliance on EECC pronouncements. While the legal efficacy of this argument will be considered *infra,* the Court's findings of fact with respect to same follow.

The Court notes that one of the early points of controversy in this litigation was the posture of the union in pressing for the change in maternity policy and the exact

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[8] In this respect, Mr. Hilbert, G.E.'s Labor Relations Council, introduced the results of a highly amusing, and dated, G.E. experiment in public relations. Exactly nine months prior to G.E.'s 75th Anniversary on October 15, 1953, the company announced that it would give five shares of stock to any employee who had a child born on the anniversary date. Preliminary estimates were that 15-20 awards would be given. The actual total turned out to be 189.

relationship of nonparty unions to contract negotiations. G.E. had initially sought to counterclaim against the IUE for indemnity or contribution and to implead the nonparty unions in order to gain contribution or indemnity for any losses that might be suffered by the company as a result of this action. See the Court's memorandum of April 30, 1973, — F. Supp. — . These issues have been rendered moot, however, by G.E.'s recent agreement at the 1973 contract negotiations talks to indemnify the unions for any losses that might be suffered by virtue of this suit. PX103. Accordingly, G.E. voluntarily withdrew its claim in this regard against the unions. See Notice of Dismissal filed June 18, 1973.[9] Detailed findings with respect to the union's position as represented by the labor steering committee, [see the Court's memorandum of May 16, 1973,] are therefore unneccessary here. For these purposes, however, the Court finds that the unions made initial demands for modification of the S & A pregnancy provisions at the contract talks of 1950, 1955, 1963, 1966 and 1969. See also, Stip. 12. These demands were never acceded to. Further, on February 24, 1972, the Union wrote to G.E. formally requesting a policy change ( PX58, 104, 110).

Plaintiffs have introduced much evidence in an effort to demonstrate that G.E.'s past history is dominated by a strain of male chauvinism. The Court deems that line of inquiry legally irrelevant and makes no findings with respect to this contention.

The proper starting point is 1964, the year Title VII was enacted. According to Thomas Hilbert, G.E.'s Labor Relations Counsel, G.E. made a unilateral review of its contract practices in 1965 to ensure that they were in compliance with the Civil Rights Act of 1964. Counsel for G.E. questioned at that time whether the S & A policy might be

[9] The parties have agreed that the contract provisions on S & A maternity benefits will be re-negotiated to conform to the outcome of this litigation. PX112.



violative of Title VII, but it was tentatively concluded that the S & A maternity policy was not. Mr. Hilbert stated that he found support for this conclusion in several opinion letters of 1966 issued by EECC's General Counsel. (DX12) (Discussion in Conclusions of Law, *infra*). An EECC decision of March 1971, see paragraph 6221, CCH Employment Practices (discussion *infra*) indicated a possible shift in EEOC policy which was confirmed by the guidelines of April, 1972, *infra*. G.E. itself did not request the opinion of counsel for the EEOCC with respect to its S & A policy.

The Court finds that prior to the April, 1972 guidelines, G.E. made no affirmative effort to determine if its policy was in compliance, even assuming arguendo that through March, 1971, it may have had a valid reason for taking the position it did. Subsequent to the April, 1972, guidelines, G.E. made the conscious decision not to comply with the EEOC guidelines and to defend this decision in court. See, *e.g.*, affidavit of Robert Friedman, Assistant General Counsel for the Union, January 2, 1973.

The Court's conclusions of law with respect to these actions are set forth, *infra*.

## III. Conclusions of Law

### A. Declaratory Judgment; Legality of GE's S & A Policy

On March 3, 1972, the EEOC issued a guideline which provides that:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Sec. 1604.10(b). 37 Fed. Reg. 6837 (April 5, 1972).

On May 18, 1973, the EEOC issued a decision in *Gilbert* v. *General Electric,* N.Y. D.C. 3-093 (PX2B), which deci-

sion represented the culmination of an investigation commenced upon the filing of their respective EECC charges by the present named plaintiffs, see memorandum of the Court under date of February 6, 1973. Said decision concluded that the GE S & A plan is violative of Title VII.

The law is well-settled that the decisions or interpretations of agencies entrusted with the enforcement of a federal statute, while not binding on a federal court, are nevertheless entitled to "great deference," *Griggs* v. *Duke Power Co.* 420 F.2d 1225, 1234 (4th Cir. 1970), 401 U.S. 424, 433-34 (1971), except under limited circumstances, *e.g.*, where legislative history indicates a contrary result, *Griggs, supra,* an agency decision may be disregarded. Pursuant to these principles; in the absence of evidence to the contrary as in the instant case, the Court must afford the EEOC decision and guidelines the appropriate weight as mandated by law. Accordingly, the Court is satisfied that the burden is on GE, as the party challenging the administration's position, to overcome the presumption that its S & A policy is violative of the Act, and this they have failed to do. Indeed the task is an impossible one, for the Court is satisfied that the EEOC's construction, as enunciated in the guideline, is in accord with the will of Congress as expressed in the Act and its legislative history. It is to be kept in mind that the true issue is whether the defendant's policies are violative of Title VII.

G.E.'s contention that because of the voluntary nature of pregnancy they are insulated from the obligation to pay disability benefits to female employees absent from work due to pregnancy-related disabilities loses much viability in light of its policy of providing disability benefits to its male employees for *all* disability, including cosmetic surgery, disabilities arising from attempted suicides, etc.

While pregnancy is unique to women, parenthood is common to both sexes, yet under G.E.'s policy, it is only their female employees who must, if they wish to avoid a



total loss of company induced income, forego the right and privilege of this natural state. See *Hanson, et al* v. *Hutt* (Supreme Court of Washington, Dec. 20, 1973). Indeed, under G.E.'s policy the consequence of a female employee exercising her innate right to bear a child may well result in economic disaster, as in the case of at least one of the witnesses who appeared before the Court.[10] No such consequences would befall a male employee who chose to subject himself to a selective operation, such as a vasectomy or cosmetic surgery. Thus, women are required to undergo the economic hardship of the disability which arises from their participation in the procreative experience. The disability is undisputed and inextricably sex-linked. To isolate such a disability for less favorable treatment in a scheme purportedly designed to relieve the economic burden of physical incapacity is discrimination by sex. That such is discriminatory by reason of sex is self evident. G.E.'s contention that the voluntary nature of pregnancy justifies, under Title VII, its treatment of that condition as challenged, must fail. While it is true that women may, under certain conditions, resort to an abortion, see *Roe* v. *Wade,* 410 U.S. 113 (1973), it cannot be reasonably argued that Congress in its enactment of Title VII ever intended that an intended beneficiary of that Act forego a fundamental right, such as a woman's right to bear children, as a condition precedent to the enjoyment of the benefits of employment free of discrimination.

The question of voluntariness is not really the issue. The fact is that the defendant's policy penalizes plaintiffs and members of their class for being women and suffering

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[10] This G.E. employee, who became unintentionally pregnant, worked until five weeks before the birth of her child. Being precluded from disability benefits, and without other funds, she resorted to Welfare Aid, but prior to receiving same, suffered the cessation of electric and gas service for her home, along with its attendant deprivations including loss of heat and inability to adequately provide for her family.

disabilities to which they alone are inherently susceptible, and this is discriminatory. See *Buckley* v. *Coyle Public School System,* 476 F.2d 92 (10th Cir. 1973).

B. Cost

While as counsel for plaintiff has pointed out, the defendant has not formally pleaded business necessity as a defense to this action, evidence of costs was introduced, and the Court deems it in the interest of a full disclosure of its reasoning leading to the conclusion reached to briefly comment upon that aspect of the case.

Primary, of course, is the principle that business necessity constitutes a valid defense only to a situation where the alleged discrimination arises from a policy neutral on its face, and in its intent. The instant case does not fall in this category. Additionally, it is doubtful in the first instance if cost alone would constitute a proper defense. See *Robinson* v. *Lorillard Corporation,* 444 F.2d 791, 799 f.n.8 (4th Cir. 1971). The business necessity rationale is premised on a policy of justification by virtue of a showing that the suspect conduct is necessary to the safe and efficient operation of the business. *Jones* v. *Lee Way Motor Freight,* 431 F. 2d 245 (10th Cir. 1970). As one court has expressed it, "Necessity connotes an irresistible demand." *United States* v. *Bethlehem Steel Corp.,* 446 F. 2d 562 (2d Cir. 1971). No such situation exists here.

The cost of S & A benefits incurred by the defendant arises by virtue of its contractual obligations, and as expressed by Judge Sobeloff in *Robinson* v. *Lorillard, supra,* at 799, "The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert."

In the instant case, the Company chose to negotiate a contract which they knew would result in certain benefits to their employees and deliberately chose to preclude



benefits to employees who became pregnant. They cannot now justify such discrimination by simply contending that the cost would be high. In addition, it is obvious that the cost, if prohibitive or destructive of defendant's business, may be reduced in any number of alternative ways, as suggested in the briefs. Simply stated, there is no evidence before the Court to render viable a defense of business necessity.

The Court's finding of a lack of a viable defense of business necessity is not to say that the Court doesn't recognize that at the core of any suit alleging discriminatory "compensation, terms, conditions or privileges of employment" are dollars and cents. This, obviously, is central to any such action. The relevant argument, however, goes not to increase in company costs, but to non-discrimination in distribution of amounts paid.

The present plan is objectionable in that it excludes from coverage a unique disability which affects only members of the female sex, while no suggestion is made to exclude disabilities which can be said to affect only males. Additionally, the Court gives no weight to the suggestion that the actuarial value of the coverage now provided is equalized as between men and women. Defenses must be bottomed on evidence, and such, in this regard, is lacking here.

Whatever inferences may be suggested by the statistical data presented, the Court simply cannot presume to draw any precise conclusions as to the actuarial value of the coverage provided under the present plan, or the effect of including pregnancy related disabilities on the basis of that limited data.

While it may, as the Court has already indicated, be theoretically argued that the adding of benefits for disabilities to which only women are subject, and which as a consequence increases their compensation, represents a

discriminatory practice against men, such an argument must fail for the lack of evidentiary support. The obvious fact that the risk of pregnancy creates an actuarial risk of disability for women not present for men and which would cost more is simply not enough. Such an argument would require a showing of similar actuarial calculations regarding other disabilities having an exclusive (*e.g.*, vasectomy) or higher (*e.g.* perhaps heart attacks or hair transplants) incidence in men and that discounts for the greater company expenditure to cover such risks had been factored into the calculus prior to the decision to analyze the disparate effects of pregnancy disability benefits. Simply stated it would have to be shown that absent pregnancy disability provisions, the effects of the balance of defendant's disability program were in fact equalized. Merely showing, as G.E. has, that in two previous years the coverage given women's per capita disabilities has cost somewhat more is insufficient especially in light of the myriad of factors which might have and undoubtedly did contribute to such a result. Indeed, the concern of defendants in reference to pregnancy risks, coupled with the apparent lack of concern regarding the balancing of other statistically sex-linked disabilities, buttresses the Court's conclusion that the discriminatory attitude characterized elsewhere in the Court's findings was in fact a motivating factor in its policy. Even had factual evidence been introduced in support of the heretofore discussed theory, a different legal result than the one here reached would not, in the Court's view, have been dictated.

Provision of a marginally greater economic benefit to women, if such it is, in the form of pregnancy disability benefits within an otherwise all inclusive disability program, cannot reasonably be considered more favored treatment. If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's biologically more burdensome place in the scheme of human existence. An industrial policy which does not account for



this fails in providing such sexual equality as is within its power to produce. If Title VII intends to sexually equalize employment opportunity, there must be this one exception to the cost differential defense.

Inherent disabilities deriving from pregnancy susceptibility are thus different from other congenital disabilities. Practically speaking, pregnancy is peculiar in that not only is procreation a necessary element of human existence, but it is one which is virtually taken for granted despite the unequal social taxes it imposes. Legally, sexual discrimination is among those expressly limited concerns of Title VII. It is not clear that this single exception to a differential compensation defense is not within the Congressional intent which Title VII embodies.

C. Good Faith

Section 713(b)(1) provides in part:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he *pleads* and *proves* that the *act* or omission complained of *was in good faith, in conformity with, and in reliance* on any written interpretation or *opinion* of the Commission. 42 U.S.C. § 2000e-12(b). (Emphasis supplied)

As the Court has previously noted, G.E. in 1965 made a unilateral review of its contract practices with reference to the Civil Rights Act of 1964.

Defendant argues that its conclusion in 1965 that its pregnancy exclusion did not violate Title XII was well founded by virtue of publication in certain of the labor services, namely Commerce Clearing House Employment Practices, of an opinion letter by the EEOC General Counsel issued pursuant to 29 C.F.R. 1601.30, *infra*. This letter, dated October 17, 1966, if directed to G.E. would undoubt-

edly have given rise to the invoking on its behalf of the good faith defense proclaimed in Section 713(b)(1) heretofore quoted. The weakness of defendant's argument lies in several factors, not the least of which is that the Court is not satisfied that General Electric relied upon the cited letter, or other similar opinion letters referred to in the evidence.

Contemporaneous with the effective date of Title VII, July 1, 1965, the EEOC caused to be published in the Federal Register (30 Fed. Reg. 8407) the following procedural regulation:

> Only (a) a letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission or (b) matter published and so designated in the Federal Register may be considered a "written interpretation or opinion of the Commission" within the meaning of section 713 of Title VII. 29 C.F.R. Section 1601.30 (1970).

In this Circuit an asserted defense of good faith as contemplated by Section 713(b) of the Act, *supra,* premised upon a specific finding by the EEOC that there was no reasonable cause to believe that the Act had been violated and upon which decision the employer contended it relied in retaining a departmental seniority system found by the Court to be discriminatory, was rejected. In commenting on such asserted defense, the Court in referring to the Section 713(b) immunity said:

> [16] Under The Commission's regulations EEOC reasonable cause determinations are not interpretations which may be relied upon to establish the § 713(b) immunity:
>
> > only (a) a letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission or (b) matter published and so designated in the Federal Register may be considered a "written interpretation or opinion of the Commission" within the meaning of section 713 of Title VII.



29 C.F.R. § 1601.30. This regulation has been upheld as a reasonable interpretation of the statute in Local 189, United Papermakers & Paperworkers, AFL-CIO, CLC v. United States, *supra* 416 F.2d at 997. And the Supreme Court has specifically held that EEOC interpretations are entitled to the "great deference" normally accorded interpretations of the agency charged with administering a statute. Griggs v. Duke Power Co., 401 U.S. at 433-435, 91 S.Ct. at 854-856.

Moreover, the EEOC interpretation of § 713(b) is an eminently reasonable one. It simply insures that the only Commission interpretations and opinions which will be given binding effect under that section are those based either upon a solid factual foundation or upon the most thorough consideration of the potential factual situations to which the rule might apply. For, as Judge Gewin notes in Beverly v. Lone Star Lead Const. Co., *supra* 437 F.2d at 1141,

> [t]he Commission is neither required nor physically able to conduct an "in depth" investigation in every case; apparently the investigative procedure, in the instant case was performed on an ex parte basis, bereft of all of the advantages which come from an adversary proceeding in a court of law.
>
> Thus, the regulation gives conclusive effect only to General Counsel opinion letters based on stated factual assumptions, and official interpretive regulations which have received the Commission's most careful consideration.
>
> We hold that a "no reasonable cause" determination is not a "written interpretation or opinion of the Commission" within the meaning of § 713(b).

See, *Robinson* v. *Lorillard Corp., supra,* at 801. See also, *Local 189, United Papermakers and Paperworkers, supra,* 416 F.2d 980, 997 (5th Cir. 1969).

Here the evidence, as heretofore noted, discloses no effort by the Company to secure an opinion from the EEOC. Additionally, in May, 1971, the defendant through its coun-

sel, was aware of the fact that prior thereto the EEOC had, in a decision issued March 19, 1971 (EEOC Decision No. 71-1474, CCH-EEOC Sec. P-6221), specifically held that a pre-1969 plan providing for a maximum of thirteen weeks of sickness and accident benefits for temporary disabilities but which excluded those arising out of childbirth or complications of pregnancy violated Title VII. Compounding that knowledge was a specific reference by counsel for the Union to the Manager of Employee Benefits for the defendant, in August of 1971, to the fact that the EEOC had so ruled.

In light of these circumstances, defendant's present contention is self-contradictory. It seems elementary that a defense of good faith presupposes a disposition to exercise it. Notwithstanding the specific knowledge of the EEOC's ruling, and formal requests by the Union for renegotiation of the then existing contract, defendant's position as to the instant issue remained constant. The Court is satisfied that whatever reasoning guided the defendant's conduct, it was not premised on any EEOC decisions.

D. Maternity Leave

The maternity leave policy of the Company while presumably national in principle seems not to have been evenly applied as evidenced by the Court's findings, *supra*. In certain instances it appears that the pregnant employee was required to take leave of her position three months prior to birth and not permitted to return until six weeks after the birth. In other instances the periods varied. Regardless of the periods involved, the evidence is clear that under the defendant's bargaining agreement and insurance plan, weekly disability benefits are not payable for absence due to pregnancy or childbirth. In short, of all the employees it is only pregnant women who have been required to cease work regardless of their desire and physical ability to work and only they have been required to remain



off their job for an arbitrary period after the birth of their child. In February, 1973, the defendant issued a directive which permits pregnant employees to continue working, if they are able, as long as they wish, subject to medical approval.

IV. Conclusion

The claim here is not of disparate treatment resulting from sex stereotyping, a claim now familiar in Title VII litigation. See, *e.g., Sprogis* v. *United Air Lines, Inc.,* 444 F.2d 1194 (7th Cir. 1970). Rather, it is a claim of disparate treatment of persons, otherwise similarly situated, on the basis of a particular condition, the peculiarity of which is both irrelevant to the purpose of the company program and ineluctably sex linked.

There is no rational distinction to be drawn between pregnancy related disabilities and a disability arising from any other cause. The defendant does not exclude from coverage any disability because it was voluntarily incurred other than disabilities arising from childbirth or other pregnancy-related conditions. That this is sex discrimination is self evident. See Judge Winter's comments in his dissent in *Cohen* v. *Chesterfield County School Board,* 474 F.2d 395, 400, 401 (4th Cir. 1973), *rev'd.* U.S. (1973) (42 L.W. 4186, Jan. 21, 1974). See also, Chief Judge Brown's dissent in *Phillips* v. *Martin-Marietta Corp.,* 416 F.2d 1257, 1257 (5th Cir. 1969), cited by Judge Winter in *Cohen, supra.* wherein he, in discussing the unwillingness of an employer who was willing to hire men with pre-school age children for a certain position but not women in a case premised on Title VII of the Civil Rights Act of 1964, said:

> The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet see a male mother. A mother, to oversimplify the simplest biology, must then be a woman.

See also, dissenting opinion of Judge Wisdom in *Schattman v. Texas Employment Commission*, 459 F.2d 32, 42 (5th Cir. 1972), wherein he said, "Female employees are the only employees . . . . who become pregnant; it follows that they are provisionally dismissed from work on account of sex . . . ."

The conduct of the defendant in engaging in discriminatory practices against the plaintiffs has been deliberate and intentional, and the plaintiffs are entitled to the relief sought.

An appropriate order shall issue.

/s/ ROBERT R. MERHIGE, JR.
Robert R. Merhige, Jr.
*United States District Judge*

Date: Apr. 13, 1974

## APPENDIX A
## (DX 42)

### Estimated Annual Births Working Population 1972

| Central Age | Birth Rate per 1,000 Population [1] | Total Female Population 1971 [2] | Annual Births (2) × (3) | Married Females Husband Present [2] | Married Female Workers Husband Present [2] | Estimated Annual Births Among Female Workers (4) × (6) ÷ (5) |
|---|---|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| 17 | 66 | 7,547,000 | 498,102 | 866,000 | 320,000 | 184,056 |
| 22 | 167 | 8,754,000 | 1,461,918 | 4,842,000 | 2,276,000 | 687,180 |
| 27 | 140 | 7,051,000 | 987,140 | 5,466,000 | 2,102,000 | 379,614 |
| 32 | 75 | 5,903,000 | 442,725 | 4,831,000 | 2,004,000 | 183,652 |
| 37 | 36 | 5,325,000 [3] | 209,700 | 4,771,000 [3] | 2,270,000 [3] | 99,773 |
| 42 | 10 | 5,825,000 [3] | 58,250 | 4,771,000 [3] | 2,269,000 [3] | 27,703 |
| 47 | 1 | 6,089,000 [3] | 6,089 | 4,735,000 [3] | 2,317,000 [3] | 2,980 |
| Total | | 74,580,000 | 3,663,924 | 45,443,000 | 18,530,000 | 1,564,988 |

[1] Table 56 Statistical Abstract (Table 65, American Almanac)
[2] Table B Special Labor Force Report 144, Bureau of Labor Statistics, U.S. Department of Labor.
[3] Data available only for two central age groups as follows: Col. (3) 11,650 for 35-44, 12,177 for 45-54 and Col. (5) 9,541 for 35-44 and 9,470 for 45-54, Col. (6) 4,539 for 35-44 and 4,634 for 45-54.

Married Women (Husband Present) in Labor Force March 1972 = 19,249 (Table 7, p. 36, Mo. Labor Rev., April 1973).

Discount for Lower Birth Rate Working Mothers .9.

Estimated Annual Births $1{,}564{,}953 \times \frac{19{,}249}{18{,}530} \times .9 = \underline{1{,}463{,}113.}$

July 17, 1973

## APPENDIX B

G.E. employment statistics with respect to childbirth (excluding data concerning ectopic pregnancies, caesarian births, abortions and miscarriages) disclose that the duration of pregnancy absences prior to the date of delivery for employees at all GE plants and locations is as follows:

| Weeks duration of Pregnancy Absence | 1970 | Cumulative Percent | 1971 | Cumulative Percent |
|---|---|---|---|---|
| Under 1 Week | 86 | | 68 | |
| 1 week but less than 2 | 46 | | 52 | |
| 2 weeks but less than 3 | 63 | | 61 | |
| 3 weeks but less than 4 | 76 | | 74 | |
| 4 weeks but less than *5* | 124 | 12% | 106 | 15% |
| 5 weeks but less than 6 | 153 | | 91 | |
| 6 weeks but less than 7 | 195 | | 146 | |
| 7 weeks but less than *8* | 211 | 29 | 167 | 31 |
| 8 weeks but less than 9 | 277 | | 206 | |
| 9 weeks but less than *10* | 246 | 45 | 185 | 47 |
| 10 weeks but less than 11 | 231 | | 162 | |
| 11 weeks but less than *12* | 229 | 59 | 165 | 60 |
| 12 weeks but less than 13 | 275 | | 210 | |
| 13 weeks but less than 14 | 184 | | 153 | |
| 14 weeks but less than *15* | 134 | 78 | 102 | 79 |
| 15 weeks but less than 16 | 117 | | 93 | |
| 16 weeks but less than 17 | 84 | | 58 | |
| 17 weeks but less than 18 | 62 | | 51 | |
| 18 weeks but less thas 19 | 52 | | 42 | |
| 19 weeks but less than *20* | 47 | 89 | 36 | 90 |
| 20 weeks but less than 21 | 46 | | 25 | |
| 21 weeks but less than 22 | 42 | | 32 | |
| 22 weeks but less than 23 | 41 | | 23 | |
| 23 weeks but less than 24 | 37 | | 16 | |
| 24 weeks but less than 25 | 14 | | 16 | |
| 25 weeks but less than 26 | 25 | | 20 | |
| 26 weeks but less than 27 | 23 | | 19 | |
| 27 weeks but less than 28 | 27 | | 19 | |
| 28 weeks but less than 29 | 23 | | 15 | |
| 29 weeks but less than 30 | 14 | | 13 | |
| 30 weeks but less than 31 | 16 | | 10 | |
| 31 weeks but less than 32 | 12 | | 17 | |
| 32 weeks but less than 33 | 16 | | 9 | |
| 33 weeks and over | 33 | 100% | 14 | 100% |
| Total | 3,261 | | 2,476 | |



## APPENDIX C

GE employment statistics with respect to ectopic pregnancies and caesarian births disclose that the duration of pregnancy absences prior to the date of delivery for employees at all GE plants and locations is as follows:

| | 1970 | 1971 |
|---|---|---|
| Under 1 week | 10 | 5 |
| 1 Week but less than 2 | 1 | 3 |
| 2 weeks but less than 3 | 6 | 3 |
| 3 weeks but less than 4 | 3 | — |
| 4 weeks but less than 5 | 4 | 3 |
| 5 weeks but less than 6 | 7 | 3 |
| 6 weeks but less than 7 | 9 | 9 |
| 7 weeks but less than 8 | 5 | 11 |
| 8 weeks but less than 9 | 16 | 14 |
| 9 weeks but less than 10 | 9 | 10 |
| 10 weeks but less than 11 | 9 | 10 |
| 11 weeks but less than 12 | 6 | 7 |
| 12 weeks but less than 13 | 6 | 5 |
| 13 weeks but less than 14 | 6 | 4 |
| 14 weeks but less than 15 | 13 | 10 |
| 15 weeks but less than 16 | 5 | 6 |
| 16 weeks but less than 17 | 6 | 3 |
| 17 weeks but less than 18 | 1 | 2 |
| 18 weeks but less than 19 | 1 | 3 |
| 19 weeks but less than 20 | 3 | 2 |
| 20 weeks but less than 21 | 1 | 1 |
| 21 weeks but less than 22 | 1 | 1 |
| 22 weeks but less than 23 | 1 | 1 |
| 23 weeks but less than 24 | 1 | 1 |
| Over 24 weeks | 10 | 8 |
| Total | 140 | 125 |

# APPENDIX D

GE employment statistics with respect to abortions and miscarriages disclose that the duration of pregnancy absences prior to the date of delivery for employees at all GE plants and locations is as follows:

| | 1970 | 1971 |
|---|---|---|
| Under 1 week | 83 | 123 |
| 1 week but less than 2 | 16 | 7 |
| 2 weeks but less than 3 | 8 | 10 |
| 3 weeks but less than 4 | 4 | 5 |
| 4 weeks but less than 5 | 6 | 5 |
| 5 weeks but less than 6 | 5 | 3 |
| 6 weeks but less than 7 | 1 | 3 |
| 7 weeks but less than 8 | 5 | 4 |
| 8 weeks but less than 9 | 6 | 5 |
| 9 weeks but less than 10 | 2 | 2 |
| 10 weeks but less than 11 | 2 | 2 |
| 11 weeks but less than 12 | 1 | 4 |
| 12 weeks but less than 13 | 1 | 1 |
| 13 weeks but less than 14 | 1 | 1 |
| 14 weeks but less than 15 | — | — |
| 15 weeks but less than 16 | — | 2 |
| 16 weeks but less than 17 | — | 1 |
| 17 weeks but less than 18 | 2 | — |
| 18 weeks but less than 19 | — | 1 |
| 19 weeks but less than 20 | 1 | 1 |
| 20 weeks but less than 21 | 1 | — |
| 21 weeks but less than 22 | — | — |
| 22 weeks but less than 23 | 1 | — |
| 23 weeks but less than 24 | 1 | — |
| | 147 | 180 |

# Table 2.—Mothers in the Labor Force, by Marital Status and Age of Children, March 1972-71

(Mothers 16 years of age and over)

APPENDIX E
(PX 73)

| Marital status and age of children | Number | | Percent distribution | | As percent of women in population | |
|---|---|---|---|---|---|---|
| | 1972 | 1971 | 1972 | 1971 | 1972 | 1971 |
| Mothers with children under 18 years | 12,682,000 | 12,201,000 | 100.0 | 100.0 | 42.9 | 42.2 |
| Married, husband present | 10,452,000 | 10,098,000 | 82.4 | 82.7 | 40.5 | 39.7 |
| Other women ever married [1] | 2,230,000 | 2,103,000 | 17.6 | 17.2 | 59.1 | 59.9 |
| Mothers with children 6 to 17 years only | 8,244,000 | 7,874,000 | 65.0 | 64.5 | 52.6 | 52.0 |
| Married, husband present | 6,706,000 | 6,424,000 | 52.9 | 52.7 | 50.2 | 49.4 |
| Other women ever married [1] | 1,538,000 | 1,450,000 | 12.1 | 11.9 | 66.5 | 67.6 |
| Mothers with children under 6 years [1] | 4,438,000 | 4,327,000 | 35.0 | 35.5 | 31.9 | 31.4 |
| Married, husband present | 3,746,000 | 3,674,000 | 29.5 | 30.1 | 30.1 | 29.6 |
| Other women ever married [1] | 692,000 | 653,000 | 5.5 | 5.4 | 47.4 | 47.8 |
| Mothers with children 3 to 5 (none under 3) [2] | 1,950,000 | 2,025,000 | 15.4 | 16.6 | 38.7 | 38.4 |
| Married, husband present | 1,580,000 | 1,680,000 | 12.5 | 13.8 | 36.1 | 36.1 |
| Other women ever married [1] | 370,000 | 345,000 | 2.9 | 2.8 | 55.8 | 56.4 |
| Mothers with children under 3 years [2] | 2,488,000 | 2,302,000 | 19.6 | 18.9 | 28.1 | 27.1 |
| Married, husband present | 2,166,000 | 1,994,000 | 17.1 | 16.3 | 26.9 | 25.7 |
| Other women ever married [1] | 322,000 | 308,000 | 2.5 | 2.5 | 40.4 | 40.8 |

[1] Widowed, divorced, or separated.

[2] May also have older children.

Source: U.S. Department of Labor, Bureau of Labor Statistics: Summary—Special Labor Force Report, October 1972, Marital and Family Characteristics of Workers, March 1972, and Special Labor Force Reports.

# APPENDIX F

## (P. Ex. 74 )

### Table 3.—Labor Force Status of Ever-Married Women, by Presence and Age of Children, March 1972

| Race and presence and age of children | Population | Labor force | |
|---|---|---|---|
| | | Number | As percent of women in population |
| **Women of all races** | | | |
| Total | 61,896,000 | 25,462,000 | 41.1 |
| Mothers with children under 18 years | 29,577,000 | 12,682,000 | 42.9 |
| With children 6 to 17 years only | 15,677,000 | 8,244,000 | 52.6 |
| With children under 6 years [1] | 13,900,000 | 4,438,000 | 31.9 |
| With no children under 3 years [1] | 5,038,000 | 1,950,000 | 38.7 |
| With children under 3 years [1] | 8,862,000 | 2,488,000 | 28.1 |
| Women without children under 18 years | 32,319,000 | 12,780,000 | 39.5 |
| **Women of Minority Races** | | | |
| Total | 6,590,000 | 3,256,000 | 49.4 |
| Mothers with children under 18 years | 3,439,000 | 1,842,000 | 53.6 |
| With children 6 to 17 years only | 1,754,000 | 1,037,000 | 59.1 |
| With children under 6 years [1] | 1,685,000 | 805,000 | 47.8 |
| Women without children under 18 years | 3,151,000 | 1,414,000 | 44.9 |

[1] May also have older children.

Source: U.S. Department of Labor, Bureau of Labor Statistics: Summary—Special Labor Force Report October 1972, Marital and Family Characteristics of Workers, March 1972.



# APPENDIX G

## (P. Ex. 75)

### Table 4.—Labor Force Participation Rates and Percent Distribution of Mothers (Husband Present), by Income of Husband in 1971 and Ages of Children, March 1972

| Income of husband | Labor force participation rates of mothers with children | | Percent distribution of mothers in the labor force with children | | |
|---|---|---|---|---|---|
| | Under 18 years | 6-17 years only | Under 18 years | 6-17 years only | Under 6 years [1] |
| Number | — | — | 10,452,000 | 6,706,000 | 3,746,000 |
| Percent | 40.5 | 50.2 | 100.0 | 100.0 | 100.0 |
| Under $3,000 | 41.8 | 51.0 | 5.7 | 5.1 | 6.7 |
| $3,000 to $4,999 | 45.1 | 53.0 | 9.9 | 8.0 | 13.4 |
| $5,000 to $6,999 | 46.5 | 57.3 | 15.3 | 13.2 | 18.9 |
| $7,000 to $9,999 | 44.1 | 56.3 | 29.1 | 27.9 | 31.3 |
| $10,000 and over | 35.5 | 45.1 | 40.0 | 45.7 | 29.6 |

[1] May also have older children.

Source: U. S. Department of Labor, Bureau of Labor Statistics: Summary—Special Labor Force Report, October 1972, Marital and Family Characteristics of Workers, March 1972.

## APPENDIX C

(Captioned Omitted in Printing)

**Order**

(Filed April 13, 1974)

For the reasons stated in the memorandum of the Court this day filed, and deeming it proper so to do, it is ADJUDGED and ORDERED as follows:

1. The failure of the defendant, General Electric Company, to pay sickness and accident benefits to the individually named class representative plaintiffs and the members of their class for periods of absence due to childbirth or other pregnancy-related disabilities, violates Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e.

2. The defendant, its agents, servants, employees, and all acting in concert therewith, be, and they are hereby enjoined and restrained from continuing its policy of discriminating against members of the class represented herein, in its failure to pay to said members weekly disability benefits for absences from work due to pregnancy-related disabilities in the same manner as afforded male employees for disabilities embodied in its sickness and accident policies and practices presently in effect.

3. Monetary judgments will be entered in favor of those members of the class affected in such amounts as the Court ultimately concludes is proper.

4. All other matters are continued until the further order of the Court.

5. Counsel are requested to meet with the Court at 9:00 o'clock a.m. on April 19, 1974, for discussion reference those matters still outstanding.

Let the Clerk send copies of the memorandum and this order to al. counsel of record.

/s/ ROBERT R. MERHIGE, JR.
Robert R. Merhige, Jr.
*United States District Judge*

Date: Apr. 13, 1974



## APPENDIX D

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON DISTRICT OFFICE
1717 H STREET, N.W.
WASHINGTON, D.C. 20006

Case No. YDC3-093

Charge No. TDC2-0745; TDC3-1188
TDC3-1189; TDC2-1459
TDC2-0868; TDC2-1140
TDC2-1143

May 18, 1973

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Doris B. Wiley
2623 Florida Ave., N.W.
Roanoke, Virginia 24017
and
Mary R .Williams
Route 8, Box 481, Lot 15
Roanoke, Virginia 24014 — *Charging Parties*

vs.

General Electric Company
1501 Roanoke Boulevard
Salem, Virginia 24153 — *Respondent*

DETERMINATION

The Commission has completed the investigation of the subject charge. Having considered the entire record and pursuant to Section 1601/9(b) of the Commission's Procedural Rules, I issue the following determination as to the merits of the charge.

Respondent is an employer within the meaning of Title VII and the timeliness and all other jurisdictional requirements have been met.

Charging Parties allege that Respondent discriminated against them because of their sex, female, by failing to provide insurance coverage for time lost due to disability from pregnancy and childbirth equal in amount to benefits provided for other disabilities.

Respondent states that no discriminatory action was contemplated or occurred.

Respondent's insurance plan manual indicates that benefits under the Weekly Sickness and Accident Insurance will not be payable for any absence due to pregnancy or resulting childbirth or to complications in connection therewith. The plan further provides that all employees who become totally disabled as a result of a non-occupational sickness or accident, will be paid weekly based on an amount equal to sixty percent of their normal straight-time weekly earnings up to a maximum weekly benefit of $150.

Where a policy has an exclusive impact upon women based solely on a condition attendant to their sex, it is illegal under Title VII, except upon a showing that the policy is reasonably necessary to normal operation of that particular business. Respondent has not sustained its burden under this exception. Moreover, the Commission has held that disabilities caused or contributed to by pregnancy are for all job-related purposes temporary disabilities and should be treated as such under any health plan or tem-



porary disability insurance plan available in connection with employment. Accordingly, we conclude that Respondent's plan discriminates against Charging Parties and females as a class because of their sex within the meaning of Section 703(a) of Title VII.

Having determined that there is reasonable cause to believe that Respondent has engaged in unlawful employment practices, the Commision now invites the parties to join with it in a collective effort toward a just resolution of this matter. We enclose an information sheet entitled "Notice of Conciliation Process" for the attention of each party. A representative of this office will be in contact with each party in the near future to begin the conciliation process.

On behalf of the Commission:

/s/ GWENDOLYN M. WELLS
Gwendolyn M. Wells
*District Director*
Washington District Office

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

MARTHA V. GILBERT, *et al*

v.

GENERAL ELECTRIC COMPANY

Civil Action No. 142-72-R

### Order

(Filed May 9, 1974)

Pursuant to the motion of the defendant, General Electrict Company, and deeming it proper so to do, it is ADJUDGED and ORDERED that the enforcement of Paragraph 2 of this Court's order filed April 13, 1974, be, and the same is hereby, stayed until the United States Court of Appeals for the Fourth Circuit has ruled on the appeal now pending herein, upon the following terms: That defendant shall comply with such further procedures as this Court may determine appropriate during the pendency of the appeal aforementioned to the end that notice be given to all members of the class affected herein, stating the holding of the Court, the rights of the plaintiffs thereunder, and the procedure to be followed for implementation, as well as such other pertinent information as the Court may deem proper, it being the Court's intention to take all necessary steps to expedite the Court's order short of requiring any payments by the defendant, until all appeals have been exhausted.

Let the Clerk send copies of this order to all counsel of record.

/s/ ROBERT R. MERHIGE, JR.
Robert R. Mehige, Jr.
*United States District Judge*

Date: May 9, 1974

Supreme Court, U. S.
FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

Nos. 74-1589 and 74-1590

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

---

GENERAL ELECTRIC COMPANY,
*Petitioner,*

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*

---

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,
*Petitioners,*

v.

GENERAL ELECTRIC COMPANY

---

## SUPPLEMENTAL BRIEF OF ALL PARTIES TO JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

12234-7-75

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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Nos. 74-1589 and 74-1590

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GENERAL ELECTRIC COMPANY,

*Petitioner,*

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*

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MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

*Petitioners,*

v.

GENERAL ELECTRIC COMPANY

---

## SUPPLEMENTAL BRIEF OF ALL PARTIES TO JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

On June 17, 1975, all parties to the suit in the court below filed a joint petition under Rule 20 of the Rules of this Court, praying that a writ of certiorari issue in advance of the judgment of the Court of Appeals for the Fourth Circuit to review this case which was then

pending in the latter court. In the petition, it was pointed out, *inter alia,* that the case presented the same question as is now before the Court in *Wetzel* v. *Liberty Mutual Insurance Co.,* No. 74-1245, certiorari granted May 27, 1975, and that the court of appeals had, on June 9, 1975, entered an order announcing that its decision in the case would be delayed pending this Court's decision in the *Wetzel* case. The purpose of this supplemental brief, filed pursuant to paragraph 5 of Rule 24 and in which all parties to the suit in the court below again join, is to bring to the Court's attention the action taken by the court of appeals after the joint petition for certiorari had been filed.

On June 27, 1975, the court of appeals issued an opinion (App. F,[1] *infra,* pp. 1a-14a) and its judgment (App. G, *infra,* pp. 15a-16a) in this case.[2] In its decision, the court of appeals (Chief Judge Haynsworth and Judge Russell; Judge Widener dissenting) affirmed the district court's decision that petitioner GE's failure to pay sickness and accident benefits for pregnancy-related disabilities violated Title VII of the Civil Rights Act of 1964.

The fact that the court of appeals has now issued a judgment (App. G, *infra,* pp. 15a-16a) in the case precludes the applicability of Rule 20, but does not render the petition for certiorari herein either moot or less viable. As set forth in the petition, we believe that the completeness of the record in this case could be of great

[1] Appendices A through E appear in the joint petition for certiorari herein.

[2] The court of appeals has not announced why it departed from its previous announcement that its decision would be delayed pending this Court's decision in *Wetzel* v. *Liberty Mutual Insurance Co., supra.*



assistance to the Court in deciding a question as important as that presented in *Wetzel,* and for this reason petitioner GE and petitioners Gilbert, *et al.,* adhere to their view, and their request, that certiorari be granted. Additionally, we also urge that certiorari be granted in view of the lack of unanimity in the court below.[3]

Respectfully submitted,

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July 28, 1975

[3] Petitioners respectfully request that if certiorari is granted, this case be scheduled for oral argument sequentially with the oral argument in the *Wetzel* case. As stated previously, the parties are prepared to follow whatever reasonably accelerated briefing schedule the Court may deem appropriate.

# APPENDIX

## APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 74-1557

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MARTHA V. GILBERT, SHARON E. GODFREY, BARBARA HALL, ALBERTA B. SMITH, JOHNNIE TAYLOR, DORIS B. WILEY, MARY R. WILLIAMS, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 161, *Appellees,*

v.

GENERAL ELECTRIC COMPANY, *Appellant.*

---

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

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Argued: January 8, 1975. Decided: June 27, 1975

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Before HAYNSWORTH, Chief Judge, RUSSELL and WIDENER, Circuit Judges.

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RUSSELL, *Circuit Judge:*

This is a class action by certain women employees of the defendant to secure affirmative injunctive relief under Section 2000e-5(f) (3), 42 U.S.C., that childbirth disabilities of women employees of the defendant are compensable under the defendant's employee disability plan which is

applicable generally throughout all defendant's plants. Following the disposition of certain procedural motions relating to venue[1] and the propriety of class representation,[2] the District Court proceeded to the merits of the controversy and, in granting relief, held the denial of pregnancy-related disability benefits violative of Title VII of the Civil Rights Act of 1964, as amended.[3] The defendant has appealed, asserting that the exclusion of such disabilities under its employee disability plan is not violative of Title VII and that, in any event, the District Court improperly permitted the action to be maintained as a class action. We affirm.

The legislative purpose behind Title VII was to protect employees from any form of disparate treatment because of race, color, religion, sex or national origin or, as one commentator has stated it, "to make employment decisions sex-blind, as well as colorblind."[4] And that remedial purpose is plainly spelt out in the Act, whose sweep "extends beyond discrimination in rates of wages," and which proscribes broadly any adverse discrimination by an employer with respect to "compensation, terms, conditions, or privileges of employment" on the basis of sex.[5] "[T]erms [or] conditions, • • • of employment," as used in the Act, include "fringe benefits" such as pension rights and retirement and disability benefits, all of which are now well recognized as "integrally related to the entire wage

[1] *See Gilbert* v. *General Electric Company,* 347 F. Supp. 1058 (1972).

[2] *See Gilbert* v. *General Electric Company,* 59 F.R.D. 267 (1973).

[3] *See Gilbert* v. *General Electric Company,* 375 F. Supp. 367 (1974).

[4] Note, *Developments-Title VII,* 84 *Harv. L. Rev.* 1109, 1175; *Sprogis* v. *United Air Lines, Inc.* (7th Cir. 1971) 444 F.2d 1194, 1198, *cert. denied* 404 U.S. 991.

[5] Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs,* 74 Colum. L. Rev. 1203, 1214-5 (1974).



structure."[6] The Equal Employment Opportunities Commission has so declared in its guidelines[7] issued under the Act. Nor is the defendant in any position to contend that "fringe benefits" are not included in "conditions of employment," for it has stated in its 1966 Annual Report:

> "Compensation at General Electric is interpreted broadly to include not only monetary returns but also the value of benefit programs."

It would seem necessarily to follow, therefore, that any limitations or restrictions on disability benefits imposed by the defendant under its program of employee benefits which may be found to be sex-based would represent a discrimination in the "compensation, terms, conditions, or

[6] *Ibid.,* p. 1214; *Rosen* v. *Public Service Electric and Gas Company* (3d Cir. 1973) 477 F.2d 90, 95; *Inland Steel Co.* v. *National Labor Relations Board* (7th Cir. 1948) 170 F.2d 247, 251, *affirmed* 339 U.S. 382.

[7] "(a) 'Fringe benefits,' as used herein includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

"(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits." 29 C.F.R. § 1604.9.

• • •

"(b) Disabilities caused or contributed to by pregnancy, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 C.F.R. § 1604.10(b).

privileges of employment'' within the proscription of the Act.

Pregnancy-related disabilities are, however, excluded from the disability benefits available under the defendant's employee benefit program. It is specifically this restriction upon the benefits available under the program which has prompted this controversy and which the plaintiffs seek by their action to invalidate. Pregnancy is a condition unique to women and a basic characteristic of their sex. A disability program which, while granting disability benefits generally, denies such benefits expressly for disability arising out of pregnancy, a disability possible only among women, is manifestly one which can result in a less comprehensive program of employee compensation and benefits for women employees than for men employees; and would do so on the basis of sex. ''[W]omen, to be treated without discrimination [under the Act], must be permitted to be women,'' and this means a right to be ''women'' without being burdened by any discrimination in employment benefits, whether in wages or in fringe benefits, on account of characteristics peculiar to their sex.[8] It is of no moment that an employer may not have deliberately intended sex-related discrimination; the statute looks to ''consequences,'' not intent.[9] Any discrimination, such as that here, which is ''inextricably sex-linked'' in consequences and result, is violative of the Act.[10] In so concluding, we are following the opinion reached by most of the Courts which have considered the issue[11] and are giving effect to the

[8] Note, 1968 *Duke L. Journal* 671, 721-2.

[9] *Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424, 432.

[10] Note, *Developments-Title VII,* 84 *Harv. L. Rev.* 1109, 1175.

[11] *Communication Workers of America* v. *American Telephone & Telegraph Co.* (2d Cir. 1974) — F.2d —; *Wetzel* v. *Liberty Mutual Insurance Co.,* (3d Cir. 1975) — F.2d —; 43 L.W. 2352, decided February 12, 1975; *Holthaus* v. *Compton & Sons* (8th Cir. 1975) — F.2d —, — L.W. —, filed April 10, 1975; *Farkas* v. *South*



construction of the Act as adopted by the Equal Employment Opportunities Commission in its guidelines, to which the courts are directed to give ''great deference'' in applying the Act.[12]

The defendant insists, however, that this pregnancy related disability exclusion provision in its plan cannot be deemed discriminatory since its plan only offers benefits

*Western City School District* (6th Cir. 1974) — F.2d —; *Vineyard* v. *Hollister School District* (D.C. Cal. 1974) — F Supp. —, 8 FEP Cases 1009; *Satty* v. *Nashville Gas Co.* (D.C. Tenn. 1974) — F. Supp. —; *contra Newmon* v. *Delta Air Lines, Inc.* (D.C. Ga. 1973) 374 F. Supp. 238, *affirmed* 475 F.2d 768.

[12] The guidelines issued by the Equal Employment Opportunities Commission, which by law is charged with enforcement of Title VII and whose guidelines are said to be entitled to ''great deference'' in the construction of the Act, *Phillips* v. *Martin Marietta Corp.* (1971) 400 U.S. 542, 545; *Griggs* v. *Duke Power Co., supra* (401 U.S. p. 434), state specifically that ''pregnancy benefits'' are within the protection of the Act.

It may be, as the defendant strenuously argues, that the Commission had earlier indicated an opinion contrary to that presently reflected in its guidelines. The defendant urges that this waffling by the Commission renders the present guidelines poor guides to a construction of the Act and that we should look to the earlier opinions of the Commission for guidance—or, at least, should give minimal weight to the Commission's guidelines. This argument was pressed on the Court in *Wetzel* v. *Liberty Mutual Insurance Co., supra,* and was effectively answered, in our opinion, by the decision of the Court in that case. It has, also, been suggested in a Note, *Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted,* 24 DePaul L. Rev. 127, that the guidelines were improperly issued and are invalid. All of this, however, is beside the point as we see it. We are of the opinion, as was the District Court, that the guidelines, as presently promulgated, are merely expressive of what is the obvious meaning and purpose of the Act. We entertain no doubt that it was the legislative purpose in enacting Title VII to prohibit any disparity of treatment in compensation and conditions of employment between men and women and this included any disparity that might be sex-related in fringe benefits. *And this would be our opinion, whatever might be the language of the Commission's guidelines.*

*during sickness* and pregnancy confinement cannot be regarded as a sickness. Its basis for arguing that pregnancy confinement is not a sickness is that such disability is "voluntary." The plan, by its provisions, covers disabilities resulting from non-occupational sickness and accident. It incorporates no definition of either "disability" or "sickness," though it does state that "non-occupational" means "any sickness or injury not arising out of or in the course of employment and not entitling you or a covered dependent to benefits under any Workmen's Compensation or Occupational Disease Act." While a number of decisions, relying on this idea of voluntarism, has, particularly in the construction of insurance contracts, refused to characterize chidlbirth as a sickness,[13] the rule generally followed in labor arbitration cases is to equate pregnancy disability and sickness and to find an employee entitled to the same disability benefits in pregnancy confinement as in the case of any other disability under an employee sickness benefit program. *See Middleton Board of Education,* 56 LA 830 (1971); *National Lead Co.,* 18 LA 528 (1952); *Republic Steel Corp.,* 37 LA 367 (1961) [14] Under the circumstances, it would seem that whether pregnancy disability was within the coverage offered by the plan would be an issue that would turn largely on the construction of the plan as followed by the defendant itself. The record appears clear that, other than for childbirth disability, the defendant had never construed its plan as eliminating *all* so-called "vol-

[13] *Mutual Benefit Health & Acc. Ass'n.* v. *United Cas. Co.* (1st Cir. 1944) 142 F.2d 390, 394, *cert. denied* 323 U.S. 729; *Price* v. *State Capital Life Insurance Company* (1964) 261 N.C. 152, 134 S.E. 2d 171, 173.

[14] *See, also, Wetzel, supra,* where the Court, in dismissing a similar claim made in a case like the present one, pointed out that disabilities resulting from voluntary acts, *i.e.,* done with full knowledge of potential disability, cover a wide range, as the Court observed, since "[d]rinking intoxicating beverages, smoking, skiing, handball and tennis are all types of activities in which we could sustain harm."



untary" disabilities. It has, as the District Court stated, applied its plan to "*all* disability, including cosmetic surgery, disabilities arising from attempted suicides, etc." except those occurring during childbirth.[15] In short, the defendant raises this defense of "voluntarism" only against a disability that is unique to women and disregards it in connection with any claim for disability submitted by male employees. Whatever facile plausibility there might be to the argument that its plan does not cover "voluntary" disabilities accordingly disappears in the face of the manner in which the defendant itself has construed and applied its plan.

The main thrust of the defendant's argument in this Court, however, is that the recent decision in *Geduldig* v. *Aiello* (1974) 417 U.S. 484, authoritatively determined that, contrary to the conclusion of the District Court below and the guidelines of the Commission, disparity in treatment between pregnancy-related and other disabilities cannot be classified as sex discrimination prohibited under either the Equal Protection Clause or Title VII. We do not read *Aiello* as so holding as applied to an action under Title VII. Nor has it been so read in the two recent Circuit decisions, which have faced directly this problem.[16] *Aiello* dealt with a constitutional attack under the Equal Protection Clause on a *legislatively* created social welfare program for private employees in which a differentiation between pregnancy-related and other disabilities was made. In that context the Court applied the customary standards in testing legislation under the Equal Protection Clause and held that, "[A]bsent a showing that distinctions involving pregnancy are mere pretexts designed to

[15] 375 F. Supp., p. 381.

[16] *Communication Workers of America* v. *American Telephone & Telegraph Co., supra; Wetzel* v. *Liberty Mutual Insurance Co.,* supra. Although *Aiello* is not discussed in *Holthaus* v. *Compton & Sons, supra,* its inapplicability to a Title VII case is implicit in the Court's decision.

effect *an invidious discrimination* against the members of one sex or the other, *lawmakers are constitutionally free* [under the Fourteenth Amendment] to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis * * *."[17] (Italics added) In line

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[17] Note 20 at p. 496.

The point of difference in the majority and dissenting opinions in *Aiello* was in identifying the standard to be used in testing the "gender-based" classifications—whether it should be the test of "rationally supportable," as adopted by the majority opinion, or what has been described as the "two-tier" test of "strict scrutiny" and "compelling necessity," as urged in the dissenting opinion, a test which, as Chief Justice Burger in *Dunn* v. *Blumstein* (1972) 405 U.S. 330, at pp. 363-4, observed in his dissenting opinion, "no state law has ever satisfied * * *." We concluded in *Eslinger* v. *Thomas* (4th Cir. 1973) 476 F.2d 225, 230-1, that the proper equal protection test, in cases of sex discrimination, was whether the classification had "a 'fair and substantial' relation between the basis of the classification and the object of the classification." *Kahn* v. *Shevin* (1974), 416 U.S. 351, decided just two months before *Aiello*, employed this test in passing on an equal protection claim dealing with sex discrimination. The Court did make some reference in that case to the fact that the statute under review was a tax statute but such comment has been characterized as "a smoke-screen." Note, *Kahn* v. *Shevin and the "Heightened Rationality Test": Is the Supreme Court Promoting a Double Standard in Sex Discrimination Cases?* 32 *Wash. & Lee L. Rev.* 275, 288. In *Weinberger* v. *Wiesenfeld* (1975) — U.S. —, — L.W. —, Justice Brennan, who had dissented in both *Aiello* and *Kahn* on the ground that the "two-tier" standard of "strict scrutiny" and "compelling necessity" applied in sex-related cases under the Equal Protection Clause, aparently recognized that the standard adopted by the majority in *Aiello* and *Kahn* and accepted by us earlier in *Eslinger*, had been established and, in his opinion for an unanimous Court, he found the statutory classification invalid because it was "entirely irrational." For a discussion of this question, *see* Note 32 *Wash. & Lee L. Rev.* 275; Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1 (1972); *Bartlett, Pregnancy and the Constitution: The Uniqueness Trap*, 62 *Cal. L. Rev.* 1532, at pp. 1538-40 (1974); Note, *Geduldig* v. *Aiello*, 75 *Col. L. Rev.* 441 (1975); Note, *Kahn* v. *Shevin—Sex: A Less-Than-Suspect Classification*, 36 *U. Pitt L. Rev.* 584 (1974); Note, *Geduldig* v. *Aiello*, 52 *J. of Urban L.* 591 (1974).



with this, it added in note 20[18] of the opinion, that not "every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra*,[19] and *Frontiero, supra*."[20] In essence, its holding was simply that a legislative classification incorporating a pregnancy-childbirth classification was "rationally supportable" in a social welfare program under the Fourteenth Amendment and that it did not amount to an "invidious discrimination" under the Equal Protection Clause. And this was all that was required to sustain the legislation against an Equal Protection assault. It should be noted, perhaps parenthetically, that the opinion in *Aiello* did not declare that the distinction in disability benefit rights in that case between males and females, a distinction which excluded pregnancy-related disabilities, was not discriminatory. In fact, the language of the Court indicates rather clearly that the Court considered the differentiation discriminatory. What it concluded was, as we have said, that such discrimination was not "invidious" and was not without a rational relationship to the objective of the legislature in establishing the social welfare program under review.

In this case, on the contrary, the issue is not whether the exclusion of pregnancy benefits under a social welfare program is "rationally supportable" or "invidious" but whether Title VII, the Congressional statute, in language and intent, prohibits such exclusion. Accordingly, as the Court in *Wetzel* v. *Liberty Mutual Insurance Co., supra*, aptly observed, "our case is one of statutory interpretation rather than one of constitutional analysis." There is a well-recognized difference of approach in applying *constitutional* standards under the Equal Protection Clause as in *Aiello* and in the statutory construction of the "sex-

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[18] At p. 496.

[19] *Reed* v. *Reed* (1971) 404 U.S. 71.

[20] *Frontiero* v. *Richardson* (1973) 411 U.S. 677.

blind'' mandate of Title VII. To satisfy constitutional Equal Protection standards, a discrimination need only be ''rationally supportable'' and that was the situation in *Aiello,* as well as in *Reed* and *Frontiero.* The test in those cases was legislative reasonableness. Title VII, however, authorizes no such ''rationality'' test in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in conditions of employment.[21] It is not concerned with whether the discrimination is ''invidious'' or not. It outlaws *all* sex discrimination in the conditions of employment. It authorizes but a single exception to this statutory command of non-discrimination and that is a narrow one[22] which, to be upheld, requires a finding that it is ''necessary to the safe and efficient operation of the business.'' *Robinson* v. *Lorillard Corporation* (4th Cir. 1971) 444 F.2d 791, 798, *cert. dis.* 404 U.S. 1006. The defendant makes no claim for relief under this exception.[23] Its denial of pregnancy-

[21] 42 U.S.C. § 2000e-2.

[22] The EEOC guidelines provide that ''the bona fide occupational qualification exception as to sex should be interpreted narrowly.'' 29 C.F.R. § 1604.2(a) (1972). The guidelines specifically reject the following as justifiable discrimination under the ''bona fide occupational qualification'' rubric: refusal to hire a woman based on assumptions,about the ''comparative employment characteristics of women in general'' (for example, the assumption that women's turnover rates are higher than those of men); refusal to hire an individual based on sexual stereotypes; refusal to hire because of client or co-worker preferences. *Id.* § 1604.2(a)(1)(i)-(iii). The only situation in which the Commission will allow sex as a bona fide qualification is ''where it is necessary for the purpose of authenticity or genuineness'' (for example, a female role in a motion picture). *Id.* § 1064.2(a)(2). * * *'' This construction accords with our own decision in *Robinson.*

[23] While the defendant disclaimed consistently any intention of asserting a business necessity defense under Section 703(e) of the Act, it did offer considerable evidence on the ''business considerations'' which prompted its exclusion of childbirth disability in its employee benefit plan. It regarded this evidence as ''material'', to



related disability from the application of its employee disability benefit program, in our opinion, falls clearly within the prohibitions of Title VII and *Aiello* confers no immunity for such denial. The District Court properly so held.

We find equally without merit the contention of the defendant that this class action falls within subsection (b)(3) of Rule 23, compelling compliance with the requirement of personal notice as held in *Eisen.*[24] This is not a (b)(3) action; it is an action in equity for injunctive relief and falls within the mold of subsection (b)(2), as the District Court properly ruled. The notice requirements imposed by the District Court were adequate for an action under subsection (b)(2). *Robinson* v. *Lorillard Corp., supra; Note,* 39 F.R.D. 69 at 102.

The judgment appealed from is accordingly affirmed.

AFFIRMED.[25]

quote its own brief, ''not because of a Section 703(e) reason, but rather because it shows the absence of pretextual motivation under the *Geduldig, supra,* rationale.'' [p. 12, Reply Brief] Since we do not consider *Geduldig* in point here, it is unnecessary to consider this evidence. It might be noted, though, that these same ''business considerations'' were marshalled in opposition to the enactment of the Equal Rights Law one year before the enactment of Title VII and were discarded by the Congress. *See* U.S. Code Congr. & Admn. News, 88th Congr., 1st Sess., 1963, p. 687 and 689. Since the two Acts (*i.e.,* the Equal Pay Law and Title VII as directed at sex discrimination) had a similar purpose, Congress no more regarded ''business considerations,'' that is claimed greater absenteeism by women employees, etc., as a basis for escape from the prohibitions of Title VII than it did for the Equal Pay Law. *See,* Note, 84 *Harv. L. Rev. supra,* at p. 1174. As to whether there is any basis in fact for those claims of ''business considerations'', *see Bartlett, supra,* at pp. 1158-9.

[24] *Eisen* v. *Carlisle & Jacquelin* (1974) 417 U.S. 156.

[25] Since the Supreme Court has granted certiorari in *Wetzel* v. *Liberty Mutual Insurance Co., supra, see* 43 LW 3624 (U.S. May 27, 1975), the District Court should perhaps defer further proceedings herein until after *Wetzel* is decided.

WIDENER, *Circuit Judge*, dissenting:

I respectfully dissent from the majority opinion that the exclusion of pregnancy related disability from the application of an employee disability benefits program is prohibited by Title VII, 42 USC § 2000e, et seq.

I think such a holding is precluded by the decision of the Supreme Court in *Geduldig* v. *Aiello*, 417 US 484 (1974). Although that case involved an action brought under the equal protection clause of the Fourteenth Amendment and not Title VII, the decision should control here.

42 USC § 2000e-2 provides in part that it shall be an unlawful employment practice for an employer to discriminate against an individual because of the individual's sex. The inquiry in this case must therefore focus initially on whether the exclusion of pregnancy related disability from the disability benefits plan is sex discrimination. If it is not sex discrimination, then, regardless of what test is applied, there is no Title VII violation.

The court, in *Geduldig*, held that the exclusion of pregnancy from a state disability insurance plan for employees of private employers was not a classification that would support a finding of sex discrimination, since it was not shown that distinctions involving pregnancy were mere pretexts designed to effect an invidious discrimination against one sex. 417 US at 496-97, n. 20. Such a showing was not made here.

The Court said of the California insurance plan, "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Geduldig*, 417 US at 496-97. In a footnote, 417 US at 496, n.20, in reply to



the dissenting opinion, the Court explained that the pregnancy exclusion is a "far cry from cases like *Reed* . . . and *Frontiero* . . . involving discrimination based upon gender as such," and most importantly continued: "The California insurance program does not exclude anyone from benefit eligibility because of gender, but merely removes one physical condition—pregnancy—from the list of compensable disabilities." 417 US, n.20, p. 496. And later in the same footnote appears the flat statement which should control our case: "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis." 417 US, n. 20, p. 497.

Absent a showing of sex discrimination, Title VII, even if its reach were broader than the equal protection clause, would not render unlawful a pregnancy exclusion such as that involved here. Since the Supreme Court has held, for precisely the same exclusion, there is a "lack of identity between the excluded disability and gender as such," the exclusion should no more support a finding of discrimination under Title VII than under the equal protection clause. And since, as the Court says, the exclusion is "merely" the removal of "one physical condition—pregnancy—from the list of compensable disabilities," no reason appears why a collective bargaining agreement may not lawfully do by contract what a state may do by legislation.

But, in this circuit, the reach of Title VII is not broader than that of the Fourteenth Amendment. We have held that "the test of validity under Title VII is not different from the test of validity under the fourteenth amendment." *United States* v. *Chesterfield County School Dist., S.C.*, 484 F2d 70, 73 (4th Cir. 1973).[1] Unless this court intends to

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[1] Indeed, the very opinion of the district court affirmed here indiscriminately cites equal protection and Title VII cases in support of its position. That the rule in this circuit as recited from the *Chesterfield County* case is a widespread practice is pointed out in a comment in 75 Col. Law Review, 441, 464, 467 (1975).

alter its position as just above stated, it is required to reverse the decision below because of the decision of the Supreme Court in *Geduldig*. If the test is "not different," there can be no justification for the finding of discrimination here.

Additional reasons for my disagreement are the illogical results bound to follow. For example: a state's disability benefit plan for its own employees covered by Title VII, 42 USC § 2000e(b), would, under our holding, not be allowed to exclude pregnancy from its coverage. However, such an exclusion could be made freely in a state plan for employees of private employers such as that in *Geduldig*. I fail to see the justification for the inconsistency.

I grant the majority opinion is most persuasively written. Nevertheless, after many readings, I am left with the impression that, read as a whole, it very nearly follows the rationale of the dissenting justices in *Geduldig* which has been rejected by a majority of the court as emphasized in footnote 20 above referred to.

In sum, I am of opinion *Geduldig* was written with an eye to Title VII cases certain to come, not in a vacuum and not with self imposed blinders, and came to the only result logically possible when we consider that the Court must be the even handed arbiter in all cases, not only those involving equal protection. I even assume that the result in *Geduldig* may not be as socially desirable as the minority there argues for, and the majority here obtains. But social desirability is not the aim. The aim is to construe the statute in view of applicable precedent and legislative purpose. And Title VII seeks to equalize opportunity, not create an advantage for either men or women. If Congress wishes to legislate in favor of pregnant women, I see no constitutional impediment,[2] legislatures have made less rational classifications for centuries. But, I submit, Congress did not so undertake in Title VII.

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[2] See *Schlesinger* v. *Ballard*, —— US —— 43 L.W. 4158 (1975), and *Kahn* v. *Shevin*, 416 US 351 (1974).



## APPENDIX G

[Filed June 27, 1975, WILLIAM K. SLATE, II, Clerk]

### Judgment

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1557

MARTHA V. GILBERT, SHARON E. GODFREY, BARBARA HALL, ALBERTA B. SMITH, JOHNNIE TAYLOR, DORIS B. WILEY, MARY R. WILLIAMS, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 161,

*Appellees,*

ACLU AND EQUAL RIGHTS ADVOCATES,

*Amicus Curiae,*

WOMEN'S EQUITY ACTION LEAGUE; NATIONAL ORG. FOR WOMEN AND HUMAN RIGHTS FOR WOMEN, INC.,

*Amicus Curiae,*

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

*Amicus Curiae,*

BELLAMY, BLANK, GOODMAN, KELLY, ROSS AND STANLEY,

*Amicus Curiae,*

versus

GENERAL ELECTRIC COMPANY,

*Appellant,*

CHAMBER OF COMMERCE,

*Amicus Curiae.*

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

WILLIAM K. SLATE, II
*Clerk*

Supreme Court, U. S.
FILED
NOV 24 1975
MICHAEL RODAK, JR., CLERK

**APPENDIX - VOL. I**

# Supreme Court of the United States

OCTOBER TERM, 1974

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**No. 74-1589**

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GENERAL ELECTRIC COMPANY,
*Petitioner,*

v.

MARTHA V. GILBERT,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, *et al.*,
*Respondents.*

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**No. 74-1590**

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MARTHA V. GILBERT,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,
*Petitioners,*

v.

GENERAL ELECTRIC COMPANY,
*Respondent.*

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITIONS FOR CERTIORARI FILED JUNE 17, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

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**APPENDIX**

IN THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
RICHMOND VIRGINIA

| | | |
|---|---|---|
| MARTHA V. GILBERT<br>SHARON E. GODFREY<br>BARBARA HALL<br>ALBERTA R. SMITH, JOHNNIE TAYLOR, DORIS B. WILEY, MARY R. WILLIAMS<br>INTERN. UNION OF ELECTRICAL, RADIO & MACH. WORKERS, INTERN. UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, LOC. 161,<br>v.<br>1-GENERAL ELECTRIC COMPANY<br>Amicus curiae: EEOC<br>Amicus curiae: The Chamber of Commerce of the U.S.<br>Basis: Discrimination<br>1964 Civ. Rts. Act.<br>Unlawful Employment Practices | : | Civil Docket No. 142-72-R |

## DOCKET ENTRIES

1972

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| March 15 | Complaint filed and summonses issued to deft. |
| March 28 | Marshal's return on summons served on 3/21/72, filed. JP |
| April 3 | Stipulation extending time for deft. to respond until 5/5/72 executed & entered. Copies mailed counsel. |
| May 5 | Stipulation of parties extending time for deft. to answer to and including June 5, 1972, or to and including 10 days after the court rules on deft's Motion for Change of Venue, whichever date is the later, filed. |
| May 5 | Certificate of Service filed by counsel. |
| May 5 | Motion for change of venue on behalf of deft. General Electric Co., with affidavit of George Kegley, filed. |
| May 5 | Affidavit in support of deft. General Electric Co's motion for change of venue, filed. |
| May 5 | Memorandum in support of deft. General Electric Co's Motion for Change of Venue, filed. |
| May 10 | Memorandum of the Court filed: |
| May 10 | ORDER transferring action to Roanoke Division, Western District of Virginia; entered 5/10/72 & filed. Copies mailed as directed. |
| May 10 | Case file with certified copy of docket entries mailed by certified mail to Clerk U.S. District Court, P.O. Building, Roanoke, Va.. |
| May 31 | Motion to vacate Order of May 10, 1972, filed by pltf. |
| June 1 | ORDER denying pltfs' motion to vacate May 10, 1972. Order ent. 6/1/72 & filed. Copies mailed counsel & certified copies of order & motion mailed Clerk, Roanoke. |



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| July 10 | Certified copy of order remanding case to Eastern District for further action rec'd from Clerk USCA & filed. |
| July 12 | ORDER vacating this Court's orders of May 10, 1972 & June 1, 1972 pending determination of deft's motion for change of venue; setting hearing 4:30 p.m. July 24 1972; memoranda due 7/20/72, 5:00 p.m.; ent 7/12/72 & filed. Copies mailed all counsel of record. |
| July 13 | Stipulation extending time for deft to file answer to 8/20/72 executed & entered. Copies to counsel. |
| July 14 | Case file rec'd from Clerk's Office, Roanoke, Va. |
| July 17 | Order relieving Beecher E. Stallard as counsel for pltf., ent. 7-17-72. Copies mailed counsel. |
| July 20 | Opposition of pltfs to deft's motion for change of venue filed by pltfs. |
| July 20 | Memorandum of pltfs in opposition to deft's motion for change of venue, filed. |
| July 20 | Affidavit in opposition to deft's motion for change of venue, filed by R.G. Delano. |
| July 20 | Affidavit of John H. Shambo in opposition to deft's motion for change of venue, filed. |
| July 20 | Supplemental Affidavit in support of deft. G.E.'s motion for change of venue, with Exhibits I, II and III attached. |
| July 20 | Memorandum on behalf of General Electric Co. in reply to pltf's opposition to motion for change of venue, filed. |
| July 20 | Pltf's motion to add parties pltfs. to complaint, filed. |
| July 24 | IN OPEN COURT: Merhige, J. Appearances: Parties by counsel. Matter came on for hearing on motions. Motion of deft. for change |

of venue argued. Motion of pltfs to add parties plaintiffs to complaint argued. Motions taken under advisement by the Court. Deft. to reply to pltfs' motion by 8-4-72.

Aug. 4 Plaintiff's additional authorities in support of opposition to motion to transfer rec'd, filed.

Aug. 4 Defendant's brief in opposition to plaintiff's motion to amend, with affidavits of Lewis R. Holly & Carmen J. Romeo, rec'd, filed.

Aug. 11 Affidavits of R.L. Howes; Marian Butts; Barbara J. De LaCruz; Louise Washington; Maggie I. Goodman; Patricia M. Johnson and Shirley C. Short in support of defts' brief, filed.

Aug. 11 Stipulation extending time for deft. to file answer until 9/20/72 ent. 8/11/72 & filed. Copies mailed counsel.

Sept. 14 Stipulation to extend time to answer complaint to and including 10-23-72, filed 9-14-72. SO ORDERED 9-14-72. Copies to counsel.

Sept. 25 Pltf's interrogatories to deft., filed.

Sept. 25 Memorandum of the court filed.

Sept. 25 Order denying deft's motion to change venue; granting CONDITIONALLY pltf's motion to add parties pltf., pending notice to the court of said parties pltf. of intentions not to intervene herein, ent. 9-25-72. Copies to counsel.

Oct. 24 Stipulation extending time to respond filed by pltf. and deft.

Oct. 25 Order extending time to and including the 15th day following date of final order of Court of Appeals disposing of such petition, if deft. files petition for writ of mandamus on or before 10-24-72, ent. 10-25-72. Copies to counsel.

Oct. 31 Form pre-trial order ent. & filed. Copies at doc. call.



Nov. 20 Answers by deft. to pltfs' interrogatories, filed.

Nov. 20 Objections by deft. to pltfs' interrogatories, filed.

Dec. 12 Supplemental answers to pltfs' interrogatories filed by deft.

Dec. 14 Motion by deft. General Electric to dismiss complaint with supporting Statements of Authoriities, filed.

Dec. 15 ORDER soliciting within 15 days of this date plaintiffs' response to deft's motion to dismiss; directing deft. to submit rebuttal within 5 days thereafter, entered 12-15-72, filed. Copies mailed as directed. (WEH)

Dec. 18 Memorandum in support of deft., General Electric's motion to dismiss complaint, filed.

Dec. 29 Pltf's third interrogatories to Defendant, filed.

1973

Jan. 2 Opposition by pltfs. to motion by GE to dismiss, filed.

Jan. 2 Memorandum in support of pltfs' opposition to motion by GE to dismiss, filed.

Jan. 2 Pltfs' statement of authorities in support of opposition to dismiss, filed, with Exhibits attached.

Jan. 9 Reply by deft. to pltfs' opposition to motion to dismiss complaint, filed.

Jan. 15 Withdrawal as party pltf. filed by Barbara J. De LaCruz.

Jan. 15 Withdrawal as party pltf. filed by Linda Knight.

Jan. 15 Withdrawal as party pltf. filed by Louise Washington.

Jan. 15 Withdrawal as party pltf. filed by Maggie Goodman.

Jan. 15 Withdrawal as party pltf. filed by Addie L. Goodman.

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| Jan. 15 | Withdrawal as party pltf. filed by Patricia M. Johnson. |
| Jan. 15 | Withdrawal as party pltf. filed by Joann M. Moses. |
| Jan. 15 | Withdrawal as party pltf. filed by Hazel Barnes. |
| Jan. 15 | Withdrawal as party pltf. filed by Debra F. Howard. |
| Jan. 15 | Withdrawal as party pltf. filed by Cheryl Chewning. |
| Jan. 15 | Withdrawal as party pltf. filed by xxxxxxxxx xxxxxxxxxxxxxx |
| Jan. 31 | Deft's objections to pltfs' third interrogatories, filed. |
| Feb. 1 | Memorandum in support of objections to interrogatories, filed by deft. |
| Feb. 6 | Memorandum of the court filed. |
| Feb. 6 | Order denying deft's motion to dismiss; overruling deft's objections to interrogatories of pltfs.; denying deft's motion for continuance, ent. 2-6-73. Copies mailed all counsel of record. |
| Feb. 22 | Answer of defts.' & counterclaim, filed. |
| Feb. 26 | Notice to take de bene esse deposition of Dr. George Willbanks filed by deft. |
| Feb. 26 | Pltfs' List of Proposed Exhibits filed. |
| Feb. 23 | Motion by deft. for definition of size of class & representative filed. |
| Feb. 26 | Deft's Memorandum in support of motion for definition of size of class filed. |
| Feb. 28 | Answers to pltfs' 3rd interrogatories filed by deft. G.E. |
| Feb. 28 | List of Exhibits filed by deft. GE. |
| March 13 | Stipulation extending time to and including 4-2-73 for pltfs. to answer counterclaim, filed. |



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| | SO ORDERED, approved 3-14-73. Copies to counsel. |
| April 2 | Notice to take deposition of Dr. George Willbanks filed by deft. |
| April 2 | Motion of pltf. unions to dismiss counterclaim filed. |
| April 2 | Memorandum in support of motion to dismiss counterclaim, filed. |
| April 10 | Supplemental Answer by deft. GE to pltfs' third interrogatories, filed. |
| April 10 | Certificate of service of above pleading filed by Stanley R. Strauss. |
| April 17 | Pltfs' motion for order that Class Action May be Maintained, rec'd. |
| April 17 | Memorandum in support of above motion rec'd. from pltfs. |
| April 17 | Motion to pltfs. to add parties pltfs. to complaint, rec'd. |
| April 18 | Opposition of General Electric Co. to motion to dismiss counterclaim filed by pltf. |
| April 20 | Order granting motion of Women's Equity Action League, the National Organization for women and Human Rights for Women, for leave to participate in this matter as amici curiae in support of pltfs., with respect ONLY to the filing of such memoranda as the movants deem appropriate, ent. 4-20-73. Copies to counsel and movants. |
| April 20 | (Above referred to motions to participate as amicus curiae lodged 4-20-73). |
| April 23 | Opposition by GE to motion of Women's Equity Action League, National Organization of Women and Human Rights for Women, Inc. for leave to participate as amici curiae, filed. |

April 26 Defts' Opposition to pltfs' motion to add parties pltf., filed.

April 27 MEMORANDUM reaffirming Court Order of 4/20/73 ent. 4/27/73 & filed. Copies mailed counsel.

April 30 Memorandum of the Court filed.

April 30 ORDER denying pltfs' motion to dismiss counterclaim; action declared to be a Class Action; designations of representatives of the class given; counsel directed to appear 5/3/73, 9:00 am; denying pltfs' motion to add parties plaintiff; ent. 4/30/73 & filed. Copies mailed counsel of record.

April 30 Pltfs' List of Proposed Exhibits, Interr and Answers, filed.

April 30 Orig. of deft's supplemental Memorandum re: class issued filed.

April 30 Pltfs' List of Expert Witnesses filed.

April 30 Affidavit of Dale McAllister filed on behalf of defts.

– Begin Pleadings File No. 3 here –

May 2 Defendant General Electric Company's List of Proposed Exhibits and Depositions it intends to offer, filed.

May 2 Revised Answer by defendant General Electric Co. to plaintiff's interrogatories.

May 4 Pre-trial Brief of Women's Equity Action League, National Organization for Women, Human Rights for Women, Inc., in support of plaintiffs, filed.

May 7 Motion of pltfs. as to form of notice to be posted, filed by pltfs.

May 8 Deft's proposed form of notice to be posted pursuant to order determining class suit filed.



May 8 PRE-TRIAL CONFERENCE IN OPEN COURT: Merhige, J. No OCR Appearances: Parties by counsel. Matter came on for pre-trial conference. Matter heard as to form of notice to be posted pursuant to order determining class suit. Court rejected proposed notices of pltfs and deft. Matter heard as to setting of new trial date. Case set for trial on July 24, 1973 at 10 A.M. Former pre-trial order extended and is in effect. Deft's motion to bring in additional defts, or in alternative to dismiss complaint filed. Pltfs to reply by Friday, May 11; Deft. to reply 5 days thereafter. Deft. to furnish pltfs with minutes as requested of G.E.

May 8 Motion to bring in Additional Defendants, or in the alternative to dismiss the complaint filed by deft.

May 8 Memorandum in support of Motion to bring in Additional defendants, or in the alternative to dismiss the complaint filed.

May 9 Legal Notice with respect to all female employees of General Electric Co. filed.

May 9 Motion to bring in third party defts. lodged by GE. Copies to counsel.

May 9 Order that the Legal Notice this day filed be distributed and promulgated in accordance with the terms set forth in said Notice, ent. 5-9-73. Copies to counsel.

May 11 Motion by pltfs. to amend legal notice with respect to all female employees of General Electric Company filed.

May 11 Memorandum in support to amend legal notice filed.

April 26 Defts' Opposition to pltfs' motion to add parties pltf., filed.

April 27 MEMORANDUM reaffirming Court Order of 4/20/73 ent. 4/27/73 & filed. Copies mailed counsel.

April 30 Memorandum of the Court filed.

April 30 ORDER denying pltfs' motion to dismiss counterclaim; action declared to be a Class Action; designations of representatives of the class given; counsel directed to appear 5/3/73, 9:00 am; denying pltfs' motion to add parties plaintiff; ent. 4/30/73 & filed. Copies mailed counsel of record.

April 30 Pltfs' List of Proposed Exhibits, Interr and Answers, filed.

April 30 Orig. of deft's supplemental Memorandum re: class issued filed.

April 30 Pltfs' List of Expert Witnesses filed.

April 30 Affidavit of Dale McAllister filed on behalf of defts.

– Begin Pleadings File No. 3 here –

May 2 Defendant General Electric Company's List of Proposed Exhibits and Depositions it intends to offer, filed.

May 2 Revised Answer by defendant General Electric Co. to plaintiff's interrogatories.

May 4 Pre-trial Brief of Women's Equity Action League, National Organization for Women, Human Rights for Women, Inc., in support of plaintiffs, filed.

May 7 Motion of pltfs. as to form of notice to be posted, filed by pltfs.

May 8 Deft's proposed form of notice to be posted pursuant to order determining class suit filed.



May 8 PRE-TRIAL CONFERENCE IN OPEN COURT: Merhige, J. No OCR Appearances: Parties by counsel. Matter came on for pre-trial conference. Matter heard as to form of notice to be posted pursuant to order determining class suit. Court rejected proposed notices of pltfs and deft. Matter heard as to setting of new trial date. Case set for trial on July 24, 1973 at 10 A.M. Former pre-trial order extended and is in effect. Deft's motion to bring in additional defts, or in alternative to dismiss complaint filed. Pltfs to reply by Friday, May 11; Deft. to reply 5 days thereafter. Deft. to furnish pltfs with minutes as requested of G.E.

May 8 Motion to bring in Additional Defendants, or in the alternative to dismiss the complaint filed by deft.

May 8 Memorandum in support of Motion to bring in Additional defendants, or in the alternative to dismiss the complaint filed.

May 9 Legal Notice with respect to all female employees of General Electric Co. filed.

May 9 Motion to bring in third party defts. lodged by GE. Copies to counsel.

May 9 Order that the Legal Notice this day filed be distributed and promulgated in accordance with the terms set forth in said Notice, ent. 5-9-73. Copies to counsel.

May 11 Motion by pltfs. to amend legal notice with respect to all female employees of General Electric Company filed.

May 11 Memorandum in support to amend legal notice filed.

May 11 Pltfs' Opposition to defts; motion to add defts. with supporting memorandum, filed.

May 14 Answer of Pltf. Int. Union of Electrical, Radio and Machine Workers to Counterclaim filed.

May 14 ORDER amending legal notice referred to in Court's Order of May 9, 1973 as follows: date of June 11 & June 7th on Page 2 shall read June 25 & June 22, 1973; ent. 5/14/73. Copies mailed counsel.

May 14 ORDER directing distribution of Legal Notice filed May 9, 1973 ent. 5/14/73 & filed. Copies mailed all counse of record.

May 15 Deft. G.E.'s Listing of Managers rec'd.

May 15 Motion to bring in Third-Party Defendants filed by deft. GE.

May 15 Memorandum In Support of Deft's Request for Leave to File A Third Party Class Action filed by deft. GE.

May 16 Memorandum of the court filed.

May 16 Order denying deft's motion to compel joinder of nonparty unions; directing Clerk to file deft's motion for leave to file third party complaint; directing counsel for deft. to file within 15 days of this date a memorandum by which a cause of action against signatory unions is demonstrated with specificity; pltfs. may respond within 10 days thereafter, ent. 5-16-73. Copies to counsel.

May 16 Defts' Reply Brief in support to add defts. or dismiss complaint, filed.

May 18 Certificate of Seymour DuBow of delivery of envelopes to Clerk and Certificate of Clerk of mailing of envelopes containing legal notice, etc. filed.

May 24 Pltfs' 4th Interrogatories to deft., filed.



May 30 Affidavit of Thomas F. Hilbert, Jr., filed 5-8-73.

May 31 Supplemental Memorandum in support of GE's motion to bring in third party deft. filed by G.E.

May 31 Affidavit of E. Sidney Willis filed.

May 31 Affidavit of Thomas F. Hilbert, Jr., filed.

June 14 Reply Memorandum in opposition to GE's Motion to bring in third party defts. and in support of pltfs' motion to dismiss counterclaim, filed by pltf.

June 18 Notice of voluntary dismissal of 3rd party complaint filed by deft. & 3rd party pltf., General Electric Co.

June 18 Deft's Motion to dismiss counterclaim & to file amended answer, filed.

June 18 Deft's Motion to reconsider order denying compulsory joinder of non-party unions as class defts., filed.

June 18 Deft's Motion to dismiss their counterclaim and to file amended answer, "SO ORDERED" 6/18/73 & copies mailed counsel.

June 18 Amended Answer of deft,, filed.

June 29 Opposition to plfts. to motion of deft. for reconsideration of order denying compulsory joinder of nonparty unions as class defts., filed.

July 2 ORDER denying deft's motion to reconsider ent. 7-2-73 & filed. Copies to counsel.

July 5 Further Supplemental Answers to deft. to pltf's interrogatories, filed.

July 5 Notice to take deposition of Sonia Pressman Fuentes filed by deft.

July 17 Pltf's List of Proposed Exhibits, Interrogatories, Answers, Thereto, etc., filed.

July 17 Deft. GE's Supplemental List of Proposed Exhibits and Depositions it intends to offer, filed.

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|---|---|
| July 17 | Deft GE's List of Interrogatories and answers thereto it intends to offer, filed. |
| July 19 | Deft's List of Expert Witnesses filed. |
| July 19 | Deft's Answers to 4th Interrogatories, filed. |
| July 20 | De Bene Esse Deposition of Dr. George Wilbanks on behalf of deft., filed. |
| July 20 | Deft's Suppl. Answers to Interrogatory No. 45, filed. |
| July 23 | Deft. GE's Objections to Proposed Exhibits, filed. |
| July 23 | Objections of pltfs. to exhibits which deft. GE proposes to offer, filed. |
| July 23 | Findings of Fact and Conclusions of Law filed by pltfs. |
| July 23 | Pltfs' Cross-Index of Lettered Exhibits in Stipulation of Facts to Numbered List of Pltfs' Proposed Exhibits, filed. |
| July 23 | Pre-Trial Stipulation of Facts filed by pltfs. |
| July 24 | Pre-Trial Stipulation of Facts filed by GE, with Exhibits. |
| July 24 | Deft. GE's Second Supplemental List of Proposed Exhibits and Depositions it intends to offer, filed. |
| July 24 | Motion of The Chamber of Commerce of the United States for Leave to participate as Amicus Curiae filed. |
| July 24 | TRIAL PROCEEDINGS: Merhige, J. Halasz, OCR Appearances: Parties by/with counsel. Matter came on for trial on merits. Motion of the Chamber of Commerce of the United States for leave to participate as Amicus Curiae granted by the Court in accordance with Memorandum of the Court of 4-20-73. Court ruled on Deft's objections to Pltfs' Exhibits as follows: Objections to Pltfs' Exhibits, Nos. 59, |



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| | 60, 61, 62, 63, 64, 65, 88C, 88D and 88E sustained by the Court. All other objections overruled by the Court. Opening Statements waived. Pltfs adduced evidence. Deft's motion to strike the testimony of Pltfs' witness, Catherine East, heard; overruled by the Court. Pltfs' adduced further evidence. Matter cont'd until tomorrow at 11:00 A.M. (4 Hours 36 Minutes) |
| July 25 | TRIAL PROCEEDINGS CONT'D: Merhige, J. Halasz, OCR Appearances: Parties by/with counsel. Matter cont'd from yesterday. Pltfs adduced further evidence. Deft withdrew Exhibits Nos. 6, 9, 14, 15, 43, 44, 45 and 46. The Court overruled all objections of pltfs to Exhibits of Deft. Pltfs adduced further evidence, rested. Deft. adduced evidence. Matter cont'd until tomorrow at 9:30 A.M. (4 Hrs. 58 Mins.) |
| July 26 | TRIAL PROCEEDINGS: Merhige, J. Halasz, OCR Appearances: Parties by/with counsel. Matter cont'd from yesterday. Deft adduced further evidence, rested. Motion of pltfs. for a continuance until tomorrow in absence of a witness heard; objection of deft heard; motion denied by the Court. Briefing schedule set up as follows: Pltf to file brief within 3 weeks after the filing of the transcript; Deft. to reply within 3 weeks thereafter; Pltf to file reply within 1 week thereafter. Amicus to file any briefs within 2 Weeks after the filing of the transcript. Matter taken under advisement by the Court. (3 Hours, 40 Minutes) |
| July 27 | Motion of the United States Equal Employment Opportunity Commission to file brief as Amicus Curiae filed. |

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| July 27 | Opposition to request of Equal Employment Opportunity Commission to file Amicus Curiae brief filed by Deft. |
| July 28 | xxxxxxxxx and Findings of Fact and Conclusions of Law of Deft filed. |
| July 30 | Supplementary List of Exhibits to Plaintiffs' Proposed List of Exhibits filed. |
| Aug. 2 | Deft General Electric Company's Third Supplemental List of Proposed Exhibits filed. |
| Aug. 6 | Memorandum of the Court filed. re: amicus curiae. |
| Aug. 6 | ORDER granting motion of EEOC for permission of Court to file pleadings as amicus curiae ent. 8-6-73 & filed. Copies mailed as directed. |
| Aug. 21 | Pltfs' Corrections to List of Exhibits, etc., filed. |
| Aug. 23 | Orig. Reporter's Transcript of trial proceedings of July 24th, 25th and 26th, 1973, 3 volumes, filed. |
| Nov. 5 | Amicus Curiae Brief of Chamber of Commerce rec'd. |
| Nov. 8 | Amicus Curiae Brief of U.S. EEOC, received. |
| Nov. 8 | Brief of Women's Equity Action League, Nat'l. Organization for Women, Human Rights for Women, Inc., received in support of Pltfs. |
| Nov. 15 | Pltfs' Post-Trial Brief, received. |
| Nov. 19 | Amicus Curiae Brief of U.S. Equal Employ. Opp. Commission, rec'd. |
| Dec. 4 | Order extending time to and including 12-20-73 for deft. to file brief; extending time to and including 1-15-74 for pltfs. to file reply, ent. 12-4-73. Copies to counsel of record. |
| Dec. 20 | Post-Trial of General Electric Company, rec'd. |



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| Jan. 15 | Pltfs' post-trial Reply Brief, rec'd. |
| Jan. 17 | Reply Brief, Amicus Curiae of United States Equal Employment Opportunity Commission, filed. |
| Jan. 25 | Findings of Fact and Conclusions of Law proposed by pltfs., filed. |
| March 12 | Corrections to Revised Findings of Fact and Conclusions of Law proposed by pltfs., filed. |
| April 12 | Stipulation for Correction of Stenographic Transcript with Attachment filed. |
| April 13 | Memorandum of the Court, filed. |
| April 13 | ORDER enjoining and restraining deft from continuing policy of discriminating against members of class, in its failure to pay weekly disability benefits; monetary judgments to be entered in favor of members of affected class; hearing set for 4-19-74, 9:00 a.m. on all remaining issues; all other matters continued until further order ent. 4-13-74, filed. Copies to counsel. |
| April 15 | Deft's Motion to Stay order of 4-13-74, filed. |
| April 18 | Memorandum in opposition to deft's motion for stay filed by pltfs. |
| April 18 | Motion to amend statement in court's opinion of 4-13-74, filed by pltfs. |
| April 19 | Order amending court's memorandum of 4-13-74, as follows: the phrase "S&A benefits" contained contained in the fifth line of paragraph II on page 3, be, and the same is hereby, deleted, and there is substituted therefor "maternity expenses," ent. 4-19-74. Copies to all counsel of record. |
| April 26 | Deft's Supporting Memorandum for motion to stay, filed. |

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| May 1 | Pltfs' Reply Memorandum in Opposition to Deft's Motion for Stay filed. |
| May 1 | Memorandum in Opposition to deft's motion for stay filed by Amicus Curiae, EEOC. |
| May 8 | Notice of appeal filed by defendant. Copies mailed purs. Rule 3. |
| May 9 | ORDER staying enforcement of Paragraph 2 of order of April 13, 1974 until ruling on pending appeal; ent. 5-9-74, filed. Copies mailed. |



IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

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| MARTHA V. GILBERT, SHARON E. GODFREY, BARBARA HALL, ALBERTA B. SMITH, JOHNNIE TAYLOR, DORIS B. WILEY and MARY R. WILLIAMS, on behalf of themselves and on behalf of all persons similarly situated, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, an unincorporated association, and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, LOCAL 161, an unincorporated association, *Plaintiffs,* | : | **CIVIL ACTION NO. 142-72-R** |
| v. | : | |
| GENERAL ELECTRIC COMPANY, a corporation<br>Serve: James Olin<br>Manager of Drive Systems<br>1501 Roanoke Blvd.,<br>Salem, Virginia 24153<br>*Defendant.* | : | |

COMPLAINT

[Filed March 15, 1972]

1. This is an action to remedy discrimination because of sex in compensation, terms, conditions and privileges of employment in violation of federal statutes. The jurisdiction of this Court is invoked Section 706(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f).

2. Each of the individual named plaintiffs, Martha V. Gilbert, Sharon E. Godfrey, Barbara Hall, Alberta B. Smith, Johnnie Taylor, Doris B. Wiley and Mary R. Williams, is a female and was employed by defendant, General Electric Corporation, hereinafter called GE, at its Salem, Virginia plant at the time she became pregnant, as more fully set forth hereinafter.

3. The individual named plaintiffs sue individually and on behalf of all present and former female employees of the defendant, GE, situated at all of its plants, offices and shops, wheresoever located, the number being in excess of 100,000 and hence so great as to make it inexpedient to join them all as plaintiffs, and all of them having been equally the victims of certain violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, as more fully set forth hereinafter. The named plaintiffs fairly represent the interest of all former and present female employees of the defendant GE.

4. The plaintiff, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, hereinafter called International Union, is the recognized bargaining representative of a national collective bargaining unit composed of employees of defendant GE at many plants scattered throughout the United States, among which are the production and maintenance employees of defendant GE at its Salem, Virginia, plant, including all of the individual named plaintiffs. At all times from 1949 to date the plaintiff, International Union, has been a party to a national collective bargaining



agreement with defendant GE. The 1970-1973 GE-IUE (AFL-CIO) National Agreement between the defendant GE and the plaintiff, International Union, signed February 4, 1970 and by its terms effective until May 26, 1973, a copy of which is attached hereto as Exhibit A, is applicable to the Salem, Virginia plant. A list of the plants represented by the plaintiff, International Union, appears at pages 1 to 5 of said contract. The plaintiff, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, Local 161, hereinafter called Local 161, is composed of the production and maintenance employees at the Salem, Virginia plant of the defendant GE and is the affiliate of said International Union to which the individual named plaintiffs and other employees of said Salem, Virginia plant belong. Said Local 161, along with the International Union, administers on behalf of said employees the national collective bargaining agreement between the plaintiff, International Union, and the defendant GE in its application to said Salem, Virginia plant.

5. The defendant GE is an employer within the meaning of Section 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-(b). It is a corporation which manufactures and distributes in interstate commerce electrical and electronic appliances, machinery and equipment for consumers, industrial and governmental use. It is duly organized and existing under the laws of the State of New York and is duly qualified to, and does, transact business in Virginia where it maintains and operates a plant at Salem, in which it employs more than 1,750 employees.

6. The defendant GE provides weekly non-occupational sickness and accident benefit payments to all its employees in an amount equal to 60 percent of an employee's normal straight time weekly wages up to a maximum benefit of $150 for each week he is absent from and unable to work

on account of any disability resulting from a non-occupational accident or sickness for a period up to and including 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related cause, excepting therefrom only sickness and other disabilities arising from pregnancy, miscarriage or childbirth.

7. Each of the individual named plaintiffs was pregnant during the year 1971. The plaintiff Alberta B. Smith was required by the defendant GE to cease work and go on leave on July 15, 1971. At all times prior to August 1971 the defendant GE followed the policy of requiring employees to cease work when they were six months pregnant. The plaintiff Doris B. Wiley voluntarily went on leave on April 30, 1971 in accordance with her understanding of the policy followed by defendant GE. As a result of activities of the plaintiff International Union in calling the attention of the defendant GE to the decisions of the courts and of the Equal Employment Opportunity Commission (EEOC) holding that a pregnant employee was entitled to work so long as her physician advised her that she was able and to begin leave whenever her physician advised she was unable to work, the defendant GE changed its policy and the plaintiffs Martha Gilbert, Sharon Godfrey, Barbara Hall and Mary Williams each was permitted to, and did continue during her pregnancy to, work at her usual job with the defendant GE until her doctor advised her that she was disabled from work. The plaintiffs Martha V. Gilbert, Barbara Hall, Alberta D. Smith and Doris B. Wiley each thereafter returned to work at her usual job with defendant GE as soon as her doctor advised her that she was again able to work. The plaintiff Johnnie Taylor has been advised by her doctor that she may return to work on March 20, 1972 and the defendant GE has agreed that she may return to work on that date. The plaintiff Mary R.



Williams gave birth to a baby on or about March 1, 1972 and has not yet returned to work. The plaintiff Sharon Godfrey has not yet returned to work. The plaintiff Sharon Godfrey has not yet returned to work. Each of the individual named plaintiffs duly made claim for weekly non-occupational sickness and accident benefits for the period of such absence during which she was disabled from work, but the defendant GE refused to pay her any weekly non-occupational sickness and accident benefits or any other benefits on account of her absence from, and inability to, work. The seniority date, date of beginning of her absence from work on account of pregnancy and childbirth, date of return to work of each plaintiff who has returned to work and date of denial of claim for weekly non-occupational sickness and accident benefit payments, of the respective individual plaintiffs is as follows:

| Name of Plaintiff | Seniority Date | Date of Beginning of Absence | Date of Return to Work | Date of Denial of Claim |
|---|---|---|---|---|
| Martha Gilbert | 8-23-65 | 10-29-71 | 2-28-72 | 12-17-71 |
| Sharon E. Godfrey | 3-17-69 | 9-24-71 | | 11-16-71 |
| Barbara Hall | 4-4-66 | 8-13-71 | 1-16-71 | 11-1-71 |
| Alberta B. Smith | 10-2-67 | 7-15-71 | 1-31-72 | 11-1-71 |
| Johnnie Taylor | 9-29-69 | 10-28-71 | | 11-1-71 |
| Doris B. Wiley | 4-14-66 | 4-30-71 | 9-22-71 | 11-1-71 |
| Mary R. Williams | 11-13-70 | 9-13-71 | | 11-1-71 |

8. The defendant GE has paid its male employees non-occupational weekly sickness and accident benefits for all absences up to a maximum of 26 weeks for any one continuous period of disability for every kind and type of non-occupational sickness and accident which any of its

male employees has ever had. The defendant GE has at all times refused to pay weekly sickness and accident benefits to any female employee for any absence due to disability arising from or related to pregnancy or childbirth. The defendant GE by its failure and refusal to pay weekly non-occupational sickness and accident benefits to each of the individual named plaintiffs for her absence due to disability from pregnancy and childbirth has engaged and is engaged in discrimination with respect to compensation, terms, conditions and privileges of employment, because of the plaintiff's sex, thereby engaging in an unlawful employment practice in violation of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1).

9. The plaintiffs, Martha V. Gilbert, Sharon E. Godfrey, Barbara Hall, Alberta B. Smith, Johnnie Taylor and Mary R. Williams each filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that the defendant GE had discriminated against her because of sex by failing and refusing to pay her non-occupational sickness and accident benefits for time lost due to disability from pregnancy and childbirth equal in amount of benefits and duration of benefits to that paid by defendant GE to males for time lost due to non-occupational disabilities arising from sickness or accident. The receipt of the charge mailed by the plaintiff Barbara Hall to EEOC was acknowledged by EEOC on January 5, 1972 and the charge was docketed as Case No. TDC2-0604. The receipt of the charge mailed by Martha V. Gilbert to the EEOC was acknowledged on February 7, 1972 and the charge was docketed as Case No. TDC2-0745. The charge mailed by the plaintiff Alberta B. Smith to the EEOC was docketed as Case No. TDC2-0671. Mary R. Williams, Johnnie Taylor and Sharon Godfrey all mailed their charges to EEOC in December 1971 at the same time that Barbara Hall mailed



her charge but have not received acknowledgement from EEOC.

10. The Equal Employment Opportunities Commission on or about March 14, 1972, issued one or more of the plaintiffs a suit letter notifying her pursuant to Section 706(e) of the Act that she might within thirty (30) days of the receipt of said letter, institute a civil action in the appropriate Federal District Court.

11. Each of the individual named plaintiffs and each of the other members of the class she represents, as a result of the unlawful employment practices above described, suffered the loss of weekly non-occupational sickness and accident benefits during the period of absence from work on account of pregnancy, childbirth and related disabilities.

12. The unlawful employment practices of the defendant GE above described have inflicted and will continue to inflict irreparable injury on the individual named plaintiffs and the class they represent unless this Court grants relief.

13. The plaintiff International Union and the plaintiff Local 161 owe a duty to each of the individual named plaintiffs and to other members of the class represented to represent each of them fairly and without discrimination because of sex. Following the issuance of EEOC Decision No. 71-1474, 3 EPG Par. 6221, 3 FEP Cases 588 (March 19, 1971) holding that an employer violated Title VII by refusing to pay non-occupational sickness and accident benefits to female employees for periods of disability due to pregnancy when male employees received such benefits for all their disabilities, the plaintiff International Union called this decision to the attention of defendant GE and requested the defendant GE to make such payments to all female employees represented by the plaintiff International

Union. The plaintiff International Union had numerous conference with the defendant GE during the latter part of 1971 and early 1972 in which the plaintiff International Union unsuccessfully so requested. By letter dated February 24, 1972 from John Shambo, General Chairman of IUE-GE Conference Board, to John Baldwin, Manager of Consulting Services, GE, the plaintiff International informed the defendant that GE's weekly non-occupational sickness and accident benefit plan and practices thereunder insofar as the defendant GE failed to provide weekly non-occupational sickness and accident benefits for employees absent on account of disabilities due to pregnancy, miscarriage or childbirth, discriminated unlawfully because of sex and made a written request of the defendant GE to agree to provide weekly non-occupational sickness and accident benefits for all periods of absence due to disabilities of females including those arising from pregnancy, miscarriage and childbirth. The plaintiff International Union and the plaintiff Local 161 may be subject to suits by female employees for failure to correct said unlawful employment practices. The plaintiffs International Union and Local 161 will suffer irreparable injury unless this Court grants relief.

14. The plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray that this Court grant the following relief:

1. Enter an injunction directing the defendant GE to pay any employee absent because of disability arising from pregnancy, miscarriage or childbirth, weekly non-occupational sickness and accident benefits in the same amount, for the same period of time and on the same terms and conditions as if the employee had been absent for disability arising from any other sickness or accident.



2. Enter a judgment against the defendant GE and in favor of each of the individual plaintiffs for the amount of weekly non-occupational sickness and accident benefits to which she is entitled.

3. Enter judgment against the defendant GE and in favor of each other member of the class for the amount of weekly non-occupational sickness and accident benefits to which she is entitled.

4. Enter judgment against the defendant GE and in favor of each of the individual plaintiffs for the amount of damages she suffered as a result of the unlawful employment practices of the defendant GE.

5. Enter judgment against the defendant GE and in favor of each other member of the class for the amount of damages she suffered as a result of the unlawful employment practices of the defendant GE.

6. Grant any other relief which may be necessary to place each of the individual named plaintiffs and each other member of the class represented in the same position in which she would have been but for the unlawful employment practices of defendant GE.

7. Award the plaintiffs and the class represented costs and a reasonable sum to be paid by defendant as attorney's fees for plaintiffs and the class represented.

8. Grant such other relief as the Court may find appropriate.

Beecher Stallard
Stallard and Levit
1223 Central National Bank Building
Richmond, Virginia 23219
Phone: 703–644-5453

Winn Newman
Ruth Weyand
1126 16th Street, N.W.
Washington, D.C. 20036
Phone: 202–296-1200

March 15, 1972



IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## AMENDED ANSWER

[Filed June 18, 1973]

Defendant General Electric Company (hereafter "GE") answers the complaint (as amended by the conditional addition of parties plaintiff) as follows:

### First Defense

Answering the numbered paragraphs of the complaint, GE:

1. Admits the allegations of paragraphs 1 and 5.

2. Admits the allegations of paragraph 2 except the following allegations: that Thelma Hubert was a female employee at defendant GE's Tell City, Indiana plant; that Cherry Osteen, Earnest Dean, Louise Cole, Marion Butt, and Louise Goldman were female employees at GE's Portsmouth, Virginia plant; and that Cheryl Chewvang and Joan Mosley were female employees at GE's Richmond, Virginia plant. GE states that a Velma Hubert was a female employee at its Tell City, Indiana plant, who was pregnant in 1971; that a Sherry Osteen, a Eunice Dean, an Eloise Cole, a Marion Butts, and a Maggie Louise Goodman were female employees at its Portsmouth, Virginia plant; that employees Osteen, Cole, and Goodman were pregnant in 1972, that employee Butts was pregnant in 1971, but that

it has no record of employee Dean's alleged pregnancy; and that a Cheryl Chewning and a Joan Moses were female employees at its Richmond, Virginia plant, who were pregnant in 1971 or 1972.

3. Admits the allegations of paragraph 3 that the individual named plaintiffs are seeking to sue individually and on behalf of all present and former female employees of defendant GE, and that the number of such present and former female employees of GE is in excess of 100,000. The other allegations of paragraph 3 are denied.

4. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 4 that the individual named plaintiffs who are employed at GE's Salem, Virginia plant, belong to Local 161. It admits the other allegations of paragraph 4. It states further with respect to the 1973 GE-IUE (AFL-CIO) National Agreement referred to in paragraph 4 that such National Agreement was, by its terms, entered into between GE and plaintiff International Union of Electrical, Radio and Machine Workers (AFL-CIO) acting for itself and in behalf of the IUE (AFL-CIO) Locals listed at pages 1-5 of such National Agreement and such other IUE (AFL-CIO) Locals as may be certified as collective bargaining representatives of GE employees, and that the bargaining units listed at such pages 1-5 are represented jointly by plaintiff International Union and the respective IUE (AFL-CIO) Locals there designated.

5. Admits the allegations of paragraph 6 that GE provides weekly non-occupational sickness and accident insurance to all its employees in an amount equal to 60 percent of an employee's normal straight-time weekly earnings up to a maximum weekly benefit of $150. It denies the other allegations of such paragraph. It states that non-occupational



sickness and accident benefit payments are paid employees who become totally disabled; that such payments to hourly-paid employees start with the eighth day of an employee's total disability (or with the first day of an employee's confinement in a hopsital as a bed patient, if earlier), and continue during the employee's total disability up to a maximum of 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related cause or causes; that such payments for salaried employees who become totally disabled are determined differently; and that non-occupational sickness and accident benefit payments are not payable for any absence due to pregnancy or resulting childbirth or to complications in connection therewith. It further states that the weekly non-occupational sickness and accident insurance provided hourly-paid employees represented by plaintiff International Union of Electrical Radio and Machine Workers (AFL-CIO) and the latter's affiliated Locals is provided pursuant to contract between GE and said plaintiff International Union and the latter's affiliated Locals.

6. Denies the allegations of the first, second, third, and eleventh sentences of paragraph 7, but admits the allegation of the ninth sentence of such paragraph. It states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of the fourth sentence of paragraph 7. It admits the allegation of the fifth sentence of paragraph 7 that the plaintiffs Martha Gilbert, Sharon Godfrey, Barbara Hali, and Mary Williams each was permitted to, and did continue during her pregnancy to, work at her usual job with the defendant GE until her doctor advised her to leave for medical reasons; it denies the other allegations of such fifth sentence. It admits the allegation of the sixth sentence of paragraph 7 that plaintiffs Gilbert, Hall, Smith, and Wiley returned to

work at their usual jobs for defendant GE after absences, but states that it is without knowledge or information sufficient to form a belief as to the truth of the other allegation of said sentence. It states that plaintiff Johnnie Taylor returned to work on March 20, 1972, after an absence, and states further that it is without knowledge or information sufficient to form a belief as to the truth of the allegation of the seventh sentence of paragraph 7 that Taylor was advised by her doctor that she could return to work on the latter date. It states with respect to the eighth sentence of paragraph 7 that after an absence plaintiff Williams returned to work on March 27, 1972, and states further that it is without knowledge or information sufficient to form a belief as to the truth of the other allegation of said eighth sentence. It admits the allegation of the tenth sentence of paragraph 7 that each of the individual named plaintiffs employed at GE plants in Tyler, Texas, Philadelphia, Pennsylvania, and Tell City, Indiana, made claim to GE for weekly non-occupational sickness and accident benefits for periods of absence due to pregnancy or resulting childbirth, and admits that such claims were denied. It admits the allegation of the twelfth sentence of paragraph 7 that GE has not made weekly non-occupational sickness and accident benefit payments to any of the individual named plaintiffs for absences during 1971 or 1972 due to pregnancy or resulting childbirth, but denies the other allegations of such sentence. It admits the allegations of the thirteenth sentence of paragraph 7, except to state as follows: the date of the return to work of plaintiff Barbara Hall is 1-17-72; the date of the beginning of absence of plaintiff Alberta Smith is 7-1-71, of plaintiff Johnnie Taylor is 10-29-71, and of plaintiff Doris B. Wiley is 5-1-71, and the seniority date of plaintiff Doris B. Wiley is 4-14-66, and the date of her return to work is 9-20-71.



7. Admits the allegation of paragraph 8 that at all times it has refused to pay weekly sickness and accident insurance benefits to any female employee for an absence due to pregnancy or resulting childbirth. It denies the other allegations of this paragraph.

8. Admits the allegations of paragraph 9 that plaintiffs Martha V. Gilbert, Johnnie Taylor, and Mary R. Williams each filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that GE had discriminated against her because of sex by failing to pay her non-occupational sickness and accident benefits for a period of absence due to pregnancy or resulting childbirth, and that plaintiff Gilbert's charge was docketed by the EEOC as Case No. TDC2-0745. It states that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations of said paragraph 9.

9. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10.

10. Denies the allegations of paragraph 11.

11. Denies the allegation of paragraph 12 that the complaint describes unlawful employment practices committed by GE. The other allegations of paragraph 12 are legal conclusions requiring no answer.

12. States that the first sentence of paragraph 13 sets forth legal conclusions requiring no answer. It states further with respect to the allegations of such first sentence that neither plaintiff International Union nor plaintiff Local 161 owes any duty whatever to GE employees who are unrepresented for collective bargaining purposes or who

are within a collective bargaining unit which is not represented for bargaining purposes by either or both such plaintiffs. It denies the allegations of the second and third sentences of paragraph 13. It denies the allegation of the fourth sentence of paragraph 13 that John Baldwin is GE's Manager of Consulting Services, but admits the other allegations of this sentence. The fifth and sixth sentences of paragraph 13 set forth legal conclusions requiring no answer.

13. Paragraph 14 sets forth a legal conclusion requiring no answer.

Second Defense

The prerequisites to a civil action under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. Sec. 2000e, *et seq.*) by plaintiffs with respect to the matters alleged in the complaint have not been satisfied in that: (a) Prior to the commencement of the action GE was not notified, either verbally or in writing, that plaintiffs had filed charges with the Equal Employment Opportunity Commission alleging that GE had engaged in unlawful employment practices as alleged in the compalint; (b) No investigation of plaintiffs' charges was made by the Equal Employment Opportunity Commission prior to the commencement of the action; and (c) Prior to the commencement of the action no opportunity was afforded GE by the Equal Employment Opportunity Commission to eliminate the unlawful employment practices charged by plaintiffs by informal methods of conference, conciliation, and persuasion.

Third Defense

GE has not engaged in discrimination with respect to the compensation, terms, conditions, or privileges of employment



of its female employees within the meaning of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 because: (a) The insurance coverage referred to in the complaint provides benefits to GE's male and female employees alike for total disabilities resulting from non-occupational sickness and accidents; and (b) Pregnancy and resulting childbirth are neither sicknesses nor the results of accidents; they are rather normal physiologic functions that are *sui generis*, the separate recognition of which is not an invidious classification by sex.

Fourth Defense

1. Section 713(b) of Title VII of the Civil Rights Act of 1964 provides in part: "In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect . . ."

2. GE cannot be held liable for the unlawful employment practice alleged in the complaint because its non-payment of sickness and accident benefits to its female employees for absences due to pregnancy or childbirth was in good faith, in conformity with, and in reliance on the written interpretations and opinions of the Equal Employment Opportunity Commission ("the EEOC")

issued as early as 1966 that: (a) the EEOC does not seek to compare an employer's treatment of illness or injury with his treatment of maternity; (b) an insurance or benefit plan may exclude maternity as a covered risk, and such exclusion is not discriminatory, and (c) an employer need not provide the same fringe benefits for pregnancy as he provides for illness. More specifically, GE acted in good faith, in conformity with, and in reliance on the aforesaid interpretations and opinions by the EEOC when on February 4, 1970, it signed a negotiated Pension and Insurance Agreement with plaintiff International Union and its affiliated IUE (AFL-CIO) Locals, effective until May 26, 1973, and providing that non-occupational sickness and accident payments are not payable for any absence due to pregnancy or childbirth or to complications in connection therewith.

3. The EEOC's "Guidelines on Discrimination Because of Sex," as amended and reissued on March 30, 1972 (37 F.R. 6835), effective on April 5, 1972, in which the EEOC set forth a position different from that stated by it in 1966 with respect to the relationship of pregnancy to illness or injury and the privileged exclusion of maternity from insurance and other benefit plans, are legally insufficient to modify or rescind the EEOC's 1966 contrary interpretations and opinions on such matters because: (a) Such Guidelines were not issued in conformity with the standards and limitations of the Administrative Procedures Act, as required by Section 13 of Title VII of the Civil Rights Act of 1964; and (b) Since the issuance of the Guidelines the EEOC has itself taken action inconsistent therewith.

Fifth Defense

Section 706(d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(d) provided that "a charge under



subsection (a) of this section shall be filed within 90 days after the alleged unlawful employment practice occurred . . ." Under such Section 706(d), the claims of all individual plaintiffs, whether named in the complaint or as members of the class the named individual plaintiffs purport to represent, whose own complaints would have been barred as untimely under such Section at the time this action was instituted, are barred, and GE is not liable in damages or otherwise for any allegedly unlawful act or omission on its part that occurred more than 90 days prior to the filing of the initial charge upon which the complaint is based.

Sixth Defense

The claims of all individual plaintiffs, whether named in the complaint or as members of the class the named individual plaintiffs purport to represent, who are represented for collective bargaining purposes by plaintiff International Union and its affiliated IUE (AFL-CIO) Locals, including plaintiff Local 161, are barred, and said plaintiff labor organizations are estopped from asserting claims on behalf of such individual plaintiffs, because such differences based on sex as may exist under the non-occupational sickness and accident insurance that is available and applicable to such individual plaintiffs have been adopted and effectuated pursuant to Pension and Insurance Agreements negotiated and agreed to by GE and plaintiff International Union acting for itself and in behalf of its affiliated IUE (AFL-CIO) Locals, including plaintiff Local 161. All the aforesaid plaintiffs who belong to bargaining units for which plaintiff International Union and its affiliated IUE (AFL-CIO) Locals, including plaintiff Local 161, are designated exclusive representatives must, by reason of the aforesaid

Pension and Insurance Agreements, be deemed to have agreed to be bound by the terms and conditions of the non-occupational sickness and accident insurance applicable to them, and to have waived any claim based upon sex discrimination resulting from or under such insurance.

Seventh Defense

The claims of all individual plaintiffs, whether named in the complaint or as members of the class the named individual plaintiffs purport to represent, who are represented for collective bargaining purposes by labor organizations which have agreed to or contracted for the non-occupational sickness and accident insurance referred to in the complaint and which is available and applicable to such individual plaintiffs, are barred. All such plaintiffs must, by reason of the contracts and agreements negotiated on their behalf by their designated exclusive bargaining representatives, be deemed to have agreed to be bound by the terms and conditions of the non-occupational sickness and accident insurance applicable to them, and to have waived any claim based upon sex discrimination resulting from or under such insurance.

Eighth Defense

In accordance with the terms and provisions of the non-occupational sickness and accident insurance referred to in the complaint, which provides benefits only for periods of total disability, GE is not liable in damages or otherwise to the named individual plaintiffs, or to the members of the class the named individual plaintiffs purport to represent, for any period or periods of absence due to pregnancy or resulting childbirth or to complications in connection therewith during which total disability was not present.



Ninth Defense

The claims of all named individual plaintiffs who have voluntarily withdrawn from this action are barred by reason of said withdrawals.

WHEREFORE, defendant General Electric Company respectfully requests that judgment be entered dismissing the complaint and awarding GE the costs and disbursements of this action.

GENERAL ELECTRIC COMPANY

By: /s/ JOHN S. BATTLE, JR.
John S. Battle, Jr.
Of Counsel

John S. Battle, Jr.
Robert H. Patterson, Jr.
McQUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219

Theophil C. Kammholz
Laurence I. Wood
Stanley R. Strauss
1750 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Attorneys for General Electric Company

Dated: June 16, 1973

[Certificate of service omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

PLAINTIFFS' MOTION TO ADD PARTIES PLAINTIFFS TO COMPLAINT
[Filed June 24, 1972]

COMES NOW Plaintiffs in the above entitled action and Brenda Ancarrow, Shirley Avant, Peggy Bailey, Hazel Barnes, Marion Butt, Cheryl Chewvang, Brenda D. Christian, Louise Cole, Betty Davenport, Earnest Dean, Barbara De LaCruz, Gloria Fischer, Emma Mae Furch, Pat Gavin, Addie Goodman, Louise Goodman, Martha Hess, Bernadette Hines, Deborah Howard, Thelma Hubert, Mary Huebschman, Patricia Johnson, Linda Knight, Betty Labhart, Geraldine Lucifero, Sarah Mallory, John Mosley, Cherry Osteen, Barbara Richards, Helen Smith, Erma Faye Thomas, Phyllis Trotter, Louise Washington, Ellen Wells, La Verne White and Shirley Wiseman (hereinafter sometimes referred to as "Additional Parties Plaintiffs") and through their undersigned attorneys, move the Court, pursuant to the provisions of Rules 15 and 21, respectively, of the Federal Rules of Civil Procedure, for an order:

1. That Brenda Ancarrow, Shirley Avant, Peggy Bailey, Hazel Barnes, Marion Butt, Cheryl Chewvang, Brenda D. Christian, Louise Cole, Betty Davenport, Earnest Dean, Barbara Delacruz, Gloria Fischer, Emma Mae Furch, Pat Garvin, Addie Goodman, Louise Goodman,



Martha Hess, Bernadette Hines, Deborah Howard, Thelma Hubert, Mary Huebschman, Patricia Johnson, Linda Knight, Betty Labhart, Geraldine Lucifero, Sarah Mallory, Joan Mosley, Cherry Osteen, Barbara Richards, Helen Smith, Erma Faye Thomas, Phyllis Trotter, Louise Washington, Ellen Wells, La Verne White and Shirley Wiseman be added as Parties Plaintiffs in this action as of the date of the filing of this Motion

2. That Paragraph 2 of the complaint in the above action be amended by adding thereto following the end of the allegations now therein contained the following:

Each of the individual named plaintiffs, Emma Mae Furch and Erma Faye Thomas is a female and was employed by defendant GE at its Central Air Conditioning Plant at Tyler, Texas, at the time she became pregnant, as more fully set forth hereinafter. The plaintiff Geraldine M. Lucifero is a female and was employed by defendant GE at its Philadelphia Works at 59th and Elmwood Avenue, Philadelphia, Pennsylvania at the time she became pregnant, as more fully set forth hereinafter. The plaintiff Brenda Christian is a female and was employed by defendant GE at its Specialty Motors Department, 1635 Broadway, Fort Wayne, Indiana at the time she became pregnant, as more fully set forth hereinafter. Each of the plaintiffs Barbara Richards, Mary Huebschman,

Helen Smith, Shirley Wiseman, Betty Labhart, Thelma Hubert and Martha Hess is a female and was employed by defendant GE at its Tell City, Indiana plant at the time she became pregnant, as more fully set forth hereinafter. Each of the plaintiffs Phyllis Trotter, Louise Washington, Patricia Johnson, Linda Knight, Peggy Bailey, Cherry Osteen, Addie Goodman, Earnest Dean, Shirley Avant, Louise Cole, Pat Gavin, Marion Butt, Barbara Delacruz, Bernadette Hines and Louise Goldman is a female and was employed by defendant GE at its Portsmouth, Virginia plant at the time she became pregnant, as more fully set forth hereinafter. The plaintiffs Brenda Ancarrow, Hazel Barnes, Cheryl Chewvang, Betty Davenport, Gloria Fischer, Deborah Howard, Sarah Mallory, Joan Mosley, Ellen Wells and La Verne White is each a female and employed at the plant of GE on Staples Mill Road in Richmond, Virginia at the time she became pregnant, as more fully set forth hereinafter.

3. That Paragraph 4 of the complaint in the above action be amended to add after the word plaintiffs in each the 7th and 21st lines of said paragraph the following:

> who are employed at the Salem, Virginia, plant

4. That paragraph 7 of the complaint be amended to add after the word 1971 in the second line and before the period the following:

> or 1972



to add after the word plaintiffs in the 16th line appearing on page 4 the following:

> who are employed at Tyler, Texas, Philadelphia, Pennsylvania, and Tell City, Indiana.

to add after the word work in the 21st line:

> The Plaintiff Brenda Christian applied to the defendant GE for the usual form used to file claims for weekly non occupational sickness and accident benefits but the defendant GE asserted that it was not providing such forms to pregnant women. All of the individual named plaintiffs were absent from work due to disability from pregnancy or childbirth during 1971 or 1972 and are entitled to be paid weekly sickness and accident benefits by defendant GE for the periods of such absence; but defendant GE has failed and refused to pay any of them such benefits.

add after the word plaintiff in the 23rd line on page 4:

> who is employed at the Salem, Virginia plant and

and add after the word plaintiffs in the 25th line on page 4:

> who are employed at the Salem, Virginia plant

5. That paragraph 13 of the complaint be amended to add after the word plaintiffs in the 2nd line the following:

who are employed at the Salem, Virginia plant

All of the Additional Parties Plaintiffs are members of the same class as the original individual named plaintiffs. All of the Additional Parties Plaintiffs were entitled to be paid by the defendant GE and were denied by the defendant GE weekly nonoccupational sickness and accident benefits during periods of disability from pregnancy or childbirth. Each of the Additonal Parties Plaintiffs learned of this suit after it was filed and requested that she be added as a party plaintiff to this suit.

/s/ Seymour DuBow
Seymour DuBow, Esquire
Suite 502, Insurance Building
10 South Tenth Street
Richmond, Virginia 23219

/s/ Ruth Weyand
Winn Newman
Ruth Weyand
1126 Sixteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Plaintiffs.

July 24, 1972



IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## OPPOSITION OF GENERAL ELECTRIC COMPANY TO PLAINTIFFS' MOTION TO ADD PARTIES PLAINTIFFS TO COMPLAINT

[Filed August 14, 1972]

General Electric Company (hereinafter "GE") respectfully opposes plaintiffs' motion to add parties plaintiffs to the complaint, and in support of its opposition shows as follows:

1. Plaintiffs' motion was filed with the Court on July 24, 1972, some four months after the complaint was filed, and on the same day that the Court heard oral argument on GE's motion for change of venue. Plaintiffs' motion, made pursuant to Rules 15 and 21 of the Federal Rules of Civil Procedure, seeks to add as parties plaintiffs 36 named individual females who work or worked in five GE plants located, respectively, in Richmond and Portsmouth, Virginia; Tyler, Texas; Philadelphia, Pennsylvania; and Fort Wayne and Tell City, Indiana. Twenty-five of such named individuals work or worked in GE's plants in Richmond and Portsmouth, Virginia, places within the Eastern District of Virginia.

At the oral argument before the Court on July 24, plaintiffs' counsel asked the Court to defer its ruling on GE's motion to transfer until it had considered plaintiffs' motion

to add parties. Even had such a request not been made, it is patent, we submit, in view of the timing and contents of plaintiffs' motion to add parties, as well as plaintiffs' vigorous efforts to overturn the Court's prior transfer order, that the real purpose underlying plaintiffs' motion is to thwart the transfer of this action to the Western District of Virginia.

2. A party may not be added by amendment of the complaint as a matter of course. Rule 21 of the Federal Rules of Civil Procedure, not Rule 15, governs the procedure for adding parties; and Rule 21 requires express approval by the court, by order, to effect such additions. *Gordon v. Lipoff*, 320 F. Supp. 905, 922 (W.D. Mo. 1970), and cases cited therein; *Spencer v. Dixon*, 290 F. Supp. 905, 922 (W.D. La. 1968); 3 Moore's Federal Practice § 15.07 [2], p. 858. Here, as shown below, Court approval of plaintiffs' motion to add parties should not be allowed.

3. The complaint herein alleges (par. 3) that the instant suit is brought as a class action on behalf of more than 100,000 present and former female employees of GE, situated at all of GE's plants, offices, and shops, wheresoever located. It is clear, therefore, that the 36 individuals now sought to be added to the lawsuit as parties plaintiffs are included within the class so delineated in the complaint. The complaint further alleges (par. 3) that the original seven named individual plaintiffs "fairly represent the interest of all former and present female employees of the defendant GE."

Thus, because the complaint alleges a class action, Rule 23 of the Federal Rules of Civil Procedure, which provides for the maintenance of class actions, governs the conduct of the instant case. Technically, the addition as parties plaintiff to a Rule 23 class action of individual persons who



are potential members of the class as originally pleaded is accomplished, not by motion to join parties plaintiff, as is attempted here, but by motion for intervention in the class suit. Furthermore, since no proceedings under Rule 23(c) and (d) have been instituted in this case to determine the nature and scope of the issues to be litigated, it is fundamental that intervention in this action by additional parties who are potential class members, and who seek the status of parties plaintiff, is subject to the provisions of Rule 24 of the Federal Rules of Civil Procedure. 3B Moore's, Federal Practice, § 23.90 [2], at pp. 1626-1627. Advisory Committee's Notes on Federal Rule 24, 1966 Amendments, 28 U.S.C.A., p. 197, 1972 Pocket Supp.

Rule 24(a), which governs intervention of right in class suits, requires a showing that the interests of those seeking to intervene will not be adequately represented by the original parties, and provides, as follows:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Again, the grounds for addition of parties plaintiff, or, more properly, for intervention, in class actions are subject to the condition that a showing must be made that the interests of those seeking to be added as parties [illegible]

not be adequately represented by the existing parties. Absent such a showing, intervention, or the joinder of additional parties, will not be allowed. 3B Moore's Federal Practice, § 23.90 [1], pp. 1601-1604; § 24.09-1 [4], pp. 24-314-24-315.

Plaintiffs' motion to join additional parties plaintiffs does not allege that representation by the original seven parties plaintiff will be inadequate. Accordingly, as there has been no allegation or showing that representation of the class by the original seven parties plaintiff is, or will be, inadequate, potential class members may not, under Rule 24(a), intervene in, or be joined as parties plaintiff to, this class action at this time. For the same reason, permissive intervention under Rule 24(b) should also be disallowed.

4. In a class action, such as the instant lawsuit, the residence of the representative parties – here, the originally named seven individual plaintiffs whose representative capacity is not in issue – is a determinative factor with respect to jurisdiction and venue matters. See *Calogez v. Calhoun*, 309 F.2d 248, 253 (5th Cir. 1962); *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497, 501 (N.D. Ill. 1969). Furthermore, as noted above, as there has been no challenge to the representative capacity of the original seven named individual plaintiffs, the individuals now sought to be added as parties plaintiffs have no standing to intervene, and consequently their residences are not relevant to the determination of GE's motion to transfer under 28 U.S.C. § 1404(a).

Plaintiffs' motion to add additional parties plaintiffs must be viewed, we submit, as a contrived device for making an inconvenient forum – the Eastern District of Virginia – a more acceptable forum. The Supreme Court has soundly



condemned such a tactic. In *Van Dusen v. Barrack*, 376 U.S. 612, 623-624 (1964), the Court said:

> . . . in construing § 1404(a) we should consider whether a suggested interpretation would discriminatorily enable parties opposed to transfer, by means of their own acts of omissions, to prevent a transfer otherwise proper and warranted by convenience and justice.
>
> * * *
>
> The possibilities thus suggested by the facts of the present case amply demonstrate that the limiting phrase of § 1404(a) should be construed to prevent parties who are opposed to a change of venue from defeating a transfer which, but for their own deliberate acts or omissions, would be proper, convenient and just. The power to defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by federal law and not from the deliberate conduct of a party favoring trial in an inconvenient forum.

Moreover, the conduct of parties after the institution of a lawsuit is not relevant with respect to transfer motions under 28 U.S.C. § 1404(a). This was made plain by the Supreme Court in *Hoffman v. Blaski*, 363 U.S. 335 (1960) where the Court quoted with approval the following language from a Third Circuit case (363 U.S. at 343):

> . . . In the normal meaning of words . . . § 1404(a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted.

*Accord: Jacobs v. Tenney*, 316 F. Supp. 151, 169-170 (D. Del. 1970). And see particularly *Gould v. Cornelius Company*, 258 F. Supp. 701, 702-703 (N.D. Okla. 1966), where the court denied a motion by the plaintiff to add a new party defendant because the requested joinder was aimed solely at thwarting defendant's pending motion to transfer under 28 U.S.C. § 1406(a).

5. Finally, we invite the Court's attention to the attached affidavits of Lewis R. Holly and Carmen J. Romeo and the letters addressed to the Court by Joann M. Moses, Hazel T. Barnes, Cheryl A. Chewning, Nora H. Davenport, Debra Howard and Sarah T. Mallory. These affidavits and letters establish with respect to the ten females employed at GE's Richmond plant whose joinder as parties plaintiffs is requested in plaintiffs' motion that: (1) none of these individuals authorized plaintiffs herein to seek to have their names added as parties plaintiffs in the instant action; (2) none had even been approached for such authorization before plaintiffs' motion to add was filed; (3) at least six of these individuals have advised the Court that they do not wish to be made parties plaintiffs in this action; and (4) none of these individuals has ever filed a claim under GE's Weekly Sickness and Accident Insurance for disability arising out of, or connected with, pregnancy.[1]

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[1] GE's plant in Portsmouth, Virginia, shut down for summer vacation on Friday, July 28, 1972, and will remain closed until Monday, August 14, 1972. The closing has interfered with efforts by GE to conduct inquiries among the individuals employed at the Portsmouth plant with respect to plaintiffs' motion to add parties. However, GE's attorneys have been told by GE officials that, on the basis of inquiries thus far made at the Portsmouth plant, three of the persons named in plaintiffs' motion who are there employed have stated that they have not authorized the use of their names in connection with

(continued)



In such circumstances, plaintiffs' motion stands, at least with respect to the Richmond Plant employees, as nothing more than a device to thwart the transfer of this action as requested in GE's motion to transfer. In an analogous situation, that involving the joinder of parties in order to defeat the removal of an action from a state court into a Federal Court, the joinder may be shown to be a sham and a device and, if so, will be disregarded. *Wilson v. Republic Iron & Steel Company*, 257 U.S. 92, 97 (1921); *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176 (1907); *Lobato v. Pay-Less Drug Stores*, 261 F.2d 406, 408-409 (10th Circ. 1958); *Covington v. Indemnity Ins. Co. of N.A.*, 251 F.2d 930 (5th Circ. 1958); *James v. National Pool Equipment Co.*, 186 F. Supp. 598 (S.D. Ill. 1960); *Carter v. Seaboard Coast Line Ry. Co.*, 318 F. Supp. 368 (D. So. Car. 1970) (Motive behind assignment of interest held material); *Gentle v. Lamb-Weston, Inc.*, 302 F. Supp. 161 (D. Me. 1969).

## CONCLUSION

For the foregoing reasons, General Electric Company respectfully submits that plaintiffs' motion to add parties plaintiffs to the complaint should be denied. Alternatively, the Company respectfully submits that the Court should rule on GE's motion for change of venue without reference to plaintiffs' motion to add parties or to whatever action the Court may take with respect to it.

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[1] (continued) plaintiffs' motion to add parties, and, indeed, that their authorization had never been sought.

/s/ John S. Battle, Jr.
JOHN S. BATTLE, JR.
ROBERT H. PATTERSON, JR.
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219
Phone: 703–643-8341
THEOPHIL C. KAMMHOLZ
LAURENCE I. WOOD
STANLEY R. STRAUSS
1705 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Phone: 202–298-6445

*Attorneys for Defendant.*

Dated: August 4, 1972

[Certificate of service omitted in printing]

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

AFFIDAVIT OF
CARMEN J. ROMEO

STATE OF VIRGINIA :
CITY OF RICHMOND : to wit:

CARMEN J. ROMEO, being duly sworn, says:

1. I am Carmen J. Romeo, Manager of Employee Relations for the General Electric Industrial Control Products Department, Richmond, Virginia.

2. This affidavit is based on personal information obtained from interviews with each of the nine employees named below.

3. Mr. Lewis R. Holly had reported that several employees were very upset when they learned that their names had been used in this suit and requested information on how they could have their names removed.

4. On Wednesday, August 2, 1972, I offered to assist Hazel Barnes, Cheryl Chewning, Nora Davenport, Debra Ho Howard, Sarah Mallory, Joann Moses, LaVerne White, Ellen Wells and Gloria Fisher in notifying the Court if they desired to have their names removed. I made clear to each employee that there was no pressure to accept this offer of assistance.

5. I made clear to them that I would assist them either by suggesting wording for a letter or by giving them the name of the court case and of the Judge. As a result of this, six of the employees prepared letters, the original copies of which are attached to my affidavit as Exhibits 1-6. Ellen Wells and LaVerne White asked more time to think about my offer, and Gloria Fisher declined. I did not talk with Brenda Ancarrow because she was then at home.

/s/ CARMEN J. ROMEO
Carmen J. Romeo

[Jurat omitted in printing]

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EXHIBIT 1

Judge Mehrige
U.S. District Court
Eastern District Virginia
Richmond, Va.

Dear Sir:

I.U.E. does not have my permission to use my name on the Court case concerning maternity leave. It is my wish that my name be taken off.

Sincerely,

/s/ JOANN M. MOSES
Joann M. Moses

EXHIBIT 2

Judge Mehrige 8/2/72
U.S. District Court
Eastern District, Va.
Richmond, Va.

I am an employee of G.E. in Richmond, Va. and the company has told me that IUE has used my name as a plaintiff in a civil action no. 142-72-R called Martha V. Gilbert, et al. vs. G.E. Company. I have not given my permission to IUE or anybody else to use my name in this case. I don't want my name used and I respctly request that it be removed.

/s/ HAZEL T. BARNES
Hazel T. Barnes



EXHIBIT 3 8-2-72

Judge Mehrige
U.S. District Court
Eastern District of Va.
Richmond, Va.

Dear Sir:

I am an employee of General Electric at the Richmond plant. I first learned that my name had been entered as a plaintiff by I.U.E. in a civil action called Martha V. Gilbert, et al. vs. General Electric Co. through a company spokesman. I have never been approached by IUE nor have I given my permission for my name to be used in this action to I.U.E. or anyone else.

I hereby request that my name be removed from this civil action 142-72-R.

Yours truly,

/s/ CHERYL A. CHEWNING

## EXHIBIT 4

Judge Mehrige
U.S. District Court
Eastern District of Va.
Richmond, Va.

I am an employee of General Electric of Richmond, Va. The company told me last week that my name had been entered by IUE in a civil action 142-72-R called Martha V. Gilbert et al. vs. General Electric Co. I have never given permission to IUE or anyone else to use my name as a plaintiff in this civil action. I hereby request that my name be remove from this action.

/s/ NORA H. DAVENPORT

8-2-72



## EXHIBIT 5

Judge Mehrige
U.S. District Court
Eastern District Virginia
Richmond, Va.

I am an employee the General Electric Plant in Richmond, Va. The company has told me that I.U.E. has entered my name as a plaintiff in a Civil Action 142-72-R called Martha V. Gilberts et al vs. General Electric. I have never given my permission to I.U.E. or anyone else to use my name in this Civil Action. I don't want my name used in this action and I hereby request that my name be removed as a plaintiff.

/s/ DEBRA HOWARD

Aug. 2, 1972

## EXHIBIT 6

Judge Mehrige
U.S. District Court
Eastern District Va.
Richmond, Va.

I am an employee of the G.E. plant in Richmond, Va.

The Company has told me that IUE has entered my name as a plaintiff in a Civil Action 142-72-R called Martha V. Gilbert et al. vs. General Electric. I have never given my permission to IUE nor anyone else to use my name in this case. I don't want my name used in the case and hereby request that my name be removed from the case.

/s/ SARAH T. MALLORY

8-2-72

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## AFFIDAVIT OF LEWIS R. HOLLY

STATE OF VIRGINIA :
CITY OF RICHMOND : to wit:

LEWIS R. HOLLY, being duly sworn, says:

1. I am Lewis R. Holly, a Personnel Specialist for General Electric Company's Industrial Control Products Department, Richmond Plant.

2. My testimony is based on personal information, review of Company records kept in the ordinary course of business and personal interviews with each of the ten employees named below.

3. At our attorneys' request, I talked with Brenda Ancarrow, Hazel Barnes, Cheryl Chewning, Nora Davenport, Gloria Fisher, Debra Howard, Sarah Mallory, Joann Moses, LaVerne White and Ellen Wells. We do not have a record of a Cheryl Chewvang or a Joan Mosley employed at this plant, but I assume the plaintiffs intend Cheryl Chewning and Joann Moses who were out on pregnancy leave within the past two years.

4. As Personnel Specialist, I know each of these employees and have dealt with most of them on various personnel matters.

5. On July 27 and 28, 1972, I asked each employee whether their names were being used in this suit with their knowledge or with their permission. All ten employees denied giving permission to anyone to use their names and further denied having any knowledge that their names had in fact been used.

6. I tried to make it very clear to the employees that the purpose of my question was merely to seek information regarding the question which the attorneys had posed to me and that their answers would have no effect on their status as employees with the Company.

7. Some of the employees were very upset when they learned that their names had been used, and Cheryl Chewning, Nora Davenport and Debra Howard sought my advice on how to have their names removed.

8. I have reviewed the plant records regarding benefit claims and find that none of the ten employees listed above have filed a claim for weekly sickness and accident benefits relative to maternity claims.

/s/ LEWIS R. HOLLY
Lewis R. Holly

[Jurat omitted in printing]

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LAW OFFICES
**McGUIRE, WOODS & BATTLE**
Ross Building
RICHMOND, VIRGINIA 23219
Cable Address McWoBat
Telephone (703) 643-8341

August 10, 1972
[Filed August 11, 1972]

Mr. W. Farley Powers, Jr., Clerk
Eastern District of Virginia
Richmond Division
Richmond, Virginia

Re: Martha V. Gilbert, et al v. General Electric Company Civil Action No. 142-72-R

Dear Mr. Powers:

Enclosed are two additional affidavits in support of defendant's brief in opposition to plaintiffs' motion for leave to add additional parties plaintiff.

I would appreciate your filing these with the other papers in this matter.

I have, today, mailed copies of the affidavits to Seymour DuBow and Ruth Weyand, counsel for plaintiffs.

Very Truly yours,

J. Robert Brame, III

JRS/bc
Enc.
cc: Stanley R. Strauss, Esquire

Seymour DuBow, Esquire

Ruth Weyand

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

AFFIDAVIT OF
R. LAURENCE HOWES
[Filed August 11, 1972]

I, R. Laurence Howes, being duly sworn depose and say as follows:

1. I am the R. Laurence Howes who is employed as manager of employee and community relations by the Television Receiver Products Department of the General Electric Company at Portsmouth, Virginia.

2. This affidavit is based on my conversation with Louise Washington, Barbara De La Cruz, Linda Knight, Maggie Goodman, Patricia Johnson, Marion Butts and Phyllis Trotter.

3. Mrs. Shirley Short reported that a number of employees were concerned that their names had been used in connection with a law suit without their knowledge and had indicated a willingness to make a statement to that effect. I indicated I would help.

4. I helped with statements from Louise Washington, Barbara De La Cruz, Maggie Goodman, Patricia Johnson, Marion Butts and Linda Knight. These are attached to my affidavit as exhibits 1 through 6.



5. Phyllis Trotter talked to me and wished to ask questions about the law suit. She said she knew of the law suit, but was not clear as to the issues. She indicated her preference that her name not be used.

6. In my discussions with all the employees named above I made it clear that in no way did I want to misrepresent the facts, as told to me, and that the statement should represent a true expression of their feelings in this matter.

/s/ R. LAURENCE HOWES

R. Laurence Howes

[Jurat omitted in printing]

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EXHIBIT 1

August 9, 1972

Judge Merhige
U.S. District Court
Eastern District of Virginia
Richmond, Virginia

I last work for General Electric July 1971. I left the company after given birth to twins. I had no knowledge that my name was being used in a law suit against General Electric over pregnancy benefits. I did not give permittion for my name to be used. I don't want it used in a law suit.

/s/ Marian Butts

EXHIBIT 2

August 8, 1972

Judge Merhige
U.S. Dist. Court
Eastern Dist. of Va.
Richmond, Va.

This is to advise that no one discussed a legal suit for maturnity benefits with me and did not authorise my name to be used in a law suit against G.E. I do not wish my name to be used.

Very truly yours,
/s/ Barbara J. De La Cruz



EXHIBIT 3

August 8, 1972

Judge Merhaige
U.S. District Court
Eastern District of Va.
Richmond, Va.

No one asked my permission to use my name in a lawsuit. I donot wished my name to be used, and have no intention of granting permission for my name to be used in a lawsuit. I understand that a suit has been filed in Richmond over pregnancy benefits. I donot wish to be involved in this suit.

/s/ Linda Knight

EXHIBIT 4

August 8, 1972

Judge Merhige
U.S. District Court
Eastern District of Va.
Richmond, Va.

I see no reason to suite G.E. for Maternity Benefits. I do not wish my name enter in the law suite file in your court in Richmond.

/s/ Louise Washington

EXHIBIT 5

(No date)

Judge Merhige
U.S. district Court
Eastern District of Virginia
Richmond, Va.

I understand that my name has been file in connection with a law suit against G.E. over pregnancy benefits. No one asked my permission to use my name. I do not wish to have my name used in this lawsuit.

/s/ Mrs. Maggie L. Goodman

EXHIBIT 6

August 8, 1972

Judge Merhige
U.S. District Court
Eastern District of Virginia
Richmond, Virginia

No one talked to me about being part of a lawsuit against General Electric over pregnancy benefits.

I do not wish to participate and have no intention of giving anyone permission to use my name. I do understand that such a lawsuit has been filed in your court.

/s/ Patricia M. Johnson



IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

AFFIDAVIT OF
SHIRLEY C. SHORT
[Filed August 11, 1972]

I, Shirley C. Short, being duly sworn say as follows:

1. I am a Specialist Employment in the Television Receiver Products Department of General Electric Company located in Portsmouth, Virginia.

2. My testimony is based on review of Company records kept in the ordinary course of business and conversations with the employees named herein below.

3. On Friday, July 28, 1972 prior to vacation shutdown at the request of Company attorneys I contacted just as many employees on a list furnished to me as I could. I talked to Addie Goodman, Marion Butts, Rose Hines, Shirley Avant and Elois Coles. All told me that they had no knowledge that their names were being used and that they had not given permission or authorized anyone to use their names in a law suit.

4. The Portsmouth plant was scheduled to shutdown for vacation the first two weeks in August. I was scheduled to work the second week and on August 7th and 8th talked to additional employees on the list.

5. Louise Washington, Barbara De La Cruz, Peggy Bailey, Linda Knight, Maggie Goodman, Patricia Johnson

indicated that they had no knowledge that their names were being used in a law suit against General Electric, that they did not wish to have their names so used and indicated willingness to write a statement to that effect.

6. I called Sherry Osteen, Patricia Gavin and Eunice Dean by telephone and was unable to reach anyone at their home on July 28th and August 8th and 9th.

7. Examination of Eunice Deans employment record shows that she left on personal illness February 21, 1969. She was paid weekly sickness and accident benefits from February 7th to November 4th, 1969. She was removed from payroll for an absence over one year on May 13, 1970. There is no record of her taking pregnancy leave.

8. Review of plant records indicate that none of the fifteen employees on the list furnished by the attorneys had ever filed for weekly sickness and accident benefits relative to maternity claims.

9. I explained to each of the employees that their willingness to make statement or not would not have any effect on their status as employees of the Company.

/s/ SHIRLEY C. SHORT
Shirley C. Short

[Jurat omitted in printing]



IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

ORDER
[Filed September 25, 1972]

In accordance with the memorandum of the Court this day filed, and deeming it just and proper so to do, it is ADJUDGED and ORDERED that:

1. Defendant's motion to change venue be, and the same is hereby, denied.

2. Plaintiff's motion to add parties plaintiff be, and the same is hereby, CONDITIONALLY granted, pending notice to the Court of said parties plaintiff of intentions not to intervene herein.

Let the Clerk send copies of the memorandum and this order to counsel of record.

/s/ Robert N. Merhige, Jr.
United States District Judge

Date: 9-25-72

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

MEMORANDUM
[Filed September 25, 1972]

Plaintiffs, alleging that they are victims of sex discrimination employed by the defendant in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, seek relief as a class. The immediate issues before the Court are premised on a motion by defendant employer for a change of venue, and one by plaintiffs seeking leave to add parties plaintiff to the complaint and to amend said complaint.

It is fairly obvious that the suggested addition of parties plaintiff and an amended complaint is for the primary purpose of overriding any adverse venue or jurisdictional determination that this Court has made or may make against named plaintiffs' stated desire to litigate in this division. It should be noted that the presently named plaintiffs purport to represent a national class, and the Court cannot conceive of any purpose of adding predominantly local named plaintiffs other than an effort to affect venue and jurisdictional requirements.

The Court's consideration of the pending motions requires a brief statement as to the background of this matter, as follows:

On May 10, 1972, upon receipt and consideration of papers and pleadings submitted by defendant on a motion to



transfer venue, and upon the response thereto by plaintiffs, this Court ordered *sua sponte*, without a hearing, having concluded that the issue was ripe for decision, that this action be transferred to the Western District of Virginia. Plaintiffs contending that they in effect had the right to select this division as their forum, sought review of the Court's order by way of an application for a writ of mandamus to the United States Court of Appeals for this Circuit. On consideration of same the Court of Appeals vacated the order of transfer and remanded the matter for a hearing, which the Court held on July 24, 1972. It was on that date that plaintiffs moved to add parties plaintiff to the complaint and requested the Court to defer its ruling on defendant's motion to transfer until subsequent to a ruling on their motion to add parties, their purpose being reasonably obvious.

The Court in its determination of the motion to add parties plaintiff pursuant to Rule 21, Fed. R. Civ. P., is duty bound to exercise its sound discretion. See Barron & Holtzoff, *Federal Practice and Procedure*, (Wright Ed.) § 543. While the Court is required to exercise its judicial discretion, it is not inclined to, and has not in that exercise been influenced by the efforts of plaintiffs to override its jurisdictional and venue determinations by a technical use of pleadings and motion practice. See *Van Dusen v. Barrack*, 376 U.S. 612, 624 (1964).

In considering the equities, the Court of necessity gives great weight to the fact that the litigation is presently at an initial stage, hence the addition of parties plaintiff would have no prejudicial effect upon the existing named parties as might occur if the case were at a later stage of litigation. The Court concludes that plaintiffs should be sustained on

their motion to add parties plaintiff and amend the complaint. This conclustion is reached only after having determined that regardless of the Court's ruling in that regard the plaintiffs must, in addition, be sustained on their contention that the Court was in error in its prior ruling.

Upon reconsideration of the arguments and pleadings herein, the Court is convinced that its earlier reliance upon *Stebbins v. State Farm Mutual Auto. Ins. Co.*, 413 F. 2d 1100 (D.C. Cir. 1969), and its stated construction of 42 U.S.C. 2000e-5(f), was misplaced. No effort on the part of the Court to explain its original error in this regard would change the fact that simply stated, the Court erred. No longer buttressed by its original misreliance on *Stebbins, supra,* the issue herein, i.e. construction of 42 U.S.C. § 2000e-5(f) is, the Court being unaware of any case precedent thereto, one of first impression.

The statute in question provides as follows:

> (f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of the actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought



> within the judicial district in with the respondent has his principal office. For purposes of sections 4104 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

Concluding that the above quoted section is one of special venue, see *General Electric Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699 (S.D. N.Y. 1966), the Court looks to the legislative history in an effort to ascertain whether any particular venue considerations, apart from 28 U.S.C. § 1404, were intended by Congress to attach thereto.

The confusion with respect to this section arises from the words:

> . . . may be brought in any judicial district *in the state* in which the unlawful employment practice is alleged to have been committed. (Emphasis supplied)

If the phrase "in the state" is omitted, the section clearly means that actions shall be brought in the particular district which is the situs of the act complained of. Addition of the phrase "in the state" can result in an interpretation that the action must be brought either (1) anywhere in the appropriate state, or, (2) as if the phrase were omitted, only in the particular judicial district. The latter interpretation treats the phrase "in the state" as surplusage without syntactical effect. General venue considerations would, without more, cause the Court to adopt the latter interpretation and to attribute

the equivocal wording to poor draftsmanship. However, as heretofore noted, this is not a general venue statute and usual venue considerations do not apply, see *SEC v. Wimer*, 75 F. Supp. 955, 963 (W.D. Pal. 1948). Moreover, legislative history shows that the phrase "in the state" was *added* by the Senate to the original House version which omitted it, 110 Cong. Rec. 2511, col. 3; 110 Cong. Rec. 12814, and said addition was reflected in the remarks of Senator Humphrey during floor debate, 110 Cong. Rec. 12723, col. 3. It is apparent, therefore, that the phrase was purposely added and not merely a product of poor draftsmanship. Accordingly, the Court concludes that the phrase must be given full syntactical weight in upholding plaintiffs' contention that the section provides for a forum in any part of the state.

Two other considerations lend weight to his conclusion. First, while the Court finds disturbing the suggestion that litigants may so blatantly engage in forum shopping, it does not seem inconsistent with Congress' militant approach to affording citizens full redress of civil rights grievances to allow plaintiffs a particularly wide latitude in choosing the situs of their litigation. Such latitude affords greater convenience to plaintiffs and enables them to avoid potential local economic and political pressures which might be believed to serve to hinder a trial judge's efforts to maintain an unfettered, impartial atmosphere.

A second consideration is relevant to the litigation herein. The broad latitude given by the statute is particularly engaging when taken in conjunction with class actions. Such actions, which are particularly appropriate and plentiful under Title VII, are often of interstate or intrastate character, stretching in geographical impact beyond the



limits of particular divisions or state districts. In this light, determination of venue merely upon the named litigants would have an arbitrary effect.

Having concluded that venue for the action herein properly lies in this district, the Court now returns to plaintiffs' motion to add parities plaintiff. Defendants, in their pleadings, have upon affidavits questioned the intention of several of the newly named plaintiffs to be included herein. Said affidavits give rise to serious questions of the personal intent of said parties. The Court will therefore conditionally grant the motion to add parties, with leave to those named to withdraw from the action herein.

An appropriate order shall enter.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

Date: 9-25-72

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

| | | |
|---|---|---|
| Martha V. Gilbert, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | Civil Action |
| v. | ) | No. 142-72-R |
| | ) | |
| General Electric Company, | ) | |
| | ) | |
| Defendant. | ) | |

## MOTION BY DEFENDANT GENERAL ELECTRIC COMPANY FOR DEFINITION OF SIZE OF CLASS, FOR DESIGNATION OF CLASS REPRESENTATIVE, AND FOR ISSUANCE OF NOTICE TO CLASS MEMBERS

[Filed February 23, 1973]

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, defendant General Electric Company (hereafter "GE"), by its attorneys, respectfully moves this Court for an order defining the size of the class, designating the class representative, and providing for the issuance of notice to class members. In support of this motion, defendant GE states as follows:

I.

1. It is a condition precedent to maintaining a class action against a defendant under Section 706(d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(d), and Rule 23 of the Federal Rules of Civil Procedure that



a party plaintiff purporting to be the representative of a class of persons similarly situated must first file a charge against said defendant with the Equal Employment Opportunity Commission.

2. Of all the plaintiffs, purported class members, and female employees of GE referred to in the conditionally amended complaint, only Martha V. Gilbert, Johnnie E. Taylor, Mary R. Williams, and Doris B. Wiley, all of whom are named individual parties plaintiff herein, have, to GE's knowledge, filed charges of discrimination against GE with the Equal Employment Opportunity Commission. Copies of said charges are attached hereto as Exhibit A. (The conditionally amended complaint, *inter alia*, alleges that Sharon E. Godfrey, Barbara Hall, and Alberta Smith, also named individual parties plaintiff, likewise filed charges of discrimination with the Commission against GE.)

3. At all times material, Martha V. Gilbert, Sharon E. Godfrey, Barbara Hall, Alberta B. Smith, Johnnie E. Taylor, Mary R. Williams, and Doris B. Wiley were or have been employed by defendant GE at its Salem, Virginia, plant.

4. At all times material, Martha V. Gilbert, Sharon E. Godfrey, Barbara Hall, Alberta B. Smith, Johnnie E. Taylor, Mary R. Williams, and Doris B. Wiley have been represented for the purposes of collective bargaining by plaintiff International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (hereafter "plaintiff International Union") and the latter's affiliate, plaintiff Local 161, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (hereafter "plaintiff Local 161"). Plaintiff International Union and plaintiff Local 161 are the collective bargaining representatives of the production and maintenance employees at GE's Salem, Virginia, plant.

5. The issues which can be raised in a class action brought under Section 706(d) of Title VII of the Civil Rights Act of 1964 are confined to those issues presented in charges filed with the Equal Employment Opportunity Commission.

6. All of the aforesaid charges of discrimination raise the same issue involving the denial of insurance benefits to females for absences from employment due to pregnancy or resulting childbirth under non-occupational sickness and accident insurance in effect at GE's Salem, Virginia, plant.

7. Pursuant to a negotiated Pension and Insurance Agreement between GE and plaintiff International Union and its affiliated IUE (AFL-CIO) Locals, the aforesaid non-occupational sickness and accident insurance is in effect at GE's Salem, Virginia, plant, and at all other GE plants where plaintiff International Union and its affiliated Locals have collective bargaining rights. There are approximately 610 female employees at GE's Salem, Virginia, plant who are represented by plaintiff International Union and plaintiff Local 161. Plaintiff International Union and its affiliated IUE (AFL-CIO) Locals represent approximately 20,000 female employees at GE plants and locations throughout the United States.

8. The aforesaid non-occupational sickness and accident insurance also applies to and affects the approximately 65,000 other female employees at GE plants and other locations throughout the United States who are not represented for collective bargaining purposes by plaintiff International Union and its affiliated IUE (AFL-CIO) Locals. Of the latter female employees, approximately 48,000 are unrepresented for collective bargaining purposes, and approximately 17,000 are represented by some 200 International and Local Unions. Non-occupational sickness and accident insurance covering the approximately 17,000 female employees represented for collective bargaining purposes by the latter approximately 200 unions is in effect as the result of negotiated bargaining agreements between GE and such latter unions.



9. Under Section 706(d) of Title VII of the Civil Rights Act of 1964 and Rule 23 of the Federal Rules of Civil Procedure, the size or composition of the class action is defined by the issues which have been presented in charges filed with the Equal Employment Opportunity Commission.

10. Accordingly, for purposes of this action, the class may only be comprised of either:

(a) those similarly situated female employees employed at defendant's Salem, Virginia, plant who, during the period commencing ninety days prior to a date in December 1971 or January 1972 (the earliest date on which any of the charges of discrimination was filed) and ending on the date of the filing of the complaint, were denied non-occupational sickness and accident insurance benefits for absences from employment due to pregnancy or resulting childbirth; or

(b) those similarly situated female employees employed at GE's plants who are represented for purposes of collective bargaining by plaintiff International Union and its affiliated IUE (AFL-CIO) Locals, and who, during the period commencing ninety days prior to a date in December 1971 or January 1972 and ending on the date of the filing

of the complaint, were denied non-occupational sickness and accident insurance benefits for absences from employment due to pregnancy or resulting childbirth.

11. Those allegations in the conditionally amended complaint that purport to establish a larger class must, therefore, be stricken, and the complaint must be dismissed as to that purported larger class.

II

1. As stated, it is a condition precedent to maintaining a class action against a defendant under Section 706(d) of Title VII of the Civil Rights Act of 1964 and Rule 23 of the Federal Rules of Civil Procedure that a party plaintiff purporting to be the representative of a class of persons similarly situated must first file charges against said defendant with the Equal Employment Opportunity Commission.

2. Of all the plaintiffs, female persons, and potential class members referred to in the conditionally amended complaint, Martha V. Gilbert, Sharon E. Godfrey, Barbara Hall, Alberta B. Smith, Johnnie E. Taylor, Mary R. Williams, and Doris B. Wiley are the only named plaintiffs who have filed, or who allegedly have filed, charges of discrimination against GE with the Equal Employment Opportunity Commission. Such named individual plaintiffs are the only plaintiffs, therefore, who may be the representatives of a class of persons similarly situated for the purposes of this action.

3. Accordingly, all parties plaintiff named in the complaint as conditionally amended except for Martha V. Gilbert, Johnnie E. Taylor, Mary R. Williams, and Doris B.



Wiley (and, arguably, Sharon E. Godfrey, Barbara Hall, and Alberta Smith) should be dismissed from this action in their capacity as parties plaintiff for failure to file the requisite charges with the Equal Employment Opportunity Commission, and plaintiffs Gilbert, Taylor, Williams, and Wiley (and, arguably, plaintiffs Godfrey, Hall, and Smith) should, therefore, be designated the *only* representatives of a class of similarly situated female employees of defendant GE for the purposes of this action.

WHEREFORE, defendant General Electric Company respectfully moves the Court for an order:

1. Defining the class of female employees in this action to be either:

(a) those similarly situated female employees employed at defendant's Salem, Virginia, plant who, during the period commencing ninety days prior to a date in December 1971 or January 1972 (the earliest date on which any of the charges of discrimination was filed) and ending on the date of the filing of the complaint, were denied non-occupational sickness and accident insurance benefits for absences from employment due to pregnancy or resulting childbirth; or

(b) those similarly situated female employees employed at GE's plants who are represented for purposes of collective bargaining by plaintiff International Union and its affiliated IUE (AFL-CIO) Locals, and who, during the period commencing ninety days prior to a date in December 1971 or January 1972 and ending on the date of the filing of the complaint, were denied non-occupational

sickness and accident insurance benefits for absences from employment due to pregnancy or resulting childbirth.

2. Designating plaintiffs Martha V. Gilbert, Johnnie E. Taylor, Mary R. Williams, and Doris B. Wiley (and, arguably, plaintiffs Sharon E. Godfrey, Barbara Hall, and Alberta Smith) as the only representatives of a class of similarly situated female employees of defendant GE for the purposes of this action, and dismissing from this action all other parties plaintiff named in the conditionally amended complaint.

3. Requiring plaintiffs Martha V. Gilbert, Johnnie E. Taylor, Mary R. Williams, and Doris B. Wiley (and, arguably, plaintiffs Sharon E. Godfrey, Barbara Hall, and Alberta Smith) to issue notice, in form and in a manner approved by the Court, to members of the class as defined by this Court advising said class members that his action is pending, that said class members may exclude themselves from the class and the effect of this suit by so notifying the Court, and that said class members electing to remain as participants in this action have a right to representation by counsel of their own choice if they so desire.

Respectfully submitted,

/s/ JOHN S. BATTLE, JR.
John S. Battle, Jr.
Robert H. Patterson, Jr.
McQuire, Woods & Battle

1400 Ross Building
Richmond, Virginia 23219



Theophil C. Kammholz
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1750 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Attorneys for General
Electric Company

Dated: February 22, 1973.

[Certificate of Service omitted in printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## PLAINTIFFS' MOTION TO ADD PARTIES PLAINTIFF TO COMPLAINT

[Filed April 17, 1973]

Come now plaintiffs in the above entitled action and Carolyn Busby, Martha Cook, Brenda Dillon, Cheryl Freeman, Alvone Gunter, Eleanor Hardesty, Dorothy Hardy, Linda K. Hayles, P.E. Hartless, Anna Hay, Rachel Hill, Jane L. Howk, Barbara Jones, Zanell Jones, Loretta H. Lucado, Zelda Lynch, Helen McClain, Cornelius Molton, Linda Sue Newcomb, Claudia L. Odom, Linda Patimore, Patricia Pruitt, Delora-Lee Ramsey, Kathleen Rozelle, Shelia Singletary, Jeanette Smith, Kathleen Stuteville, Flora Suggett, Linda Terry, Marilyn Thomasson, Barbara Wells and Ula Winter (hereinafter sometimes referred to as "Additional Parties Plaintiffs") and through their undersigned attorneys, move the Court, pursuant to Rules 15 and 21, respectively, of the Federal Rules of Civil Procedure, for an order:

1. That Carolyn Busby, Martha Cook, Brenda Dillon, Cheryl Freeman, Alvone Gunter, Eleanor Hardesty, Dorothy Hardy, Linda K. Hayles, P.E. Hartless, Anna Hay, Rachel Hill, Jane L. Howk, Barbra Jones, Zanell Jones, Loretta H. Lucado, Zelda Lynch, Helen McClain, Cornelius Molton, Linda Sue Newcomb, Claudia L. Odom, Linda Patmore, Patricia Pruitt, Delora-Lee Ramsey, Kathleen Rozelle, Shelia Singletary, Jeanette Smith, Kathleen Stuteville, Flora Suggett, Linda Terry, Marilyn Thomasson, Barbara Wells and Ula Winter be added as Parties Plaintiffs in this action as of the date of the filing of this Motion.



2. That Paragraph 2 of the complaint in the above action be amended by adding thereto the following at the end of the allegations now therein contained:

(a) Each of the individual named plaintiffs, June L. Howk and Kathleen Rozelle is a female and was employed by defendant GE at its Auburn, New York plant at the time she became pregnant, as more fully set forth hereinafter.

(b) The individually named plaintiff Marilyn Thomasson is a female and was employed by defendant GE at its Dekalb, Illinois plant at the time she became pregnant, as more fully set forth hereinafter.

(c) The individually named plaintiff Cornelius Molton is a female and was employed by GE at its Fort Wayne, Indiana plant at the time she became pregnant as more fully set forth hereinafter.

(d) Each of the individually named plaintiffs Martha Cook, Alvone Gunter, Dorothy Hardy, Linda K. Hayles, Rachel Hill, Helen McClain, and Shelia Singletary is a female and was employed by GE at its Memphis, Tennessee plant at the time she became pregnant as more fully set forth hereinafter.

(e) Each of the individually named plaintiffs Patricia Pruitt, Linda Sue Newcomb and Claudia L. Odom is a female and was employed by defendant GE at its Murfreesboro, Tennessee plant at the time she became preggy.

(f) The individually named plaintiff Flora Suggett is a female and was employed by defendant GE at its Newcomerstown, Ohio plant at the time she became pregnant as more fully set forth hereinafter.

(g) The individually named plaintiff Delora-Lee Ramsey is a female and was employed by defendant GE at its Portsmouth, Virginia Plant at the time she became pregnant as more fully set forth hereinafter.

(h) Each of the individually named plaintiffs Brenda Dillon, P.E. Hartless, Barbara Jones, Loretta H. Lucado and Jeanette Smith is a female and was employed by defendant GE at its Salem, Virginia plant at the time she became pregnant as more fully set forth hereinafter.

(i) The individually named plaintiff Barbara Wells is a female and was employed by defendant GE at its Syracuse, New York plant at the time she became pregnant as more fully set forth hereinafter.

(j) Each of the individually named plaintiffs Cheryl Freeman, Eleanor Hardesty, Anny Hay, Zelda Lynch, Linda Patmore, Kathleen Stuteville, Linda Terry and Ula Winter is a female and was employed by defendant GE at its Tell City, Indiana plant at the time she became



pregnant as more fully set forth hereinafter.

(k) Each of the individually named plaintiffs Carolyn Busby and Zanell Jones is a female and was employed by defendant GE at its Tyler, Texas plant at the time she became pregnant as more fully set forth hereinafter.

3. That paragraph 7 of the complaint be amended to add after the word plaintiffs in the 16th line appearing on page 4 the following: and who are employed at Dekalb, Illinois, Memphis, Tennessee, Murfreesboro, Tennessee, Newcomerstown, Ohio and Syracuse, New York.

In support of said motion plaintiffs state:

1. This motion at this time is made necessary by:

(a) The pendency of two complaints against the defendant GE before the State of New York, Executive Department, Division of Human Rights, *Rozelle v. GE,* Case No. CS-28383-72 and *Howk v. GE,* Case No. CS-28809-72, which raise the same legal issue as is presented here, namely, whether the refusal of the defendant GE to pay sickness and accident benefits for periods of absence due to childbirth or other pregnancy-related disability constitutes unlawful discrimination in employment because of sex subjects plaintiffs to the risk of inconsistent decision in another tribunal. Since the complainants before the New York Division of Human Rights have agreed to join as plaintiffs here and be represented by the same attorneys as represent the present plaintiffs and then withdraw their complaints before the New York Division of Human Rights it was decided to file this motion rather than attempt to enjoin continuance of the New York State proceedings. The *Rozelle* and *Howk* cases first came to the attention of the plaintiffs on or about

April 6, 1973 when a member of the staff of the New York Human Rights Division phoned counsel for the plaintiffs because the defendant GE had moved the New York agency to hold the cases in abeyance pending decision in *Gilbert v. GE*, the instant case. The member of the staff of the New York Human Rights Division stated that the New York agency had a policy not to hold cases in abeyance but would postpone hearing until it could be determined if Rozelle and Howk would be willing to join as plaintiffs in the *Gilbert* case and withdraw their New York complaints. Rozelle and Howk have so agreed.

(b) The refusal of counsel for the defendant GE to stipulate facts with respect to any member of the class who is not named as a plaintiff and the assertion of counsel for the defendant GE that it will object at the trial of this case to the receipt of any evidence with respect to the types and kinds of instances in which it has refused to pay sickness and accident benefits on grounds of its pregnancy exclusion by evidence relating to any employee who is not named as a plaintiff, has led counsel for the plaintiffs to decide that the simplest way to avoid this objection and simplify the trial is to move to add as plaintiffs those employees as to whom it has requested the defendant GE to stipulate certain facts but GE has refused solely on the ground such employees are not named as plaintiffs.

(c) The undertaking of counsel for plaintiffs to remove any problems that members of the staff of the Equal Employment Opportunity Commission seem to feel exist by having pending before them charges from members of the class which EEOC records show that the EEOC staff has pending without investigation or efforts at conciliation, by adding as parties plaintiff the employees who have filed EEOC charges raising the issues presented by this case.



2. The filing of this motion at this time should not occasion any delay. The defendant GE has been fully aware of the intention of the plaintiffs to litigate the facts respecting the Additional Parties Plaintiffs and can reasonably be expected to have already collected all relevant facts as to those plaintiffs because:

(a) The proposed Pre-Trial Stipulation of Facts served by plaintiffs on defendant on February 8, 1973 contained the names and some or all of the facts upon which the plaintiff intended to rely with respect to the proposed Additional Parties Plaintiffs Zanell Jones (Proposed Pre-Trial Stipulation of Facts Paras. 19, 37, Cornelius Molton (*id.*, Paras. 19, 37) Carolyn Busby (*id.*, Paras. 20, 29, 37), Shirley Wiseman, Zelda Lynch, Anna Hay, Eleanor Hardesty, Linda Patmore, Linda Terry, Cheryl Freeman, Kathleen Stuteville (*id.*, Paras. 20, 37), Flora Suggett (*id.*, Para. 23), Loretta Lucado, Brenda Dillon, P.E. Hartless, Barbara Jones, Jeanette Smith (*id.*, Para. 37), Linda Sue Newcomb, Claudia Odom, and Patricia Pruitt (*id.*, Para. 37)).

(b) The following Additional Parties Plaintiffs have processed grievances for the claims here involved through Third Step and on the date indicated received a Third Step Answer from defendant GE at its New York headquarters: Barbara Jones (2-6-72), Barbara Wells (12-12-72), Martha Cook (3-9-72), Linda Terry (10-27-72), Linda K. Hayles, (8-17-72), Alvone Gunter (8-27-72), Helen McClain (8-17-72), Shelia Singletary (8-17-72), Rachel Hill (1-9-72), Dorothy Hardy (1-9-72), Ula Winter (10-27-72), Kathleen Stuteville (10-27-72) and Marilyn Thomasson (7-20-72).

(c) The following Additional Parties Plaintiffs have filed EEOC charges against the defendant GE for the claims here asserted: Loretta H. Lucado (EEOC Case No. TDC2-1459), Linda Sue Newcomb (EEOC Case No. TME3-0771),

Claudia L. Odom (EEOC Case No. TME3-0772); Patricia Pruitt (EEOC Case No. TME3-0770); and Flora Suggett, whose EEOC case number has not been supplied to counsel for plaintiffs.

3. All of the Additional Parties Plaintiffs are members of the same class as the original individual named plaintiffs.

4. All of the Additional Parties Plaintiffs were entitled to be paid by the defendant GE and were denied by the defendant GE, weekly non-occupational sickness and accident benefits during periods of disability from pregnancy or childbirth.

5. Each of the Additional Parties Plaintiffs learned of this suit after it was filed and requested that she be added as a party plaintiff to this suit.

6. The Additional Parties Plaintiffs Jane L. Howk and Kathleen Rozelle have pending before the New York State Division of Human Rights complaints docketed respectively as Case No. CS-28809-72 filed in December 1972 and Case No. CS-28383-72 filed October 25, 1972 for failure of defendant GE to pay them sickness and accident benefits for the periods they were absent from work becuase of childbirth and other pregnancy related disability. The New York State Human Rights Division although requested by defendant GE to hold in abeyance ruling on said complaints pending the outcome of this suit has stated to counsel that it is the policy of the New York State Human Rights Division to refuse to defer hearing and decision of cases pending decision of cases before courts or other administrative agencies and that the only way the plaintiffs Howk and Rozelle may avoid decision by the New York Human Rights Division is to withdraw their complaints. Rather than risk inconsistent ruling said plaintiffs have elected to move to



be added as parties plaintiffs herein. If the court grants said motion they will withdraw their state complaints.

/s/ SEYMOUR DuBOW

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Winn Newman
Ruth Weyand
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Washington, D.C. 20036
Phone: 202–296-1200

*Attorneys for Plaintiffs.*

April 16, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND VIRGINIA

[Title omitted in printing]

* * * * *

MOTION BY PLAINTIFFS FOR ORDER
THAT CLASS ACTION MAY BE MAINTAINED,
DEFINING CLASS AND
DESIGNATING REPRESENTATIVE PLAINTIFFS

[Filed April 17, 1973]

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the plaintiffs by their attorneys, respectfully move this Court for an order:

(a) determining that this suit may be maintained as a class action under Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure;

(b) determining that with respect to the issue of whether the failure of the defendant GE to pay sickness and accident benefits for periods of absence due to childbirth or other pregnancy-related disabilities violates Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, this suit may be maintained as a class action under Rule 23(b)(1) and (2) on behalf of a class composed of all females who are now or have been employed by the defendant GE on or after September 14, 1971, or who become employed by defendant GE during the pendency of this suit, at any of its plants, offices and shops wherever located, and also all females whose claims or grievances against the defendant GE for sickness or accident benefits for a period of disability due to childbirth or other pregnancy-related disability were filed before September 14, 1971 and were still pending on September 14, 1971 or could still be timely filed on or after September 14, 1971;



(c) determining that with respect to the issue of whether a judgment should be entered against the defendant GE requiring it to make whole employees who suffered losses as a result of the failure of the defendant GE to pay sickness and accident benefits for periods of absence due to childbirth or other pregnancy-related disability this suit may be maintained as a class action under Rule 23(b)(1) and (2) on behalf of a subclass composed of all females who are now or have been employed by the defendant GE on or after September 14, 1971, or who become employed by defendant GE during the pendency of this suit, at any of its plants, offices and shops wherever located and who have been, are or become disabled from work due to childbirth or other pregnancy-related disability on or after September 14, 1971 and also all females whose claims or grievances against the defendant GE for sickness or accident benefits for a period of disability due to childbirth or other pregnancy-related disability were filed before September 14, 1971 and were still pending on September 14, 1971 or could still be timely filed on or after September 14, 1971; and

(d) determining that the individuals who are named as parties plaintiffs in the complaint as amended constitute proper representatives of both the class and the sub-class.

In support of this motion, plaintiffs state as follows:

1. The complaint as amended (Par. 3) alleges, and the answer of defendant GE (First Defense, Par. 3) admits, that the individual named plaintiffs sue individually and on behalf of all present and former female employees of the defendant GE, and that the number of such present and former female employees of defendant GE is in excess of 100,000. The class is thus admittedly so numerous that joinder of all members is impracticable within the meaning of Rule 23(a)(1) of the Federal Rules of Civil Procedure.

2. The Supplemental Answers by the defendant GE to Plaintiffs' Interrogatories Nos. 5 and 45 show that figures are not available for 1972 and 1973 but that the number of employees of the defendant GE who were pregnant in 1970 numbered 3,263 and in 1971 numbered 2,396. The sub-class is thus admittedly so numerous that joinder of all members is impracticable within the meaning of Rule 23(a)(1) of the Federal Rules of Civil Procedure.

3. The complaint as amended (Par. 6) alleges, and the answer of defendant GE (First Defense, Par. 5) admits, that the defendant GE provides weekly non-occupational sickness and accident insurance to all its employees in an amount equal to 60 percent of an employee's normal straight time weekly earnings up to a maximum weekly benefit of $150. The complaint as amended (Par. 8) alleges, and the answer of the defendant GE (First Defense, Par. 7) admits, that the defendant GE at all times has refused to pay weekly sickness and accident insurance bene-



fits to any female for an absence due to disability arising from or related to pregnancy or resulting childbirth. The answer of the defendant GE (Third and Fourth Defenses) alleges that as to each member of the class the refusal of the defendant GE to pay such benefits for periods of absence due to disabilities arising from pregnancy or resulting childbirth was based on the same reasons, namely, the defendant GE's insurance plan does not provide such benefits (Third Defense), the exclusion does not constitute discrimination because of sex (Third Defense) and the defendant GE acted in good faith reliance on written interpretations and opinions of EEOC (Fourth Defense). Thus, admittedly, the action presents questions of law and fact common to all members of both the class and the sub-class within the meaning of Federal Rule of Civil Procedure 23 (a)(2).

4. The complaint as amended (Pars. 2, 7, 8, 11 and 12) alleges, and the answer of the defendant GE (First Defense, Pars. 2, 6, and 7) admits, that one or more of the individual named plaintiffs was employed by defendant GE at each of its plants in Portsmouth, Richmond and Salem, Virginia; Philadelphia, Pennsylvania; Fort Wayne, Indiana; Tell City, Indiana; and Tyler, Texas; that all of the individual named plaintiffs, except one as to whom it has no knowledge of her pregnancy, were pregnant during 1971 or 1972 and lost wages due to absence from work due to pregnancy and resulting childbirth; and that the defendant GE did not pay any of the individual named plaintiffs sickness and accident benefits for the period of such absence from work. The answers of defendant GE to plaintiffs' interrogatories state that complete figures as to the total number of pregnancies among its employees during 1971 and 1972 were not yet available at the time the answers were prepared but that according to statistics compiled by

Metropolitan Life Insurance Company there were during 1971, 5,545 claims for maternity expenses incurred by GE employees (Answer to Interrogatory No. 36). The defendant GE admits that it paid none of these GE employees any sickness or accident benefits for time lost due to pregnancy or resulting childbirth (Answer, First Defense, Par. 7). Thus, the claims of the representative plaintiffs are typical of the claims of all members of both the class and the sub-class within the meaning of Federal Rule of Civil Procedure 23(a)(3).

5. The individual named plaintiffs have diligently and competently pursued all the steps necessary to protect the interests of both the class and the sub-class. The plaintiff Barbara S. Hall filed with the Equal Employment Opportunity Committee on December 13, 1971, a charge alleging that the defendant GE discriminated because of sex in violation of Title VII of the Civil Rights Act of 1964 by failing to provide insurance coverage for time lost due to disability from pregnancy and childbirth equal in amount and duration of benefits to that for time lost due to non-sex related disabilities, which charge was docketed as EEOC Case No. TDC2-0604/YDC2-270, all as more fully appears from a copy of the charge which is attached hereto marked Exhibit A and made a part hereof, and from the letter dated February 23, 1973 addressed To Whom It May Concern, signed by Treadwell O. Phillips, Deputy Director, Washington District Office, EEOC confirming that EEOC received the charge filed by Barbara S. Hall on December 13, 1971, a copy of which letter is attached hereto as Exhibit B and made a part hereof. The record in this case, together with the record in the related mandamus proceedings instituted by the plaintiffs in the United States Court of Appeals for the Fourth Circuit, *Gilbert v. Merhige*, 4th Cir. Case No. 72-1664, establish that the individual named



plaintiffs will fairly and adequately protect the interests of both the class and the sub-class within the meaning of Federal Rule of Civil Procedure 23(a)(4).

6. The prosecution of separate actions by members of the class or the sub-class would create a risk of inconsistent or varying adjudications with respect to individual members of the class or sub-class which would establish incompatible standards of conduct for the defendant GE within the meaning of Federal Rule of Civil Procedure 23(b)(1)(A). The defendant GE apprehended the danger to it of inconsistent or varying adjudications for it has requested the State of New York Executive Department, State Division of Human Rights to hold in abeyance, pending the decision in the instant case, two cases filed under the New York Human Rights Law (Consolidated Laws of New York Executive Law, Article 15, Section 290, *et seq.*) by two females employed by the defendant GE at its plant at Auburn, New York, where the recognized bargaining agent is Local 967, International Association of Machinists, AFL-CIO. The first of these cases, Case No. CS-28383-72, was filed on October 25, 1972 by Kathleen Rozelle and the second, Case No. CS-28809-72, in December 1972 by Jane L. Howk. By letter dated January 2, 1973 to the Regional Director of the New York State Human Rights Division, the defendant GE stated that the issue raised by the complaints in the *Rozelle* and *Howk* cases is being litigated in the United States District Court of Virginia in *Gilbert v. GE* and proposed that the *Rozelle* and *Howk* cases be held in abeyance until the law is settled in this pending litigation. The New York State Human Rights Commission agreed with counsel for GE to defer a hearing until after the scheduled date for the hearing in the instant case in order to determine what disposition might be made in this case. The hearing date in the *Rozelle* and *Howk* cases has accordingly been set for June 5, 1973.

7. The prosecution of separate actions by individual members of the class or sub-class other than the individual named plaintiffs will create a risk of adjudications with respect to individual members of the class or sub-class which would as a practical matter be dispositive of the interests of individual named plaintiffs not parties to the adjudications or substantially impair or impede their ability to protect their interests within the meaning of Federal Rule of Civil Procedure 23(b)(1)(B).

8. The defendant GE has denied the claims of the individual named plaintiffs for sickness and accident benefits for the periods they lost wages due to childbirth or other pregnancy-related disabilities and has denied the claims of all other members of the sub-class upon the same grounds, as is admitted by the answer of the defendant GE (Third and Fourth Defenses), thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class and the sub-class as a whole within the meaning of the Federal Rule of Civil Procedure 23(b)(2).

9. The question of whether the defendant GE has discriminated unlawfully because of sex in violation of Title VII of the Civil Rights Act of 1964, by refusing to pay to any employee absent because of a disability arising from pregnancy, miscarriage or childbirth, weekly non-occupational sickness and accident benefits is a question of law and fact common to all members of the class which predominates over any question affecting only individual members of the class and a class action is superior to other available methods for the fair and efficient adjudication of the controversy, within the meaning of Federal Rule of Civil Procedure 23(b)(3).

10. No question not common to all members of the class is presented by the fact that some members of the



class are represented for purposes of collective bargaining by unions other than the plaintiff unions and other members of the class are unorganized. The General Electric Insurance Plan with Comprehensive Medical Expense Benefits, As Amended January 16, 1970 ERB 32D, a copy of which is attached hereto as Exhibit C and made a part hereof, is equally applicable to all members of the class whether they are represented for purposes of collective bargaining by the plaintiff unions, by other unions or no union. In *NLRB v. GE*, 418 F.2d 736, 741, 752 (2d Cir., 1969), cert. denied, 397 U.S. 965 (1970), enforcing, 150 NLRB 192, 209, 237, 258, 271-272, which was litigation to which both the plaintiff International Union and the defendant GE were parties, it was found that defendant GE insisted on a completely uniform insurance plan, and, in order not to have different terms applicable to units represented by different unions or unorganized employees, had refused to bargain with the plaintiff International Union or with any other union with respect to changes in its insurance plan (see especially 150 NLRB at 272, fn. 119). The General Electric Insurance Plan at all times here material has been and today is uniform as to all employees whether represented by the plaintiff unions, other unions or unrepresented. No changes have been made by collective bargaining with any union which have any relevance to any issue involved in this suit.

11. Because of the policy of uniformity upon which the defendant GE has insisted, the plaintiff International Union and the other major unions representing employees of the defendant GE, beginning in 1965 and continuing to date, have established a coordinated bargaining committee whereby all unions, which care to participate, join in formulating the common bargaining demands to be presented to defendant GE and representatives of all the unions serve on the

bargaining committee of each union in dealing with defendant GE as more fully described in *General Electric Co.*, 173 NLRB 253 (1968), enf'd as modified 412 F.2d 512 (2d Cir. 1969). During negotiations between the plaintiff International Union and the defendant GE which preceded that execution of the 1966-1969 National GE-IUE Agreement and the 1970-1973 National GE-IUE Agreement the IUE negotiating committee, which included among its members representatives of other unions, made demands for sickness and accident benefits for disabilities due to childbirth and other pregnancy-related disabilities and such proposal was one of the demands of the plaintiff International Union throughout a 100 day strike which preceded the execution of the 1969-1970 Agreement. The following unions are members of the Coordinated Bargaining Committee of GE-Westinghouse Unions: the plaintiff International Union, the United Automobile Workers (Ind.), the International Brotherhood of Teamsters (Ind.), the United Steelworkers of America, AFL-CIO, the International Association of Machinists, AFL-CIO, the International Brotherhood of Electrical Workers, AFL-CIO, the United Electrical Radio and Machine Workers of America (Ind.), the Allied Industrial Workers, AFL-CIO, the American Federation of Technical Engineers, AFL-CIO, the American Flint Glass Workers, AFL-CIO, the Sheet Metal Workers, AFL-CIO, International Brotherhood of Fireman and Oilers, AFL-CIO, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, AFL-CIO. In its allegations that it has collective bargaining agreements with some 200 unions, the defendant GE is counting as a separate union each of the units which are not covered by a national agreement, even though represented by the same International Union. See *General*



*Electric Co.*, 150 NLRB 192, 205, fn. 1. All of the unions affiliated with the Coordinated Bargaining Committee have been kept fully informed of the progress of this suit and one of the bargaining demands for the 1972 negotiations with defendant GE which has been adopted by this Committee is that to the extent that an employee is disabled by pregnancy, childbirth or complications arising therefrom, she shall have the right to the same sickness and accident benefits as any other disabled employee.

12. So far as we have been able to ascertain, there are no members of the class who have indicated any interest in individually controlling the prosecution of separate actions. There are no other law suits pending against defendant GE by other members of the class. In addition to the two complaints filed with the New York State Division of Human Rights by Kathleen Rozelle and Jane L. Howk, described in Par. 6, *supra*, charges have been filed with the EEOC by various other members of the class from both plants represented by the defendant International Union and from unorganized plants, e.g., EEOC Case No. TDC2-1459 filed by Loretta H. Lucado, an employee at the Salem, Virginia plant, a copy of which charge is attached to Motion by General Electric Company to Dismiss Complaint; EEOC Case No. TME3-0772 filed by Claudia L. Odom, an employee at the Murfreesboro, Tennessee plant, an unorganized plant; EEOC Case No. TME3-0770 filed by Patricia Pruitt, an employee at the Murfreesboro, Tennessee plant; EEOC Case No. TME3-0771 filed by Linda Sue Newcomb, an employee at the Murfreesboro plant; EEOC Case No. TDA3-0965 filed by Zanell Jones, an employee at the Tyler, Texas plant which is represented by the plaintiff International Union; and an EEOC case for which a number has not yet been received filed by Flora Suggett, Newcomerstown, Ohio, a plant represented by the

plaintiff International Union. Counsel for plaintiffs have been authorized by such persons to add their names as additional parties plaintiff to this suit and is filing concurrently herewith a motion to add such persons as additional parties plaintiff to this suit. If this Court grants the motion to add Kathleen Rozelle and Jane L. Howk, they will ask leave of the New York State Division of Human Rights to withdraw their complaints there pending. The International Association of Machinists as the collective bargaining agent for Kathleen Rozelle and Jane L. Howk has consented to the addition of Rozelle and Howk as plaintiffs herein and their representation in this suit by counsel for the present plaintiffs.

13. The extent to which any of the claims of members of the class or the sub-class may present questions other than the above described questions common to all members of the class is at present unknown because the defendant GE has not rejected any claim on any basis other than the above described defenses interposed to the claims of all members of the class.

14. The denial of a designation of this suit as a class action or the denial of a designation of the class as embracing all females employed by the defendant GE may result in irreparable loss to the many members of the class who have failed to file charges in reliance upon the pendency of this class suit in the belief that their interests were protected by this suit. The instant suit has been described in publications having nationwide circulation, as a class suit on behalf of all female employees of defendant GE, as for instance in Business Week, March 25, 1972, p. 26, a copy of which is attached hereto marked Exhibit D; and Associated Press news release which appeared in newspapers throughout the United States, including the Richmond, Virginia



Times Dispatch, March 15, 1972, a copy of which is attached hereto marked Exhibit E; The New York Times for March 19, 1972, p. 44, Grand Rapids, Mich. Press, March 16, 1972, Wilmington, Del. Press, March 15, 1972, Cleveland Plain Dealer, Louisville Kentucky Courier Journal, March 17, 1972; an article in the Wall Street Journal, March 16, 1972, p. 10, a copy of which is attached hereto marked Exhibit F. The AFL-CIO News, which is distiributed to members of AFL-CIO unions described this suit in an article carried on April 8, 1972, pp. 1 and 8, a copy of which is attached marked Exhibit G. The Wall Street Journal for December 1, 1972, pp. 1 and 19, a copy of which is attached hereto marked Exhibit H also described this suit. If this Court fails to designate this as a class suit or fails to make the class all inclusive, all females not included in the class whose claims arose more than six months ago and who have not filed charges may be barred by the six months statute of limitations included in Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-5(f)(1).

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April 16, 1973

EXHIBIT B.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON DISTRICT OFFICE
1717 H Street, N.W.
Washington, D. C. 20006

February 23, 1973

Re: TDC2-0604/YDC2-270

TO WHOM IT MAY CONCERN:

This is to confirm that the Equal Opportunity Commission received a charge of employment discrimination from Barbara S. Hall on December 13, 1971. This charge was filed against General Electric Company located at 1501 Roanoke Boulevard, Salem, Virginia, alleging sex discrimination in benefits and terms and conditions of employment.

/s/ TREADWELL O. PHILLIPS
Treadwell O. Phillips
Deputy Director
Washington District Office



EXHIBIT D.

Business Week, March 25, 1972

**Women press for maternity benefits**

Is maternity disabling? Depending on what the courts decide, this question could cost General Electric Co.–and hundreds of other companies–millions of dollars in increased insurance premiums. In a class action suit filed last week in U.S. District Court in Richmond, Va., the International Union of Electrical, Radio & Machine Workers charged that GE violated the 1964 Civil Rights Act by not paying disability benefits to women employees suffering from maternity-related ills.

Like GE, many companies do not pay such benefits during job absences stemming from pregnancy or childbirth. Some limit the benefits to shorter periods than for other conditions.

Naming seven women workers in GE's Salem (Va.) plant, the IUE acted on behalf of about 100,000 union and non-union women on GE's payroll in 1971. The union complaint charges that GE pays 26 weeks of disability benefits at 60% of straight-time weekly earnings "for every kind and type of non-occupational sickness and accident which any of its male employees has ever had." Winn Newman, IUE general counsel, argues that GE should do the same for maternity-related problems.
**Follow up.** To support its case, the union cites a May, 1971, finding of the Equal Employment Opportunity Commission that an employer violated Title VII of the Civil Rights Act by denying "female employees weekly benefits . . . for disability due to pregnancy."

In filing the suit, Newman says, the union is also trying to protect its own interests. Conceivably union members could sue the IUE jointly with GE or with any other company with which it has a similar contract, he says. To head off this possibility, the IUE has urged all its locals to file grievances on the maternity disability issue. One grievance is already on file—at General Motors' Delco Products Div. in Rochester, N.Y. GM pays six weeks of benefits for maternity-related absences, compared with varying, seniority-linked periods for other absences.

GE takes the IUE case seriously. The company paid medical benefits to some 5,000 pregnant women employees in 1971, a GE spokesman says. Assuming an average eligibility of $90 in disability payments, 26 weeks of payments would have cost the insurance company $12.7-million. It also would have cost GE a hefty increase in insurance premiums, the spokesman notes.

EXHIBIT E.

Richmond, Virginia
Times-Dispatch
March 15, 1972.

**Seven at Salem File Action Against GE**

SALEM (AP) – Seven women members of Salem Local 161. International Union of Electrical Workers, and the entire IUE have filed an action against General Electric Co. for sickness and accident benefits during pregnancy.



The sex-discrimination suit was filed in Wednesday in U.S. District Court for Eastern Virginia in Richmond.

The seven plaintiffs, who said General Electric refused to pay any weekly sickness and accident benefits during their pregnancies last year, said they are suing on behalf of all present and former female employes of General Electric at all its facilities. They seek a class action on behalf of the more than 100,000 women.

Plaintiffs in the suit are Martha V. Gilbert, Sharton E. Godfrey, Barbara Hall. Alberta B. Smith, Johnnie Taylor, Doris B. Wiley and Mary R. Williams.

Defendants in the civil action are General Electric and James Olin, Manager of the drive systems department at the Salem plant.

EXHIBIT F.

Wall Street Journal
March 16, 1972

**Female Employes File Discrimination Suit On GE Benefit Policy**

**Refusal of Sickness Payments For Pregnancy Is Civil Rights Violation, 7 Women, Union Say**

**Special to The Wall Street Journal**

SALEM, Va. – Seven female employes of General Electric Co.'s plant here filed a suit in U.S. district court in Richmond charging that the company refused to pay them

sickness and accident benefits for absences due to pregnancy and childbirth last year.

The suit was brought by the seven women, the International Union of Electrical Workers and its Local 161.

By refusing to pay the benefits, GE discriminated on the basis of sex, in violation of Title 7 of the 1964 Civil Rights Act, the union charged.

Sickness and accident benefits, amounting to 60% of wages, are paid for up to 26 weeks under the union's national contract with GE. In the suit the union said GE has paid male employes these benefits "for every kind and type of sickness and accident. . . ."

The suit asks the court to enter an injunction directing GE to pay the benefits to the seven plaintiffs and to other women employed by GE, damages, court costs and attorney fees.

The union said it represents 90,000 GE workers, at least a third of whom are women.

EXHIBIT G.

AFL-CIO News
April 8, 1972

**New Guidelines Tighten Rules On Sex Bias**

New guidelines designed to tighten the rules barring job discrimination based on sex have been published by the Equal Employment Opportunities Commission.



The broadened guidelines are advisory and do not have the force of law. They are intended to aid the courts, employers, unions and others on how the EEOC interprets Title VII of the Civil Rights Act of 1964 that bars discrimination based on sex.

The new guidelines hold that hiring policies that exclude women from jobs because of pregnancy violate the law and that health and insurance plan benefits must be extended to women workers disabled by pregnancy, miscarriage, abortion or childbirth.

The EEOC guidelines revised existing directives on women's protective legislation adopted by a number of states, extending to men certain benefits previously limited by the state laws to women. These include minimum wage laws, working age standards, premium overtime, special rest or meal periods and retirement ages.

States that do not bring their laws into conformity with EEOC guidelines may be open to court challenge on the ground that they are in violation of the Civil Rights Act.

The guidelines also are aimed at equalization of fringe benefits including medical, hospital, accident, life insurance and retirement benefits, profit-sharing and bonus plans, leave and other terms, conditions and privileges of employment.

Special attention was directed to distinctions such as "head of household" or "principal wage earner" status which confers greater benefits on men, and pension or retirement plans containing differentials based on sex.

Before publication of the guidelines in the Federal Register, the Electrical, Radio & Machine Workers had

filed suit in U.S. court in Richmond, Va., charging the General Electric Co., with sex discrimination because it refused to pay sickness benefits to seven women at its Salem, Va., plant for absences due to pregnancy and childbirth.

The IUE suit claimed that women workers unable to work because of pregnancy are entitled to the same sickness and accident benefits paid any other worker for non-occupational disability.

The union contended that GE's refusal to pay the benefits is a violation of Title VII of the 1964 Civil Rights Act because this section of the law forbids discriminatory employment practices on the basis of sex.

Sickness and accident benefits amounting to 60 percent of wages—with a maximum of $150 weekly—are paid for up to 26 weeks per disability under IUE's national contract with General Electric.

In its complaint, the union pointed out that GE has paid these benefits to male employes "for every kind and type of sickness and accident . . ." but has refused to pay "any female employe for any absence due to disability arising from, or related to, pregnancy or childbirth."

IUE represents about 90,000 GE workers, and at least one-third of these are women, the union said.



EXHIBIT H.

Wall Street Journal
December 1, 1972

## EXPECTANT MOTHERS

### Women Employes Seek Disability Coverage During Pregnancy Leave

**They Also Push for Improved Insurance, Old Jobs Back; Many Hurdles, Some Gains**

**'Paternity Leave' for Papas?**

By JAMES C. HYATT
Staff Reporter of The Wall Street Journal

Brian Smith doesn's look like the kind of kid to stir up a protest. At age 11 months, he's more engrossed in pulling himself up in his playpen than in pulling down established corporate custom.

But when Brian was born, his mother had to quit work without pay. She lost about $1,000 in wages, and she didn't like it. So 27-year-old Alberta Smith of Roanoke, Va., joined six other women workers and the *International Union of Electrical Workers* to sue General Electric Co. over policies at GE's Salem assembly plant. They charge that the company shows sex bias by refusing disability pay in maternity cases. "If a man hurt his finger, he'd get paid weekly disability benefits," Mrs. Smith complains.

As the challenge to GE indicates, women workers are taking up the cause of "maternity lib." They want to

choose, without interference from the boss, when they'll quit work to have a baby and when they'll return. They want disability pay while unable to work. They seek more generous employer contributions for insurance covering their doctor and hospital bills. And they don't want an argument about getting their old job back when they return to work.

**The Pregnant Captain**

The battle rages on several fronts:

—In courtrooms, employers including DuPont and National Can Corp. face government lawsuits alleging bias; Du Pont is accused on disability benefits, National Can on leave policies. Federal appeals courts have overturned leave policies in Ohio and Virginia schools, which required women to quit work early in their pregnancies. And an Air Force Captain who became pregnant is asking the Supreme Court to reverse her discharge from the service.

—In union complaints to state and federal anti-bias agencies, such big companies as Westinghouse Electric, AT&T and General Motors are being accused of discrimination; many complaints assert that sick-leave and disability benefits are available to men for almost any reason but that maternity coverage for women is barred.

—In bargaining sessions, unions and women workers are pushing for improved maternity leave, disability pay and other benefits. Under such pressure, Polaroid Corp., IBM and Commins Engine Co. have all recently liberalized policies; among others, Cummins now makes disability payments in maternity cases. And many other firms are reviewing their treatment of pregnant workers.

"Maternity lib" enjoys support from many women's organizations. Groups ranging from the National Organ-



ization for Women (NOW) to the Business and Professional Women's Clubs to a Catholic antiabortion group endorsed broader maternity benefits in a Wisconsin hearing this year.

**Much Opposition**

But to the amazement of many women, the issue seems to generate much more business opposition than do demands for equal pay and equal job opportunities. "This is the hottest issue confronting personnel men these days," asserts an official of the American Society for Personnel Administration. An actuary for a leading insurance firm adds, "This is a very emotional question."

Just the thought of paying for maternity time-off repels some bosses. "There's a distinct difference between maternity and sickness, although that's almost heresy as far as the Equal Employment Opportunity Commission is concerned," says James W. Hoose, director of industrial relations at Michigan Seamless Tube Co. "To pay a woman a salary during that period, when maternity is a matter of her choice, grates a little bit."

(Mrs. Smith, the GE worker, doesn't agree that maternity is purely a matter of choice. "Nobody is going out having babies to get a couple of pennies," she says. "Even with birth-control pills, women do get pregnant.")

And some employers worry that maternity disability benefits may be abused. They fear that doctors may be overly generous in certifying that a new mother is physically unable to return to work. Or they foresee that women will collect maternity disability checks and then quit work. "I'd imagine a number of employers would be looking closer at hiring women who've gone through the menopause," says one personnel man.

**"Temporary Disabilities"**

Much of the pressure for change comes from the Equal Employment Opportunity Commission in Washington. This four-man, one-woman commission takes the position that any employment policy ought to apply equally to men and women. To provide for a male leg broken in a skiing accident while ignoring a temporarily disabled pregnant woman is absurd and unfair, according to the EEOC. In guidelines issued last spring, it said pregnancy isn't a valid basis for refusing to hire, for discharging, laying off or denying promotions to women. For job purposes, the commission added, pregnancy, miscarriage, abortion, childbirth and recovery are "temporary disabilities and should be treated as such." The guidelines don't have the force of law, but the Supreme Court has indicated that it gives "great deference" to such administrative interpretations.

For employers, disability payments cause the deepest concern—and greatest potential cost. Companies often pay workers a percentage of their salary—70% is typical—when they're sick or injured and off the job. But most disability plans exclude or limit coverage for maternity. Even a generous plan may provide up to 26 weeks of disability pay for most injuries or illnesses, but only six weeks for maternity.

The cost of maternity disability benefits, of course, depends on the number and age of women workers, the number of babies they have and the length of time that new mothers stay off the job. Adding six weeks of maternity coverage to a typical disability plan costs an extra 10%, according to an official of Martin E. Segal Co., employe-benefit consultants. But one actuary estimates that in a group more than half female, maternity disability



coverage lasting 26 weeks could increase premium 80%.

General Electric estimates that providing up to 26 weeks of maternity disability payments could cost $4 million to $12 million a year, depending on actual usage; the company has more than 100,000 female workers. GE now pays up to 26 weeks of disability benefits at 60% of a worker's wage, up to a maximum of $150 a week, but it excludes maternity.

**Teachers' Suits**

Perhaps significantly, the lawsuit against GE is pending before U.S. District Judge Robert R. Merhige Jr., who last year ruled that the Chesterfield County, Va., school board couldn't require a teacher to quit after the fifth month of pregnancy; an appeals court upheld his decision. In a similar case this summer, two teachers won an appeals court finding that the Cleveland school system's maternity-leave policy discriminated against women. Pregnant teachers were required to take an unpaid leave five months before the birth of a child, and they couldn't return to work until the first school term after the child was three months old. Both courts said they found no medical justification for the rules.

Outside the courts, equal-rights agencies are seeing an increasing number of maternity-related cases. Leave policies have been attacked in charges filed by the Communications Workers against AT&T, by the *International Union of Electrical Workers* against Westinghouse, and by the United Auto Workers against General Motors, Ford and Chrysler.

Under all this pressure, many employers are softening up on motherhood. A recent Prentice-Hall survey of 108

companies found more than half at least considering new policies as a result of the EEOC guidelines. A 1965 survey had found only one firm in five letting a pregnant employe decide when to quit working; the latest poll found six out of 10 firms leaving the decision to the worker and her physician.

Recently, National Broadcasting Co. dropped a policy requiring a pregnant woman to quit in the seventh month and stay out three months after delivery. "Now she can go to the hospital right from work as long as the doctor approves," a spokesman says. "And if she can return the week after she delivers, terrific."

**Disability Benefits**

What's more important, more employers are offering disability benefits in maternity cases. Last year Cummins Engine made pregnancy a temporary disability for salaried women, and union contracts negotiated this year have adopted the same change for other women employed by Cummins. The disability payments amount to "a couple of weeks at most in an uncomplicated pregnancy," an official says.

Just recently, the Arma division of Ambac Industries Inc. in Garden City, N.Y., proposed changing union contracts to include up to 26 weeks of maternity disability benefits. "We know the requirements relating to women are becoming more strict," says Mel Stebbins, manager of employe relations.

Such changes won't be enough to satisfy all the "maternity lib" demands. Pressure is expected, too, for bolder innovations, such as expansion of employer-paid hospital insurance to include maternity care for unmarried women.



The EEOC guidelines have weakened corporate resistance to this step. In August, Blue Cross of Northeast Ohio offered holders of group policies a rider for single-person maternity coverage. "A dozen groups have enrolled," an official reports. "Companies think they're going to be under the gun eventually, and they're getting an early jump."

Other possible pattern-setters can be glimpsed now. The Delevan division of American Precision Industries, in East Aurora, N.Y., last December negotiated a liberalized leave policy for mothers of newly adopted children. The policy permits a six-months leave, without pay and without loss of seniority, when a child is adopted; previously, only a one-month leave was permitted.

And in current contract talks between the professional staff and City University of New York, the university has proposed formal leave policies for faculty members that could include paid "paternity leave" for new papas needed at home.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

ORDER
[Filed April 30, 1973]

In accordance with the memorandum this day filed, and deeming proper so to do, it is adjudged and ordered that:

1. Plaintiffs' motion to dismiss the counterclaim be, and the same is hereby, denied.

2. This action is declared a class action pursuant to Rule 23 (b)(1) and (2), F.R.C.P. The members of the plaintiff class are as follows:

(a) With respect to the issue of whether the failure of the defendant GE to pay sickness and accident benefits for periods of absence due to childbirth or other pregnancy related disabilities violates Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, this suit may be maintained as a class action under Rule 23 (b)(1) and (2) on behalf of a class composed of all females who are now or have been employed by the defendant GE on or after September 14, 1971, or who become employed by defendant GE during the pendency of this suit, at any of its plants, offices and shops whereever located, and also all females



whose claims or grievances against the defendant GE for sickness or accident benefits for a period of disability due to childbirth or other pregnancy-related disability were filed before September 14, 1971 and were still pending on September 14, 1971 or could still be timely filed on or after September 14, 1971;

(b) With respect to the issue of whether a judgment should be entered against the defendant GE requiring it to make whole employees who suffered losses as a result of the failure of the defendant GE to pay sickness and accident benefits for periods of absence due to childbirth or other pregnancy-related disability this suit may be maintained as a class action under Rule 23 (b)(1) and (2) on behalf of a subclass composed of all females who are now or have been employed by the defendant GE on or after September 14, 1971, or who become employed by defendant GE during the pendency of this suit, at any of its plants, offices and shops wherever located and who have been, are or become disabled from work due to childbirth or other pregnancy-related disability on or after September 14, 1971 and also all females whose claims or grievances against the defendant GE for sickness or accident benefits for a period of disability due to childbirth or other pregnancy-related disability were filed before September 14, 1971 and were still pending on September 14, 1971 or could

still be timely filed on or after September 14, 1971.

3. The following are designated as the representatives of the class: Martha V. Gilbert, Sharon Godfrey, Barbara Hall, Alberta B. Smith, Johnnie Taylor, Doris B. Wiley and Mary R. Williams.

4. Counsel are directed to appear before the Court on May 3, 1973 at 9:00 a.m. for the purpose of insuring that appropriate actions are taken to give notice to the plaintiff class of the pending of this action.

5. Plaintiff's motion to add parties plaintiff shall be, and the same is hereby, denied.

Let the Clerk send copies of this order and the memorandum to counsel of record.

/s/ Robert N. Merhige, Jr.
United States District Judge

Date: April 30, 1973.

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

[Filed April 30, 1973]

MEMORANDUM

Plaintiff female employees of defendant General Electric Company (GE) seek class relief from alleged sex employment discrimination practices by the defendant in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e). The employment practice complained of is GE's denial of sickness and disability benefits to employees absent because of pregnancy. The history of this litigation, which does not appear to be as complex as might be inferred from the amount of pleadings and other documents contained in the file, has been recited in previous memoranda of the Court and need not be repeated here. See memoranda of September 25, 1972, 347 F. Supp. 1058, and February 6, 1973. The parties are again before the Court prior to trial pursuant to three motions:

1) Plaintiffs' motion to dismiss GE's counterclaim.

2) GE's motion for definition of size of class, designation of class representatives and issuance of notice to class members.

3) Plaintiff's motion to add parties plaintiff.

Counsel have briefed their respective positions, and it is upon the memoranda and records before it that the Court

finds these matters ready for disposition. The motions and issues raised with respect to each shall be considered in turn.

I. Motion to Dismiss the Counterclaim

GE's counterclaim reads as follows:

> 1. The non-occupational sickness and accident insurance referred to in the complaint is made applicable and available to GE employees within the collective bargaining units represented by plaintiff International Union and its affiliated IUE (AFL-CIO) Locals[1] pursuant to, and solely as the result of, a negotiated Pension and Insurance Agreement between GE and plaintiff International Union and its affiliated IUE (AFL-CIO) Locals, including plaintiff Local 161, which was signed February 4, 1970, and by its terms is effective until May 26, 1973. Such Pension and Insurance Agreement provides that non-occupational sickness and accident benefit payments are not payable for any absence due to pregnancy or childbirth or to complications in connection therewith.
>
> 2. GE's failure to pay non-occupational sickness and accident benefits to GE employees within collective bargaining units represented by plaintiff International Union and plaintiff Local 161 for absences due to pregnancy or childbirth or to complications in connection therewith, has been in

[1] The named plaintiffs to this action include the International Union of Electrical, Radio and Machine Workers, AFL-CIO and Local 161 of said union.



> accordance with the terms and provisions of the aforesaid Pension and Insurance Agreement. If such failure by GE is unlawful, complete and appropriate relief therefore under Section 706(g) of Title VII of the Civil Rights Act of 1964 as amended, can be obtained only if directed against plaintiff labor organizations as well as GE.
>
> 3. In the event that GE is held to be liable in damages or otherwise for acts or omissions alleged in the complaint and effected pursuant to and in accordance with the aforesaid Pension and Insurance Agreement signed on February 4, 1970, GE asserts a right of contribution from, and indemnification by, plaintiff International Union and plaintiff Local 161 in respect to any such liability.

The Union's first asserted ground in support of its motion is the failure of GE to allege that the unions have engaged in any unlawful employment practice or caused GE to do so. The unions argue that said failure is fatal to the counterclaim because:

> If any right of contribution or indemnification against a counterdefendant ever exists under Title VII, it must obviously be based on some finding that there was either a violation of Title VII by the counterdefendant or that the counterdefendant could or attempted to cause the counterplaintiff to commit an unlawful employment practice.

The unions further urge that being a signatory to a collective bargaining agreement which contains a discriminatory provision is not violation of Title VII and that further,

the unions have labored since February, 1972 to alter the contract provisions in question when the law on this matter "became clear."

GE disputes that the unions made a good faith effort to alter the pregnancy benefit portions of the contracts in question and cite case law in support of its position that being a signatory to a contract with discriminatory provisions may render a union liable on counterclaims for contribution by a defendant employer.

*Blanton v. Southern Bell Telephone & Telegraph Company*, 49 FRD 162 (N.D. Ga. 1970), cited by GE, is a well-reasoned decision closely on point. Plaintiffs in *Blanton* included female employees, who alleged employment discrimination on the basis of sex, and the union to which they belonged. Southern Bell filed a counterclaim against the union alleging that challenged provisions in the employment contract evolved from free and open bargaining sessions between the union and Southern Bell and that therefore, if any said provisions were found illegally discriminatory then the union was equally responsible. That shared responsibility was urged as the basis for a claim for contribution in case plaintiffs were to recover. The union, as here, moved to dismiss on the ground that the counterclaim was jurisdictionally defective by virtue of Southern Bell's failure to raise same before the EEOC pursuant to 42 U.S.C. § 2000(e)-5(e). The *Blanton* court dismissed this contention finding that the counterclaim "appears to be in the nature of a claim against a joint tortfeasor rather than a claim under the Civil Rights Act." 49 FRD at 163. Though doubting the ultimate viability of the counterclaim, the court concluded that for purpose of Rule 13, F.R.C.P., a proper counterclaim was stated. See also, *Osborne v. McCall Printing Co.*, 4 FEP Cases 276 (S.D. Ohio 1972).



It is conceivable, of course, that a counterclaim may be brought either under theories of tort law or Title VII or both. While the court does not embrace the seemingly restrictive view of *Blanton*, it does concur that a claim in tort is colorable.

This view, that a union freely a party to a negotiated contract with illegal provisions may potentially be held liable as a joint tortfeaser upon a counterclaim, is tacitly acceptable as well by the District Court in *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332, 358 (S.D. Ind. 1967), *mod on other grounds*, 416 F.2d 711, 719 (7th Cir. 1969).[2] *Bowe*, however, adds that a change in the law, occurring after the date of the contract signing, which renders portions of the contract illegal will free a union from liability if efforts were made by the union to alter the effect or stop the implementation of the challenged provisions from the time the law became clear. See also, EEOC Dec. No. 70-112, 2EPG ¶6108 (9-5-69).

Against these principles of law, which the Court for these purposes adopts as appropriate interpretations, the respective parties here have set forth conflicting factual allegations. The plaintiff unions allege that 1) the contract provisions complained of were not the result of free negotiations,[3] 2) since the issuance of EEOC Decision No. 71-1471, 3 EPG Par. 6221, 3FEP Cases 588 (3/19/71) holding

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[2] On appeal, the United States Court of Appeals for the Seventh Circuit viewed the claim against the union as one brought under Title VII. Because Title VII procedures were not complied with, the Court of Appeals affirmed the District Court's dismissal of the claim.

[3] The decision in support of this allegation cited coercive bargaining techniques utilized by GE and reprimanded in NLRB Proceedings

(continued)

that disparate treatment of pregnancy related inabilities constituted sex discrimination, the unions have consistently sought to recover sickness and accident benefits for pregnant employees. GE denies both allegations, citing particularly "real" negotiations in 1969-70 for the 1970-1973GE-IUE Pension and Insurance Agreement. GE further avers that it was under no obligation to respond to a February, 1972 union proposal to change the disputed provisions by virtue of Section 8(d) of the National Labor Relations Act, as amended 29 U.S.C. § 158(d), which provides that neither party need discuss or agree to contract modifications to become effective before the contract terms or questions can be reopened under the contract.

The proper issue, in the Court's view, is whether or not the union sought to gain for its members relief from the disputed pregnancy benefits clauses at the time the law became clear. *Bowe, supra.* In so stating, the Court is aware that the law under Title VII has been quickly evolving. To gain ultimate recovery under a theory of Tort liability, it would appear that the union need show that at the time of the 1970 negotiations the union was aware that the disputed contract provisions were illegal but freely agreed to them. This showing, in turn, would necessitate proof by GE that:

1) The terms are in fact illegal.

2) The terms were illegal in 1970, or that the unions did not act to alter or prevent their implementation at the time knowledge of their illegality was acquired.

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3 (continued) in Gen. Electric Company, 150 NLRB 192, 207, 209, 237, 258, 271 (1963-69), enforced NLRB v. Gen. Elec., 418 F.2d 736 (2nd Cir. 1969).



3) The above malfeasance, if existent, states a claim for which relief can be granted.[4]

Though these factual issues may well be determinable upon the voluminous record before it, the Court, at this late stage, choses not to exercise its discretion under Rule 12(c), FRCP, to construe the present motion to dismiss as a motion for judgment on the pleadings and to search the record thereby to determine these issues. The Court is hopeful, however, that evidence at trial will be offered in a manner consistent with these views.

The union's further grounds in support of its motion to dismiss the counterclaim have been dealt with, *inter alia,* in the foregoing discussion. The second ground asserts that the counterclaim does not state a course of action for which relief may be granted. In view of *Blanton, supra,* and *Bowe, supra,* the court is disinclined to accept this view but reserves its ultimate decision pending appropriate memoranda or argument at trial.[5]

The third ground asserted is that a claim for contribution is not ripe at this stage and therefore not presently justiciable. This Court has previously rejected this reasoning in connection with a third party claim, ruling that a claim for contribution is "ripe" and permissible under Rule

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4 The union urges that no such claim exists under federal common law. Without prejudging the matter, said claim amy exist under state law, over which the Court may chose to take pendent jurisdiction, or in fact in federal law, over which the Court may chose to take ancillary jurisdiction.

5 With time short before trial of this action, the Court will not now direct memoranda on this issue.

14, F.R.C.P. *Bell v. Federal Reserve Board,* __F. Supp. __, CA 51C-72-R (E.D. Va. 1972). That rationale is applicable here: The liberal spirit of the Federal Rules mandate avoidance of duplicative litigation. The Court will therefore allow GE to maintain its counterclaim in tort pursuant to Rule 13, F.R.C.P.

The final grounds asserted essentially aver that the counterclaim is jurisdictionally barred by the absence of proper EEOC proceedings against the unions pursuant to 42 U.S.C. §§ 2000e-5(e) and 5(f)(1). These contentions are well taken. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969). GE may maintain this counterclaim upon the theory of Title VII violations.

The Court will, however, allow GE to pursue its claim under a theory of tort liability conditioned on a proper showing in accordance with the aforementioned principles. At this stage, therefore, the union's motion to dismiss the counterclaim shall be denied.

## II. Motions with Respect to Class

General Electric moves for an order defining plaintiff class as consisting of either:

> (a) those similarly situated female employees employed at defendant's Salem, Virginia plant who, during the period commencing ninety days prior to a date in December 1971 or January 1972 (the earliest date on which any of the charges of discrimination was filed) and ending on the date of the filing of the complaint, were denied non-occupational sickness and accident insurance benefits for absences from employment due to pregnancy or resulting childbirth; or



> (b) those similarly situated female employees employed at GE's plants who are represented for purposes of collective bargaining by plaintiff International Union and its affiliated IUE (AFL-CIO) Locals, and who, during the period commencing ninety days prior to a date in December 1971 or January 1972 and ending on the date of the filing of the complaint, were denied non-occupational sickness and accident insurance benefits for absences from employment due to pregnancy or resulting childbirth.

Plaintiffs, on the other hand, pray for a two part class definition with respect to declaratory relief, a class is sought to include:

> "All females who are now or have been employed by the defendant GE on or after September 14, 1971, or who became employed by defendant GE during the pendency of this suit, at any of its plants, offices and shops wherever located and also all females whose claims or grievances against the defendant GE for sickness or accident benefits for a period of disability due to childbirth or other pregnancy related disability were filed before September 17, 1971 and were still pending on September 14, 1971 or could still be timely filed on or after September 19, 1971.

With respect to monetary relief, a sub-class is sought to include all those in the above class who become disabled from work by reason of pregnancy or who filed claims with respect to pregnancy with GE. The first class would member approximately 100,000 employees, the sub-class, 5659 employees.

The Court has little difficulty with this issue, concluding that plaintiffs' position is well-taken.

The four requisites set out in Rule 23(a), F.R.C.P., require 1) that the class be so numerous that joinder of all members is impractical. Since GE allegedly has 100,000 female employees, the number of women workers with a stake in the outcome of this litigation is obviously large enough to meet this criterion; 2) that there are questions of law or fact common to the class. All GE employees, whether represented by unions or not, are covered by the General Electric Insurance Plan with Comprehensive Medical Expense Benefits, as amended January 16, 1970. The pregnancy benefit exclusion applies equally to all women employees. Further, because GE insists upon a uniform policy, the major unions representing GE workers have since 1965 established a coordinated bargaining committee whereby those unions choosing to participate formulate common demands in this regard. It is therefore clear that questions of law and fact raised here by the named plaintiffs are common to the entire class. By virtue of these facts, it is likewise clear that the third condition, that 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class. Finally, the Court is satisfied that 4) the parties will fairly and adequately protect the interest of the class. In short, it would be difficult to conceive of a class more appropriate under Rule 23 than that proposed by plaintiffs. These considerations apply as well to the sub-class seeking monetary relief. Plaintiffs assert that the class should accrue from September 14, 1971. GE proffers that the proper date should be measured at 90 days prior to the earliest date of filing of charges with the EEOC by a class representative. *Diaz v. Pan American World Airways,* 346 F. Supp. 1301 (S.D. Fla. 1972). Plaintiff Barbara Hall filed with the EEOC on December 13, 1971.



Plaintiffs proffered accrual date of September 14, 1971 is therefore in accord with defendants position and the law on the subject and will be adopted by the Court.

As a final matter, the Court will designate the original named personal plaintiffs, excluding the unions and named plaintiffs to the amended complaint, as the class representatives.

Because of the preceding adjudication with respect to the class, addition of further named plaintiffs to this action is unnecessary. Plaintiff's motion in this regard shall be denied.

An appropriate order shall enter. It will, *inter alia,* direct that counsel meet to confer with the Court to establish appropriate procedures for providing notice to the class pursuant to Rule 23(d)(2).

/s/ ROBERT A. MERHIGE
Robert A. Merhige
United States District Judge

April 30, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

[Lodged with the clerk, May 9, 1973; filed May 15, 1973]

## MOTION TO BRING IN THIRD-PARTY DEFENDANTS

Defendant, General Electric Company, by counsel, moves this court for leave to file a third-party complaint on International Union of Electrical, Radio and Machine Workers, United Electrical, Radio and Machine Workers of America, Local 124, International Association of Machinists, Local 10, International Union of Electrical, Radio and Machine Workers, Local 161, and All Other International and Local Unions Representing Present and Former Female Employees of the Defendant, which Unions are Signatory to Collective Bargaining Agreements with the Defendant, based upon the attached affidavit, Exhibit A. A copy of the third-party complaint is attached hereto as Exhibit B.

GENERAL ELECTRIC COMPANY

By /s/ JOHN S. BATTLE, JR.
John S. Battle, Jr.
Of Counsel

John S. Battle, Jr.
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Va. 23219

[Certificate of service omitted in printing]



IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## AFFIDAVIT OF THOMAS F. HILBERT, JR.

DISTRICT OF COLUMBIA :
CITY OF WASHINGTON : SS

Thomas F. Hilbert, Jr., being duly sworn says:

(1) I am Thomas F. Hilbert, Jr. and have been an Attorney with General Electric Company since 1950; since 1960 I have been Labor Relations Counsel for that Company with an office at 570 Lexington Avenue, New York, City.

(2) I am making this affidavit in support of defendant's motion for leave to file a third party class action against unions with whom General Electric Company has signed collective bargaining agreements.

(3) The NLRB has over the past years certified a number of unions as collective bargaining representatives of various units of General Electric Company employees.

(4) Many of such certifications have been issued to IUE and various IUE locals who are currently involved in this lawsuit.

(5) Certifications have also been issued to other international unions and their locals, notably United Electrical Radio & Machine Workers of America, United Automobile

Workers of America, International Association of Machinists, International Brotherhood of Teamsters, International Brotherhood of Electrical Workers, United Steelworkers of America, Allied Industrial Workers, American Federation of Technical Engineers, Sheet Metal Workers, United Plate Glass Workers of America, American Flint Glass Workers of America, International Union of Plant Protection Employees, Machinists Educational Society of America, as well as three independent unions, Syracuse Draftsmen Association, Independent Association of Technical & Clerical Personnel, and Association of Engineering and Laboratory Assistants. A complete list of such unions, the assigned locals and their work locations and employment figures is attached hereto as Attachment A.

(6) Following NLRB certifications of such unions, the Company has bargained collectively with them and has reached and signed agreements as a result of such bargaining. In all such instances, except IUE and UE units, local company management at the plant or other work location for which the union was certified, has negotiated on a local basis with the certified union, and has signed a collective agreement limited to the specific bargaining unit certified at that location. In the case of UE, the Company has negotiated a series of multi-unit contracts, covering all the separate UE locals certified at GE locations. (The current GE-UE National Agreement is attached hereto as Attachment B.)

(7) The latest such agreements were negotiated with and signed by unions and locals in late 1969 and early 1970, and will terminate on or about May 26, 1973. Such agreements contain insurance provisions granting weekly sickness and accident benefits similar to those contained in the 1970 GE-IUE Pension and Insurance Agreement. As in the IUE agreement, the other union agreements do not provide weekly payment for absences due to pregnancy.



(8) Prior to the expiration of these contracts, GE cannot alter the terms of the collective bargaining contract without the consent of the signatory unions.

(9) After the expiration fo the contracts, GE must bargain to an impasse with the unions representing its employees before making any unilateral changes in the terms and conditions of employment.

/s/ THOMAS F. HILBERT, JR.
Thomas F. Hilbert, Jr.

[Jurat omitted in printing]

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## GENERAL ELECTRIC COMPANY

| Location | Union | Local | Number in Unit Total | Number in Unit Women | Termination Date of Contract * |
|---|---|---|---|---|---|
| Albuquerque, N.M. | IAM | 794 | 804 | 24 | |
| Auburn, N.Y. | IAM | 967 | 885 | 718 | |
| Bellevue, Ohio | IAM | 2159 | 549 | 449 | |
| Bloomington, Ill. | IAM | 1000 | 775 | 384 | 6/24/73 |
| Bucyrus, Ohio - Glass Plant | IAM | 2165 | 55 | 4 | |
| Chicago, Ill. - Serv. Shop | IAM | 8 | 121 | 9 | |
| Danville, Ill. | (IAM | 2076 | 997 | 765 | |
| | (IAM | 710C | 30 | 1 | |
| Evendale, Ohio | IAM | 912 | 1220 | 101 | |
| Fort Wayne, Ind. | IAM | 70 | 610 | 1 | 6/16/73 |
| Louisville, Ky. | IAM | 2409 | 329 | 1 | |
| Milwaukee, Wisc. - Medical Sys. | IAM | 1916 | 1411 | 311 | |
| Richmond, Va. - Serv. Shop | IAM | 10 | 49 | 1 | |
| Rockford, Ill. | IAM | 1553 | 281 | 183 | |
| Salt Lake City, Utah - Serv. Shop | IAM | 1525 | 77 | 3 | |
| San Jose, Calif. - Atomic Power Plant | IAM | 93 | 440 | 132 | |

* Termination date May 26, 1973 unless otherwise noted.



| Location | Union | Local | Number in Unit Total | Number in Unit Women | Termination Date of Contract * |
|---|---|---|---|---|---|
| South Portland, Me. | IAM | 2139 | 466 | 1 | |
| Utica, N.Y. - French Rd. Plant | (IAM | 1669 | 1139 | 519 | 6/17/73 |
| | (IAM | 784 | 135 | 8 | 6/10/73 |
| Utica, N.Y. - Receiver Plant | IAM | 558 | 186 | 62 | 6/9/73 |
| York, Pa. - | IAM | D-98 | 21 | 1 | |
| Avon, Ohio | IBEW | 2283 | 44 | 18 | 6/30/73 |
| Baltimore, Md. - Serv. Shop | IBEW | 1805 | 61 | 1 | |
| Birmington, Ala. - Serv. Shop | IBEW | 1871 | 20 | 111 | |
| Bloomington, Ind. | IBEW | 2249 | 1314 | 501 | |
| Blue Ash, Ohio | IBEW | 1198 | 230 | 2 | |
| Buffalo, N.Y. Serv. Shop | IBEW | 1813 | 54 | 2 | |
| Chamblee, Ga. - Serv. Shop | IBEW | 613 | 116 | 15 | 6/10/73 |
| Chicago/Cicero, ILL. | IBEW | 134 | 59 | 1 | |
| Cleveland, Ohio – Euclid Lamp | IBEW | 1377 | 1007 | 812 | |
| Gainesville, Fla. | IBEW | 2156 | 9911 | 821 | |

* Termination date May 26, 1973 unless otherwise noted.

| Location | Union | Local | Number in Unit Total | Number in Unit Women | Termination Date of Contract |
|---|---|---|---|---|---|
| Houston, TX- Serv. Shop | IBEW | 716 | 84 | 3 | |
| Jackson, Miss.-Glass Plant | IBEW | 1493 | 53 | 1 | |
| Jackson, Miss.-Lamp Plant | IBEW | 1435 | 322 | 207 | |
| Lexington, Ky.-Lamp Works | IBEW | 183 | 291 | 220 | |
| Lexington, Ky.-Glass Wks. | IBEW | 183 | 73 | 24 | |
| Medford, Mass.-Svc. Shop | IBEW | 1014 | 78 | 6 | |
| New Concord, Ohio -DFSD | IBEW | 2111 | 207 | 60 | |
| North Bergen, N.J. - Svc. Shop | IBEW | 3 | 167 | 7 | |
| North Hollywood, Calif. | IBEW | 1710 | 95 | 14 | |
| Portland, Ore.-Svc. Shop | IBEW | 49 | 44 | 2 | |
| San Leandro, Calif. | IBEW | 2131 | 95 | 5 | |
| Seattle, Wash. | IBEW | 46 | 35 | 1 | |
| Toledo, Ohio - Svc. Shop | IBEW | 1076 | 25 | 2 | |
| Tucson, Ariz. | IBEW | 1116 | 66 | 39 | |
| Van Nuys, Calif. | IBEW | 1710 | 46 | 23 | 7/15/73 |
| Oklahoma City, GESCO | IBEW | 1411 | 14 | 4 | |



| Location | Union | Local | Number in Unit Total | Number in Unit Women | Termination Date of Contract* |
|---|---|---|---|---|---|
| Detroit, Mich. | UAW | 771 | 874 | 63 | |
| Edmore, Mich. | UAW | 1436 | 471 | 88 | 6/23/73 |
| Evendale, Ohio | UAW | 647 | 3764 | 316 | |
| Fort Smith, Ark. | UAW | 716 | 53 | 9 | 6/11/73 |
| Milwaukee, Wisc.- Hotpoint | UAW | 261 | 634 | 91 | |
| Paterson/Fairlawn, N.J. | UAW | 191 | 310 | 29 | |
| Shelbyville, Ind. | UAW | – | 593 | 232 | |
| Omaha, Neb. | IBT | 554 | 9 | 6 | |
| Erie, Pa. | AFTE | 138 | 247 | 17 | 7/1/73 |
| Hudson Falls/Ft. Edward, N.Y. | AFTE | 143 | 10 | 1 | |
| Lynn River Works | AFTE | 142 | 410 | 20 | |
| Philadelphia, Pa. | AFTE | 13 | 288 | 44 | |
| Pittsfield, Mass. | AFTE | 140 | 366 | 27 | |
| Schenectady, N.Y. (Commercial) | AFTE | 147 | 769 | 83 | 6/3/73 |
| Schenectady, N.Y. (KAPL) | AFTE | 147 | 102 | 6 | 6/3/73 |
| West Lynn & Wilmington, Mass. | AFTE | 142 | 66 | 2 | |

* Termination date May 26, 1973 unless otherwise noted.

| Location | Union | Local | Number in Unit Total | Number in Unit Women | Termination Date of Contract* |
|---|---|---|---|---|---|
| Chamblee, Ga. | IATCP | – | 65 | 25 | |
| Chicago/ Cicero, Ill. | SMW | 571 | 3786 | 594 | |
| Seattle, Wash. | SMW | 383 | 34 | 7 | |
| Cleveland, Ohio - Lamp Div. | UPGWA | 675 | 75 | 1 | |
| Decatur, Ill. | AIW | 955 | 1548 | 1243 | |
| Owensboro, Ky. | AIW | 783 | 2723 | 2199 | 8/19/73 |
| Logan, Ohio | AFGW | 1017 | 148 | 17 | |
| Syracuse, N.Y. | IUPPE | 5 | 64 | 3 | |
| Philadelphia, Pa. | AEEA | – | 68 | 4 | |
| Syracuse, N.Y. | Draftsmen (Ind.) | – | 146 | 13 | |
| Tiffin, Ohio | MESA | 55 | 6 | 3 | |
| Coshocton | USW | 4377 | 775 | 63 | |

* Termination date May 26, 1973 unless otherwise noted.



## PREAMBLE

This Agreement (referred to as the 1970-1973 GE-UE National Agrement) which succeeds prior Agreements (first effective the 2nd day of April, 1956 and modified as of October 24, 1960, September 6, 1963 and October 3, 1966) is entered into as of January 26, 1970 by and between the GENERAL ELECTRIC COMPANY (hereinafter referred to as the "Company") and the UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) (hereinafter referred to as the "Union"), acting for itself and on behalf of its below-listed affiliated UE Locals, currently certified as collective bargaining representatives of Company employees, which ratifiy this Agreement as set forth herein and such other UE Locals as may hereafter be certified as collective bargaining representatives of Company employees (each referred to individually as the "Local").

The currently certified UE Locals are bargaining units covered by this Agreement are as follows:

Local 120, Baltimore, Md. (Locke)
Local 124, Waynesboro, Va.
Local 128, Allentown, Pa.
Local 205, Ashland, Mass.
Local 211, Bridgeport, Conn. (Powerhouse)
Local 297, Lowell, Mass.
Local 310, Elmira, N.Y.
Local 327, Johnson City, N.Y.
Local 332, Fort Edward and Hudson Falls, N.Y.
Local 334, Rochester, N.Y. (DFSD)
Local 506, Erie, Pa.
Local 618, Erie, Pa.
Local 506, Erie, Pa. (Reconditioning Shop)

Local 618, Erie, Pa. (Reconditioning Shop)
Local 703, Akron, Ohio (Service Center)
Local 707, Cleveland, Ohio (DFSD)
Local 707, Cleveland, Ohio (DFSD–Great Lakes District)
Local 731, Conneaut, Ohio
Local 751, Niles, Ohio (Glass Plant)
Local 751, Niles, Ohio (Mahoning Glass)
Local 769, Indianapolis, Ind. (Service Shop)
Local 924, Decatur, Ind.
Local 947, Detroit, Mich. (Service Shop)
Local 947, Flint, Mich. (Service Shop)
Local 1010, Ontario, Calif. (Aircraft Service Shop, Los Angeles)
Local 1012, Ontario, Calif. (Appliance)
Local 1412, Oakland, Calif. (Transformer)
Local 1412, Oakland, Calif. (Service Shop)
Local 1412, San Francisco, Calif. (Service Center)
Local 1421, Los Angeles, Calif. (Service Shop)

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## MOTION TO BRING IN ADDITIONAL DEFENDANTS, OR, IN THE ALTERNATIVE TO DISMISS THE COMPLAINT
(Filed May 8, 1973)

Comes now the defendant, General Electric Company, by counsel, pursuant to Rules 19 and 21 of the Federal Rules of Civil Procedure and moves the court for an order compelling the joinder as indispensable defendants of all international and local unions representing present and former female employees of the defendant, which unions are signatory to collective bargaining agreements with the defendant.

In the alternative, the defendant moves to dismiss the claims of the plaintiffs and plaintiff class for failure to join these indispensable party defendants.

GENERAL ELECTRIC COMPANY

By /s/ JOHN S. BATTLE, JR.
Of Counsel

John S. Battle, Jr.
McGuire, Woods & Battle
1400 Ross Building
Richmond, Va. 23219

[Certificate of service omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND VIRGINIA

[Title omitted in printing]

* * * * *

## OPPOSITION OF PLAINTIFFS TO MOTION OF DEFENDANT GENERAL ELECTRIC COMPANY TO BRING IN ADDITIONAL DEFENDANTS, OR, IN THE ALTERNATIVE TO DISMISS THE COMPLAINT

(Filed May 11, 1973)

The plaintiffs oppose the motion of the defendant General Electric Company to bring in additional defendants, or, in the alternative to dismiss the complaint, and as grounds for such opposition state:

1. There are no persons or organizations not named as parties to this suit whose absence will prevent the Court from affording full relief to persons already party to the suit.

2. There is no person or organization not named as a party to this suit who claims any interest in the subject matter of this suit and who is so situated that his absence will impair or impede his ability to protect all his interests or leave the defendant GE subject to any risk of double, multiple or otherwise inconsistent obligations by reason of his claimed interest.

3. There is no union which would be adversely affected if the relief requested by the plaintiffs herein is granted. The other major unions which represent employees of the defendant GE are at the present time seeking from the defendant GE contractual provisions



which would obligate the defendant GE to pay to females for absences because of a disability due to pregnancy or resulting childbirth or to complications in connection therewith. A copy of the Statement of Policy on the Basic Bargaining Goals of GE-Westinghouse Unions in 1973 adopted by the Steering Committee of the Coordinated Bargaining Committee of GE-Westinghouse Unions is attached hereto as Exhibit A and made a part hereof. Page 4 thereof 1st column contains the statement of a policy to eliminate all provisions which discriminate against pregnant employees. Page 4 thereof lists the names and union representation of the members of the steering committee. When the list of labor organizations represented on this steering committee is compared with the list of unions on Exhibit A to the Affidavit of Thomas F. Hilbert, Jr., attached to the Motion To Bring In Third-Party Defendants it appears that all except 50 of the females employed by defendant GE who have union representation are represented by the plaintiff International Union or some other union member of the Coordinated Bargaining Committee. A copy of the Race and Sex Discrimination Proposal adopted unanimously by said Steering Committee on January 15, 1973 as the proposal which each union would submit to defendant GE as its bargaining demand in implementation of the foregoing Statement of Policy is attached hereto marked Exhibit B and made a part hereof. The third sentence of Section 21(d) thereof shows that these unions are seeking sickness and disability benefits for pregnancy related disabilities the same as for any other disability.

4. As further appears from the affidavit of Thomas F. Hilbert, Jr., attached to the Motion To Bring In Third Party Defendants, and marked as Exhibit A, all of the contracts with other unions will expire prior to the trial date

set in this case except one contract with the Allied Industrial Workers applicable to the Owensboro, Kentucky plant of defendant GE which will expire on August 19, 1973. The Allied Industrial Workers is a member of the Coordinated Bargaining Committee and seeks the same provisions as would result should the relief prayed in the complaint be granted.

5. The defendant GE at all times here material has maintained a "uniformity policy" pursuant to which the defendant GE insisted on having its General Electric Insurance Plan apply to all its employees, whether represented by the plaintiff International Union, by other unions or by no union. The National Labor Relations Board in *General Electric Company*, 192, 272, fn. 119, enforced 418 F.2d 736, 741, 752 (2d Cir. 1969), cert. denied 357 U.S. 965 (1970) found that by its insistence on uniformity the defendant GE had refused to bargain collectively with the plaintiff International Union and all other unions with respect to changes in its insurance plan. Charges that the defendant GE had refused to bargain collectively during the 1963, 1966 and 1969-1970 negotiations were filed. The charges with respect to the 1963 negotiations were filed jointly by the plaintiff International Union, the United Automobile, Aerospace and Agricultural Implement Workers (UAW) and the United Steelworkers of America (USA), all as more fully appears from a copy of such charges marked Exhibit C and attached hereto. The National Labor Relations Board upon investigation determined that in the later years the defendant GE had engaged in the same refusal to bargain collectively as occurred in 1960 but declined to issue a complaint as proceedings would be merely a duplication of the findings and order issued in 150 NLRB 192 which had not yet been enforced by the courts, all as more fully appears from the letter of



Ivan C. McCleod, Regional Director, NLRB to the plaintiff International Union dated October 11, 1968, a copy of which is attached hereto marked Exhibit D and made a part hereof.

The NLRB did issue a complaint in connection with the 1966 negotiations which resulted in a finding that the defendant GE had engaged in an unlawful refusal to bargain. *General Electric Co.*, 173 NLRB 253 (1968) enforced as modified 412 F.2d 512 (2d Cir. 1969). The plaintiff International Union filed charges of unlawful refusal to bargain in 1969-1970 but the NLRB refused to issue a complaint. NLRB Case No. 2-CA-11953.

6. The defendant GE has insisted on its uniformity policy to such an extent that it has refused to include any mention of the plaintiff International Union or any other union in the General Electric Insurance Plan. The defendant GE distributes to all its employees whether represented by the plaintiff International Union, other unions or no union the pamphlet entitled General Electric Insurance Plan with Comprehensive Medical Expense Benefits, As Amended January 26, 1970 ERB-32D, a copy of which is attached hereto marked Exhibit E and made a part hereof. The collective bargaining agreement which the defendant GE has entered into with the plaintiff International Union and with the other unions representing its employees in no case sets forth any terms and conditions respecting the payment of weekly sickness and accident benefits but merely states that the defendant GE agrees to pay the benefits set forth in the General Electric Insurance Plan. In these circumstances the relief here requested would not deprive any union of any contractual benefit. There is no basis for assuming that any union would object to having this Court hold that the benefits

which the defendant GE is lawfully required to pay are greater than those expressly specified in the General Electric Insurance Plan.

7. The defendant GE has taken the position that all of the other unions with which it has contracts stand in the same position as the plaintiff International Union, with respect to the issues here involved. As appears from page 2, paragraph 6 of the affidavit of Thomas F. Hilbert Jr., attached to the Opposition of Defendant General Electric Company To Motion To Dismiss Counterclaim, the plaintiff International Union included among its bargaining demands in 1955, 1963, 1966 and 1969 a proposal that the defendant GE remove from the General Electric Insurance Plan the language excluding pregnancy-related disabilities and grant six weeks of weekly sickness and accident benefits. With all the other unions admittedly standing in the same position as the plaintiff International Union in this regard, they have no interest which would be adversely affected by the relief here prayed.

8. All of the unions representing female employees of the defendant GE are fully aware of the existence of this suit. They all have competent legal advice. Should any of them deem any of the relief herein prayed inconsistent with its interests, it will move for leave to intervene.

For the foregoing reasons it is respectfully urged that this Court should deny the motion of defendant GE to bring in additional defendants, or, in the alternative to dismiss the complaint.



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Insurance Building
10 South 10th Street
Richmond, Virginia 23219
Phone: 703-649-3415

Winn Newman
Ruth Weyand
1126 16th Street, N.W.
Washington, D. C. 20036

Attorneys for Plaintiffs

May 10, 1973

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EXHIBIT A.

**STATEMENT OF POLICY**

**ON THE BASIC BARGAINING GOALS OF GE-WESTINGHOUSE UNIONS IN 1973**

**Adopted by the Steering Committee of the Coordinated Bargaining Committee of GE-Westinghouse Unions**

The Steering Committee of the Coordinated Bargaining Committee, representing the members of 14 international unions who are employed by the General Electric and Westinghouse companies, is charged with formulating a wage policy and national bargaining goals which will result in realistic, attainable and justifiable benefits for those whose labor is the life-blood of these corporations.

After conducting Grass Roots meetings throughout the country, the Steering Committee will evolve general guidelines broadly applicable to both GE and Westinghouse It will be the responsibility of the bargaining committees of the various unions to implement these national goals through negotiations for the units they represent.

* * *

In these troubled and uncertain times, our members rightly look to their unions for solutions. Our experience over the last seven years has proved that only through the united action of all our organizations can effective progress be made. In that spirit we recommend the policies set forth below.

* * *

**ANTI-DISCRIMINATION**

The Equal Employment Opportunity Commission has found that GE and Westinghouse are violating federal law by such practices as the maintenance of discriminatory hiring and pay schedules for women and the denial to them of better jobs. These practices are not only illegal but are deeply offensive to the fundamental principles of the labor movement.

In order to bring about a total and complete end to such practices we will continue to seek contractual changes such as:

- Arbitration as a matter of right for grievances alleging discrimination because of race, color, sex, creed, marital status, age or national origin.



- Joint union-management committees in each plant and a review committee at the national level to look into such cases.

- A system of in-plant advertising of all job vacancies that affords all employees an opportunity to make known their desire to be considered for the vacancies under applicable seniority rules.

- The elimination of all provisions which discriminate against pregnant employees.

* * *

**CONCLUSION**

The above items are those which the Steering Committee believes require special emphasis. We stress, however, that they by no means represent a complete list of national bargaining goals.

There are many phases of the present contracts that need to be improved and modernized. These have been examined at length by the committee, and specific proposals with respect to them will emerge during the course of bargaining.

We urge each negotiating committee to conduct a complete review of existing agreements with a view toward remedying deficiencies that have been disclosed by experience. Every effort should be made to incorporate in the new agreements, were appropriate, benefits that are now provided by some contracts but not others.

Finally, let us note again that no matter how justifiable our bargaining goals may be, they will not be attained unless our bargaining mechanism is effective. We who bargain with GE and Westinghouse know, from years of past frustration, that effective bargaining is possible only through unity, the unity we have achieved through the Coordinated Bargaining Com-

mittee. The CBC proved its worth in 1966 and 1969, and we are confident that it will continue its indispensable role in the success of our bargaining in 1973.

**Steering Committee Members**

Fred J. Purcell, IAM
Dominic Carnavale, UA
John Curan, IBFO
Nelson Samp, UAW
George Turner, USA
Paul F. Stuckenschneider, SMW
James Parker, Carpenters
Frank Demeria, Teamsters
John Zalusky, AIW
Joseph F. Swain, AFTE
Albert Vottero, AFGW
Joseph Turkowski, UE

Richard H. Mills, IBEW
*Treasurer*

James D. Compton, IUE
*Chairman*

EXHIBIT B.

Race and Sex Discrimination Proposal

EEOC has found that General Electric and Westinghouse are engaged in a number of practices, including the maintenance of a discriminatory hiring and pay schedule for females and the denial to them of better jobs, which violate Title VII of the Civil Rights Act of 1964. A number of lawsuits involving such matters are also pending in Federal Courts. In order to bring about a total and complete end to such practices, we recommend contractual changes to eliminate all discriminatory provisions and to include new provisions to correct existing discriminatory *practices* including:



(a) Arbitration as a matter of right for grievances alleging violation of the prohibition on discrimination because of race, color, sex, etc. (Article IV, Sec. 3 of GE Agreement; Article IV, Section 3 of Westinghouse Agreement). EEOC has held that IUE violated Title VII because the Westinghouse contract does not require arbitration of a sex discrimination grievance.

(b) Joint union-management committees in each plant and a review committee at the national level. The local committee shall investigate complaints that rates are discriminatory either because the female was being paid at a lower rate than a male doing substantially equal work or was paid at a rate which was lower than an evaluation of the job would reasonably have fixed under standards applies to males. The local union or management may request review by the national committee. Any dispute remaining may be referred by either party to arbitration.

(c) A system of in-plant advertising all job vacancies and affording all employees an opportunity to make known their desire to be considered for the vacancy. This is essential to end discrimination against minority groups and females in promotions. The job stratification which presently exists in most GE and Westinghouse plants shows that they have hired and promoted on the theory that certain jobs were appropriate for males, others for females. In such cases the courts have held that failure to post job vacancies is itself a violation of Title VII and that the posting should contain a description of the job, rate of pay, qualifications required for job and if senior employee is not chosen, a written statement of why the senior employee was not chosen. In accordance with court decisions, the contract should provide that in any instance in which GE or Westinghouse contemplates filling a vacancy with anyone other than the senior applicant, the

company shall notify the local, meet with representatives of the local and explain to them its reasons for deviating from seniority and hear their arguments before making final selection.

(d) The elimination of all provisions in the national agreement or local supplements which single pregnancy out for special treatment. As long as pregnant employees are able to work they should be treated exactly the same as other able bodied employees. To the extent that an employee is disabled by pregnancy, childbirth or complications arising therefrom, the rights to leave, return to work, accumulation of service credits and sickness and accident benefits should be the same as for any disabled employee.

(e) For GE only, correct the pension plan to permit male employees the same early retirement benefits as are presently provided for female employees.

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

ORDER
[Filed May 9, 1973]

In accordance with the memorandum of the Court filed on April 30, 1973, and upon submissions of and conference with counsel with respect to this matter, and deeming it just and proper so to do, it is ADJUDGED and ORDERED that



the Legal Notice filed this day be distributed and promulgated in accordance with the terms set forth therein.

Let the Clerk send copies of the notice and this order to counsel of record.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

Date: 5/9/73

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted]

* * * * *

LEGAL NOTICE
WITH RESPECT TO ALL FEMALE EMPLOYEES
OF GENERAL ELECTRIC COMPANY
[Filed May 9, 1973]

Pursuant to Rule 23 (c)(2) of the Federal Rules of Civil Procedure, YOU ARE HEREBY NOTIFIED:

Individual named plaintiff employees of General Electric Companyhave commenced legal action themselves and as representatives of a primary class consisting of the following:

> "All females who are now or have been employed by the defendant GE on or after September 14, 1971, or who became employed by defendant GE during the pendency of this suit, at any of its plants, offices and shops wherever located and also all females whose claims or grievances against the defendant GE for sickness or accident benefits for a period of disability due to childbirth or other pregnancy related disability were filed before September 4, 1971 and were still pending on September 14, 1971 or could still be timely filed on or after September 14, 1971."

The foregoing described class seeks declaratory and other relief. In addition to the aforementioned class, a sub-class had been declared to include all those in the above class who become disabled from work by reason of pregnancy or who file



claims with respect to pregnancy with the defendant General Electric Company. This portion of the primary class is referred to herein-after as the sub-class. If you are a member of the class or sub-class your rights may be affected by this action. Plaintiffs in this action allege, in essence, that General Electric Company violated Title VII of the Civil Rights Act of 1964 by refusing to make weekly non-occupational sickness and accident benefit payments available for total disability resulting from pregnancy, miscarriage or childbirth. Should the Court conclude that General Electric must pay sickness and accident benefits in cases of childbirth or other pregnancy related disabilities, appropriate action will be taken by the Court for determing the amount, if any, due each member of the sub-class, at which time each such member will have the opportunity to be heard as to the amount due her. Only those employees of General Electric who are members of the sub-class aforementioned may be excluded from the sub-class by filing written notice of their intention to be so excluded, and causing same to be delivered to W. Farley Powers, Jr., Clerk of the United States District Court for the Eastern District of Virginia, 10th and Main Streets, Richmond, Virginia 23219 by no later than June 11, 1973. If any such requests be filed by mail same shall be postmarked not later than June 7, 1973.

The failure to request exclusion from the sub-class in accordance with the foregoing paragraph will result in inclusion as a member of the class bound by such judgment, whether favorable or not, as the Court may enter; and any member not requesting exclusion may, whether she be a member of the primary class or the sub-class, if she desires, enter an appearance through her own counsel providing said appearance is made by not later than June 10, 1973.

All employees of General Electric who have been, are or become pregnant during the pendency of this usit are requested to keep a record of the days they were unable to work by reason of childbirth or a pregnancy related disability and in the event they shall cease to be employed by General Electric, to notify the Clerk of this Court of any change of address.

Pursuant to the order of the Court, the foregoing notice shall be posted in two or more conspicuous places in each and every plant, office and shop accessible to and utilized by female employees of the General Electric Company.

By Order of the Court.

W. Farley Powers, Jr.
Clerk, United States District Court

by

/s/ PAUL P. VEST, JR.,
Paul P. Vest, Jr., Deputy Clerk

Date: May 9, 1973



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

ORDER
[Filed May 14, 1973]

Deeming it proper so to do, it is ADJUDGED and ORDERED that the legal notice referred to in the Court's order of May 9, 1973 be, and the same is hereby, amended as follows: The date of June 11, 1973 and the date of June 7, 1973 as shown on Page Two of that notice shall read June 25, 1973 and June 22, 1973 respectively.

Let the Clerk send copies of this order to all counsel of record.

/s/ ROBERT R. MERHIGE
United States District Judge

Date: May 14, 1973

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA

(Title omitted in printing)

* * * * *

## MOTION BY PLAINTIFF TO AMEND LEGAL NOTICE WITH RESPECT TO ALL FEMALE EMPLOYEES OF GENERAL ELECTRIC COMPANY

[Filed May 11, 1973]

Now come the plaintiffs, through their counsel, and move this Court to amend the Legal Notice filed by this Court on May 9, 1973, in the following respects:

1. To delete the letter (c) in the first sentence of the Legal Notice and insert the letter (d) in its place so that the first sentence should read "Pursuant to Rule 23 (d) (2) of the Federal Rules of Civil Procedure, YOU ARE HEREBY NOTIFIED."

2. To add the following sentence at the conclusion of the first paragraph on page two of the Legal Notice:

Notice of intention to be excluded from the subclass shall not operate to exclude any person from the primary class.

Respectfully submitted,

/s/ SEYMOUR DUBOW

Seymour DuBow
Suite 402, Heritage Building
10th and Main Streets
Richmond, Virginia 23219



Ruth Weyand
1126 16th Street, N.W.
Washington, D.C. 20036

Attorneys for Plaintiff

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## MEMORANDUM IN SUPPORT OF MOTION TO AMEND LEGAL NOTICE

[Filed May 11, 1973]

The plaintiffs maintain that this Court's Legal Notice filed on May 9, 1973, should be amended in order to clarify that the Legal Notice is pursuant to Rule 23 (d) (2) of the Federal Rules of Civil Procedure and that the subclass members may request exclusion only as to the issue of damages. Notice pursuant to Rule 23 (c) (2) applies only in the language of that Rule "[i] In any class action maintained under subdivision (b) (3),". Since this Court in its order of April 30, 1973, held this suit a class action pursuant to Rule 23 (b) (l) and (2), Rule 23 (c) (2) is not applicable here, and notice should be given pursuant to Rule 23 (d) (2).

Respectfully submitted,

/s/ SEYMOUR DUBOW

Seymour DuBow
Suite 402, Heritage Building
10th and Main Streets
Richmond, Virginia 23219

Ruth Weyand
1126 16th Street, N.W.
Washington, D.C. 20036

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

ORDER
[Filed May 14, 1973]

In accordance with the Memorandum of the Court filed April 30, 1973, and deeming it just and proper to do so, it is adjudged and ordered that the legal notice filed May 9, 1973 be distributed in the following manner.

1. Defendant General Electric Company shall provide the Court with a complete list of the names and addresses of all of its Employee Relations Managers on or before May 14, 1973.

2. On or before May 21, 1973, Plaintiff's counsel shall deliver to the Clerk envelopes separately addressed to each General Electric Employee Relations Manager and containing six copies of the legal notice filed herein on May 9, 1973 and one copy of this Court's letter of May 14, 1973.



3. The Clerk of this Court shall mail the aforesaid notices to General Electric Company's Employee Relations Managers and plaintiffs will reimburse the Clerk for the cost of mailing.

4. Within 36 hours of receipt, each General Electric Employee Relations Manager, or his designee, shall send two or more copies of the notice to each plant, office, shop or other company location for which his office has employee relations responsibility. He will direct the responsible employee in each plant, office, shop or location immediately to post the notice in two or more conspicuous places in such plant, office, shop or location.

5. Within three days of receipt of the letter and notices, each General Electric Employee Rleations Manager, or his designee, shall write the Clerk of this Court to advise that the notices were forwarded to the appropriate employees as required by the Court's letter.

Let the Clerk send copies of the order to counsel of record.

/s/ ROBERT R. MERHIGE
United States District Judge

Date: May 14, 1973

JUDGE'S CHAMBERS
UNITED STATES DISTRICT COURT

RICHMOND, VIRGINIA 23219

ROBERT R. MERHIGE, JR.
JUDGE

May 14, 1973

McGuire, Woods & Battle
Ross Building
Richmond, Virginia 23219

Attnetion: Mr. John S. Battle, Jr, Esq.

RE: Gilbert v. G.E.
C. A. No. 142-72-R

Dear Mr. Battle:

I have this day entered an order directing that each General Electric Company Employee Relations Manager foward two copies of the Legal Notice filed herein, as well as a copy of this letter, to each plant, office, shop or other company location for which that manager has responsibility. In turn, the responsible employee recipient is directed to post the notice in two or more conspicuous places to the end that the notice will be brought to the attention of each female employee of General Electric.

Each Employee Relations Manager is requested to forward additional copies of the legal notice to the larger plants as he or she may deem necessary in order to effectuate the purpose of same. Additional copies may, if necessary, be obtained from the Court.



Should any question arise as to employees right to request exclusion from the sub-class it is to be noted that that right applies exclusive to members of the sub-class and not to employees who are members of the primary class only.

Your cooperation and that of the personnel of General Electric Company is much appreciated.

Very truly yours,

/s/ ROBERT R. MERHIGE, JR.
Robert R. Merhige, Jr.
U.S. District Judge

cc: All Counsel

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

[Filed April 13, 1974]

ORDER

[Order printed in full in Joint Petition for a Writ of Certiorari p. 46a]

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

[Filed April 13, 1974]

[Opinion of District Court printed in full in Joint Appendix for a Writ of Certiorari pp. 2a-46a]

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

[Filed April 18, 1974]

MOTION TO AMEND STATEMENT
IN COURT'S OPINION

Now comes the plaintiffs, Martha V. Gilbert, *et al.*, through their counsel and moves to amend the following statement on page 3, paragraph 3 of this Court's opinion in this case dated April 13, 1974:

> . . . although during 1971 G.E. received over 5,500 claims for S&A benefits from women absent because of pregnancy.
> [Interrogatory #36]

The defendant's answer to interrogatory #36 states that ". . . during 1971 there were 5,545 claims for *maternity expenses* [emphasis added] incurred by G.E. employees . . .". That answer was in response to plaintiff's interrogatory to state the number of claims paid for maternity services. The plaintiffs, therefore, move to correct this Court's statement that the claims were for S&A benefits by deleting the words *S&A benefits* and inserting the words *maternity expenses.*

Respectfully submitted,

Seymour DuBow
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Tenth and Main Streets
Richmond, Virginia
(304) 649-3415

Winn Newman
Ruth Weyand
1126 16th Street, N.W.
Washington, D.C. 20036
(202) 296-1200

*Attorneys for Plaintiffs*

April 17, 1974



IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

[Filed April 19, 1974]

ORDER

Deeming it proper so to do, it is ADJUDGED and ORDERED that the Court's memorandum of April 13, 1974 be amended in the following respect: The phrase "S & A benefits" contained in the fifth line of paragraph II on page 3, be, and the same is hereby, deleted, and there is substituted therefor "maternity expenses."

Let the Clerk send copies of this order to all counsel of record.

/s/ ROBERT R. MERHIGE, JR.
Robert R. Merhige, Jr.
United States District Judge

Date: April 19, 1974.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

[Filed May 9, 1974]

ORDER

[Stay order printed in full in Joint Petition for a Writ of Certiorari, p. 50a]

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

[Filed May 9, 1974]

NOTICE OF APPEAL

Notice is hereby given that General Electric Company, defendant above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from Paragraphs 1, 2, and 3 of the Order of this Court entered in this action on April 13, 1974.

/s/ JOHN S. BATTLE, JR.
John S. Battle, Jr.

THEOPHIL C. KAMMHOLZ
STANLEY R. STRAUSS
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

JOHN S. BATTLE, JR.
J. ROBERT BRAME, III
McGuire, Woods & Battle
1400 Ross Building
Richmond, Virginia 23219

Dated: May 8, 1974.

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA

[Title omitted in printing]

* * * * *

[Filed July 23, 1973]

## PRE-TRIAL STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties hereto that, subject to the right of either the plaintiffs or the defendant to object as to relevancy or materiality as to any fact or facts, the following may be accepted by the Court as admitted fact or facts on the trial of this case:

1. The plaintiff International Union of Electrical, Radio and Machine Workers (AFL-CIO) hereinafter called International Union, and the defendant General Electric Company, hereinafter called GE, on February 4, 1970, entered into a 1970 Settlement Agreement, a copy of which is attached hereto marked as Exhibit A, which by its terms was effective until May 26, 1973.

2. Part Three of said 1970 Settlement Agreement is the 1970-1973 GE-IUE National Agreement, a copy of which is attached hereto marked Exhibit B. The foregoing 1970 Settlement Agreement has been recognized by International Union and GE as applicable to all the plants and classifications listed on pages 1 to 5, inclusive of the 1970-1973 GE-IUE (AFL-CIO) National Agreement, and also to certain additional plants and classifications for which the International Union has been certified subsequent to February 4, 1970.



3. At all times since January 26, 1970, pursuant to the 1970 Settlement Agreement and particularly to the provisions of the 1970 GE-IUE Pension and Insurance Agreement, GE has provided and does now provide non-occupational sickness and accident benefit payments to all of its employees represented by the plaintiff International Union and its affiliated IUE locals in an amount equal to 60 percent of an employee's normal straight time weekly earnings up to a maximum benefit of $150 for each week he or she is totally disabled as a result of a non-occupational accident or sickness for a period up to and including 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related cause, excepting therefrom absences due to pregnancy or resulting childbirth or to complications in connection therewith. The full terms and conditions governing the payment by defendant GE to such employees of weekly non-occupational sickness and accident benefits and medical expense benefits at all times since January 26, 1970, are set forth in the General Electric Insurance Plan with comprehensive Medical Expense Benefits, as amended January 26, 1970 (ERB 32D), a copy of which is attached hereto as Exhibit C.

4. From October 3, 1966 until October 26, 1969, pursuant to the 1966 Settlement Agreement, and between October 27, 1969 and January 26, 1970, pursuant to agreement between GE and plaintiff International Union, Ge provided non-occupational sickness and accident benefit payments to all employees represented by the plaintiff International Union and its affiliated IUE locals in an amount equal to one-half of an employee's normal straight time weekly earnings with a minimum weekly benefit of $32.50 and a maximum weekly benefit of $100 for each week he or she is totally disabled as a result of a non-occupational accident

or sickness for a period up to and including 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related cause, excepting therefrom absences due to pregnancy or resulting childbirth or to complications in connection therewith. The full terms and conditions governing the payment by defendant GE to such employees of weekly non-occupational sickness and accident benefits and medical expense benefits during the period from October 3, 1966 to January 26, 1970, are set forth in the General Electric Insurance Plan with Comprehensive Medical Expense Benefits, as amended October 3, 1966 (ERB 32B), a copy of which is attached hereto as Exhibit D.

5. At all times since January 1, 1970, pursuant to the 1970 Settlement Agreement, GE has maintained for hourly employees represented by the plaintiff International Union and its affiliated IUE locals the General Electric Long-Term Disability Insurance Plan for Hourly Employees effective January 1, 1970 (ERB 135), a copy of which is attached hereto as Exhibit E.

6. At all times since January 1, 1970, pursuant to the 1970 Settlement Agreement, GE has maintained for salaried employees represented by the plaintiff International Union and its affiliated IUE local unions the General Electric Long-Term Disability Income Plan for Salaried Employees, as amended January 1, 1970, a copy of which is attached hereto as Exhibit F.

7. At all times since January 26, 1970, pursuant to the 1970 Settlement Agreement, GE has maintained for the employees represented by the plaintiff International Union and its affiliated locals the General Electric Pension Plan, as amended January 1, 1970 (ERB-42E), a copy of which is attached hereto as Exhibit G.



8. At all times since January 1, 1970, GE has maintained for pensioners who retired from employment in which they were represented by plaintiff International Union and its affiliated IUE locals, the medical care plan for pensioners which is set forth in the aforesaid 1970 GE Insurance Plan with Combined Medical Expense Benefits (ERB 32D). Attached hereto as Exhibit H-1 is a copy of a booklet entitled "General Electric Medical Care Plan For Pensioners" (ERB-107C), in which there is reproduced the medical care plan for pensioners set forth in such General Electric Insurance Plan.

9. At all times since January 1, 1971, pursuant to the 1970 Settlement Agreement, GE has maintained for all employees represented by the plaintiff International Union and its affiliated IUE locals the Individual Development Program, effective January 1, 1971 (ERB-161), a copy of which is attached hereto marked as Exhibit I.

10. The General Electric Insurance Plan with Comprehensive Medical Expense Benefits as amended July 26, 1970 (ERB-32D), a copy of which is attached hereto as Exhibit C, is made applicable to GE employees who are not represented by the plaintiff International Union and its affiliated IUE locals. As to those GE employees represented by unions other than plaintiff International Union and its affiliated IUE locals, the Plan is made applicable pursuant to collective bargaining agreements between GE and such unions.

11. At all times since October 3, 1966, and at the present time GE has been and is primarily responsible for the payment to its employees of the weekly sickness and accident benefits specified in the General Electric Insurance Plan then and now operative and was and is in effect a self-insurer. With respect to coverage outside of California

during this period, GE has obtained an insurance policy covering weekly sickness and accident benefits, among others, whereunder a tentative initial premium was paid to Metropolitan Life Insurance Company (hereinafter "Metropolitan Life") subject to later adjustment in the light of actual experience. In California GE has made no arrangements with any insurance carrier with respect to its weekly sickness and accident undertaking under the Insurance Plan. With respect to weekly sickness and accident coverage under the Insurance Plan for employees in California, GE was and is a self-insurer in form and in effect.

12. The plaintiff International Union as one of its proposals during national bargaining negotiations with defendant GE in each 1955, 1963, 1966 and 1969 requested the deletion of the language then present and still present in the General Electric Insurance Plan, at p. 18 of Exhibit C attached hereto, which then provided and still provides that benefits under the Weekly Sickness and Accident Insurance Plan will not be payable for any absence due to pregnancy or resulting childbirth or to complications in connection therewith. During each of said negotiations the plaintiff International Union requested the defendant GE to pay weekly sickness and accident benefits for a maximum of six weeks for absences due to pregnancy or resulting childbirth but defendant GE refused to agree to make any payment of weekly sickness and accident benefits for absences due to pregnancy or childbirth. Exhibit H-2 attached hereto is a correct copy of the proposals for changes in the General Electric Insurance Plan which the plaintiff International Union presented to defendant GE on August 26, 1969.



13. Attached hereto as Exhibit J-1 are pages 118 and 123 of the minutes maintained by defendant GE of the IUE National Level Meeting of September 13, 1966, which took place as part of the 1966 national negotiations. Attached hereto as Exhibit J-2 are pages 1 and 4 of the minutes maintained by the plaintiff International Union of the negotiation session of September 13, 1966. Attached hereto as Exhibit K-1 are pages 460 and 468 of the minutes maintained by GE of the IUE Negotiating Committee Meeting of September 18, 1969, which took place as part of the 1969 national negotiations. Attached hereto as Exhibit K-2 are pages 1 and 2 of the minutes maintained by the plaintiff International Union of the negotiation session of September 18, 1969. None of the minutes maintained by either the plaintiff International Union or the defendant GE is a verbatim transcript of what transpired at the meetings to which the minutes relate; nor do such minutes necessarily reflect everything that was said or the words used; nor do the minutes or what was actually said necessarily include all the reasons which the defendant GE may have had in 1966 or 1969 for refusing to agree that Benefits under its Weekly Sickness and Accident Insurance Plan should be payable for absences related to pregnancy.

14. The sheets attached hereto marked Exhibit L-1 to L-70 inclusive are correct copies of the records of the defendant GE showing the hourly straight time earnings of its employees at plants represented by the plaintiff International Union in December 1972. The figure 30 in the left hand column designates hourly straight time earnings of $3.00. The figure 31 in the lefthand column designates hourly straight time earnings of $3.10. The heavy black horizontal line across the page with an hourly earnings figure entered in long hand above the line indicates the common labor or equivalent rate at the plant designated.

The initials DW designate day work. The initials PW designate piece work.

15. Exhibit M attached hereto is a correct copy of pages 382-387 of the book by John Winthrop Hammond entitled Man and Volts: The Story of General Electric (Lippincott Company, 1941).

16. Exhibit N-1 attached hereto is a correct copy of pages 152-156 of the book by Davith Loth entitled Swope of GE: The Story of Gerard Swope and General Electric in American Business (Simon and Schuster, New York, 1958).

17. Exhibit N-2 attached hereto is a correct copy of pages 131 to 137 of volume 154 of the Annals of the American Academy of Political and Social Science (March 1931) which prints what purports to be a speech by Gerard Swope, then president of GE.

18. Exhibit O-1 is a correct copy of pages 16 and 17 of the General Electric Annual Report for 1928; Exhibit O-2 is a correct copy of the cover page and pages 16-25 of the General Electric Annual Report for 1930; Exhibit O-3 is a correct copy of the cover page and two pages headed Employee Benefit Plan Statistics of the General Electric Annual Report for 1943; Exhibit O-4 is a correct copy of the cover page and pages 20-21 of the General Electric Annual Report for 1949; Exhibit O-5 is a correct copy of the cover page and page 12 of the General Electric Annual Report for 1958; Exhibit O-6 is a correct copy of the table of contents page and pages 17-19 of the General Electric Annual Report for 1957. Each of the foregoing was the official report of the defendant GE issued to its stockholders for the year indicated.



19. Exhibit P attached hereto is a correct copy of a document printed by the U.S. Department of Commerce, "Unemployment: Industry Seeks a Solution" (Govt. Print. Off. 1931) pp. 1-5, purporting to be an address on December 16, 1930, by Gerard Swope, then president of GE.

20. Exhibit Q attached hereto is a correct copy of pages 23-51, 91-100, Hearings Before a Select Committee on Unemployment Insurance, United States Senate, 72nd Cong., 1st Sess., pursuant to S. Res. 483 (71st Cong.) on October 19, 1931 (U.S. Govt. Print. Off. 1931).

21. Exhibit R attached hereto is a correct copy of pages 19-62 of a book entitled "The Swope Plan" edited by J. George Frederick, and printed by The Business Bourse, New York 1931. Exhibit S attached hereto is a correct copy of pp. v-ix, 1-9, 24-25, and 108-109 of a book entitled "New Frontiers for Professional Managers," as printed by McGraw-Hill Book Company, Inc., 1956, containing pages purporting to be addresses given in April and May 1956 by Ralph J. Cordiner, then president of General Electric Company.

22. Exhibit T attached hereto is a correct copy of a decision issued December 29, 1945, by the National War Labor Board in *General Electric Co.*, 28 War Lab. Rep. 666 (1945).

23. The Employee & Community Relations Instructions bearing the issue date 2-1-68, Instructions No. ER-2.31 and ER-2.32, copies of which are attached hereto marked Exhibit U-1 and U-2, were issued to management personnel by defendant GE at its Salem, Virginia plant on the date indicated. The Employee Handbook, GE, Industrial Control Department, Salem, Virginia, attached hereto marked Exhibit U-3 was mailed to all non-supervisory employees

of the Salem plant in May or June 1970 and was distributed to all new non-supervisory employees hired during the rest of 1970 and 1971 during the orientation sessions conducted by the defendant GE for new employees. Copies of said Employee Handbook were distributed to all new nonsupervisory employees until the supply of the handbooks was exhausted. No record is available as to the exact date on which the supply was exhausted but it is believed to have been exhausted towards the end of 1971. No new handbook has been distributed to non-supervisory employees at any time since 1970. At no time since 1968 has the defendant GE issued any written notice or written instructions to non-supervisory employees at the Salem plant that the policy respecting mandatory leave stated in such Employee Handbook is no longer in effect.

24. Exhibit V is a filled-in form delivered by J.P. Yandell, Specialist, Personnel Practice, GE, Tyler, Texas, to the plaintiff Erma Faye Thomas. The next to the last sentence thereof reads: "Her absence due to pregnancy, unless otherwise indicated, should commence 2/13/72." Exhibit W is a filled-in form delivered by J.P. Yandell to Carolyn Busby. The next to the last sentence thereof reads: "Her absence due to pregnancy, unless otherwise indicated, should commence 4/14/72." Exhibit X is a true copy of a letter from Oliver N. Pettey, President IUE Local 182, to D.V. Dorey, Manager of GE's Tyler, Texas plant, dated February 15, 1972, and Exhibit Y is a true copy of a letter from S.J. Przywara, Manager Union Relations and Compensation to Oliver Pettey dated February 16, 1972.

25. The defendant GE at its Salem, Virginia plant at all times here material has followed the practice and at the present time does follow the practice of notifying each female who is about to go on leave for purposes of child-



birth that she is to phone the plant six weeks after her child is born.

26. Exhibits Z-1 and Z-2 are authentic copies of the News Digests issued by defendant GE to its employees at its plant at Murfreesboro, Tennessee, on or about the dates appearing thereon.

27. Exhibit AA attached hereto is a true copy of a grievance filed on 2/11/70 by Betty Snyder, an employee at the Tell City, Indiana plant of defendant GE, together with the foreman's answer to said grievance. Exhibit BB attached hereto is a true copy of the appeal filed by Betty Snyder on 2/16/70. Exhibit CC attached hereto is a correct copy of the Second Step answer to said grievance. Exhibit DD attached hereto is a true copy of the Third Step Answer to said grievance given in National Docket No. 23980.

28. Except as to plaintiff Doris Wiley, the defendant GE paid hospital bills for the childbirth or miscarriage of each of the individually named plaintiffs. As to those individually named plaintiffs represented by the plaintiff International and its affiliated IUE locals, such payments were made pursuant to the 1970-GE-IUE Pension and Insurance Agreement.

29. Exhibits PP, QQ, RR, SS, TT, UU, VV, and WW are true copies of the claims filed with the defendant GE by the plaintiffs Barbara S. Hall, Doris B. Wiley, Sharon E. Godfrey, Alberta B. Smith, Mary R. Williams, Johnnie E. Taylor, Martha V. Gilbert and Erma F. Thomas, respectively. The other employees listed below each filed a claim with the defendant GE for non-occupational sickness and accident benefits for all the period she was on pregnancy leave as shown in paragraph 41 herein, upon the form of

claim supplied by GE, which was certified and signed by her personal physician and in which the question if the disability was caused by pregnancy was checked "yes" by her physician. Each of said claims was respectively denied by the defendant GE on the date listed opposite the employee's name. The sole ground stated for the denial in all cases was that the General Electric Insurance Plan provides that benefits under weekly sickness and accident insurance will not be payable for any absence due to pregnancy, resulting childbirth or to complications in connection therewith. In those instances in which the employees also processed a grievance to the Third Step, the National Docket Number of the grievance is stated and where a Third Step answer denying the grievance has been received the date of such denial is as stated.

| Name of Employee | Date Claim Denied | National Docket Number of Grievance | Date Third Step Answer Denying Grievance |
|---|---|---|---|
| Salem, Virginia | | | |
| Mary R. Williams | 11-1-71 | | |
| Martha V. Gilbert | 12-1-71 | 32785 | 12-14-72 |
| Johnnie Taylor | 11-1-71 | | |
| Albert B. Smith | 11-1-71 | 31225 | 6-8-72 |
| Doris B. Wiley | 11-1-71 | 30887 | 6-8-72 |
| Sharon E. Godfrey | 11-16-71 | 31228 | 6-8-72 |
| Barbara Hall | 11-1-71 | 30886 | 6-8-72 |
| Tyler, Texas | | | |
| Erma F. Thomas | 5-2-72 | 33003 | 11-28-72 |
| Tell City, Indiana | | | |
| Martha Hess | 11-8-71 | 30925 | 4-20-72 |
| Mary Huebshman | 3-8-72 | 31609 | 7-20-72 |
| Velma Hubert | 12-14-71 | 30926 | 4-20-72 |
| Barbara Richards | 1-3-72 | 31261 | 4-20-72 |
| Betty Labhart | 1-24-72 | 31262 | 4-20-72 |



| Name of Employee | Date Claim Denied | National Docket Number of Grievance | Date Third Step Answer Denying Grievance |
|---|---|---|---|
| Helen Smith | 5-22-72 | 32645 | 10-27-72 |
| Shirley Wiseman | 5-8-72 | 32647 | 10-27-72 |
| Philadelphia, Pa. | | | |
| Geraldine Lucifero | 1-17-72 | 31776 | 6-29-72 |

30. The plaintiff Brenda Christian applied to defendant GE at its Fort Wayne plant on July 17, 1972, for a form on which to apply for weekly sickness and accident benefits but defendant GE refused to give her a form. On July 19, 1972, Bob Wire, Business Agent of Local 901, IUE, wrote a letter to H.K. Reinking, Manager, Personnel Accounting and Banking, GE, Fort Wayne, complaining of the refusal of defendant GE to furnish the plaintiff Brenda Christian with a form, a copy of which letter is attached hereto marked Exhibit EE. Under date of July 21, 1972, M.E. Hamilton, Manager Union Relations, GE, Fort Wayne, wrote the said Bob Wire a reply, a copy of which is attached hereto marked FF.

31. The plaintiff Emma Furch is employed at the Tyler, Texas plant of the defendant GE and has a seniority date of October 13, 1966. On April 5, 1972, she went on pregnancy leave and was hospitalized on April 7, 1972. On April 14, 1972, she delivered a stillborn baby. After returning home she was again hospitalized on April 21, 1972, due to a blood clot in the lung unrelated to her pregnancy or miscarriage. The plaintiff Emma M. Furch filed a claim with the defendant GE for weekly sickness and accident benefits, a copy of which is attached hereto as Exhibit XX. Her claim was returned attached to a letter, dated June 6, 1972, signed by S.J. Przywara, a copy of which is attached hereto as Exhibit YY.

32. The defendant GE at all times here material has paid and is paying weekly sickness and accident benefits on the basis of each calendar day so that each day of entitlement is paid at the rate of 1/7 of the weekly rate. The defendant GE at all times here material has and is now using calendar days in determining the 8th day on which the benefits start when an employee is disabled for eight days without being confined in a hospital during these days.

33. The defendant GE has an established and uniform policy of paying weekly sickness and accident benefits to each employee on account of a qualifying sickness and accident for such period as the employee is authorized to be absent and for such extended period or periods as are certified by the employee's personal physician, except where the defendant GE by its own physician disputes the existence of a disability, limited, however, by the maximum period of 26 weeks for any one disability or sickness. On many occasions an employee who had received such payments for 26 weeks thereafter failed to return to work, either because of death, continuing disability, retirement, or, in relatively few cases, because of quitting. In the relatively few quitting cases where an employee does not return to work after receiving sickness and accident benefits, only where defendant GE has contended the amounts were fraudulently obtained, has the defendant GE attempted to recover any amounts so paid.

34. The claim for Weekly Sickness and Accident Benefits filed by the plaintiff Martha V. Gilbert was denied by a letter to J.O. Randall, Supervisor, General Electric Company, from N.E. Sarmiento, Assistant Supervisor, Group Health Claims, Metropolitan Life, dated December 17, 1971, a copy of which is attached hereto marked Exhibit GG.



Copies of said letter were furnished to plaintiff Martha V. Gilbert and to plaintiff Local 161 on or about December 18, 1971. The claims of plaintiffs Alberta B. Smith, Johnnie Taylor and Doris B. Wiley for Weekly Sickness and Accident Benefits were each denied by a letter to J.O. Randall, Supervisor, General Electric Company from N.E. Sarmiento, Assistant Supervisor, Group Health Claims, Metropolitan Life, dated November 1, 1971, all of which were substantially similar with the aforesaid letter to plaintiff Martha V. Gilbert except for the name of the claimant. The claim of the plaintiff Barbara Hall for Weekly Sickness and Accident Benefits was denied by a letter to J.O. Randall, Supervisor, Group Health Claims, Metropolitan Life, date November 1, 1971, a copy of which is attached hereto marked Exhibit HH. Copies of said letter were furnished to the plaintiff Barbara Hall and to plaintiff Local 161 on or about November 2, 1971.

35. The plaintiffs Martha V. Gilbert, Sharon E. Godfrey and Doris B. Wiley each filed a grievance challenging the denial of her claim for Weekly Sickness and Accident Benefits for the period she was disabled by pregnancy. In each instance the grievance was denied at the first and second step of the grievance machinery. The answer of the defendant GE at the first step of the grievance machinery was in each instance in the form of a statement written by a supervisor of GE on the bottom of the grievance form. The plaintiff Sharon E. Godfrey filed her grievance on December 8, 1971, and the answer written thereon by her supervisor stated:

> "In accordance with the IUE-GE Pension and Insurance Agreement and page 18 of the Insurance Pension Booklet (ERB-32D) Weekly Disability Benefits are not payable for absence due to pregnancy or childbirth."

A copy of the grievance filed by the plaintiff Sharon E. Godfrey bearing thereon the denial by the defendant GE at the first step, is attached hereto marked Exhibit JJ. The grievances filed by the plaintiffs Martha V. Gilbert, Barbara Hall, Alberta B. Smith and Doris B. Wiley were each answered by the defendant GE at the first and second step in substantially the same words.

36. The grievances filed by the plaintiffs Sharon E. Godfrey, Barbara Hall, Alberta B. Smith and Doris B. Wiley were all sent to New York City for processing there at the third step in the grievance procedure in accordance with provisions of the IUE-GE National Agreement. These grievances were all presented to the defendant GE at the third step of the grievance procedure on May 25, 1972, and were all denied by the defendant GE by notification to the plaintiff IUE, entitled "Company Position, Roanoke, Virginia, L-161, meeting date May 25, 1972, New York," signed by B. Hindle, dated June 8, 1972, a copy of which is attached hereto marked Exhibit KK. The ground stated for the denial is as follows:

> "It is the Company position that the denial of sickness and accident benefits during a leave of absence for pregnancy is consistent with the terms of the Agreement negotiated between the Company and the Union and to which the Union is therefore a party."

37. In the instance of all claims filed by the individually named plaintiffs for weekly sickness and accident benefits and in the instances of all grievances filed by the individually named plaintiffs grieving the denial of their claims the defendant GE has never contested or admitted the fact that the gievant was disabled from work by pregnancy or childbirth, but has denied the claim and justified its rejection of the claim for Weekly Sickness and Accident Benefits solely on the ground that such benefits were not properly due when the absence was caused by pregnancy or childbirth.



38. The defendant GE has paid sickness and accident benefits for periods during which employees, whether male or female, are totally disabled because of:

(a) sclerosis of the liver
(b) lung cancer
(c) emphysema
(d) injury incurred in auto accident
(e) injury incurred in sport activity of employee
(f) injury incurred in a fight

Also defendant GE has paid sickness and accident benefits for periods during which employees, whether male or female, are totally disabled because of the following causes (the number of total claims based on disabilities resulting from such causes is infinitesimal and claims for such disabilities rarely occur):

(g) following a program for the cure of alcoholism
(h) injury incurred in an attempted suicide
(i) drug addiction
(j) following a program for the cure of drug addiction
(k) sterilization
(l) elective surgical operations unrelated to pregnancy
(m) elective plastic surgery
(n) following a program of psychiatric treatment

39. The defendant GE has on occasion temporarily assigned to other suitable work an employee who is disabled

temporarily from performing his or her regular job but is not disabled from performing other available work.

40. Exhibit LL attached hereto is a true and correct copy of pages 1, 34-36 of the minutes of the meeting of August 31, 1960, pages 16-17 of the minutes of the meeting of September 1, 1960, pages 1, 10-11 of the minutes of the meeting of September 7, 1960, and pages 14-16 of the minutes of the meeting of September 22, 1960, as recorded by the defendant GE in its minutes of the meetings between the plaintiff International Union and GE for the purpose of negotiating a new national agreement in 1960. Exhibit MM is a correct copy of pages 1 to 5 of the statement of Philip D. Moore, Manager Employer Relations, GE, made to the negotiations committee for the plaintiff International Union on September 22, 1966, as part of national negotiations between the plaintiff International Union and defendant GE in 1966. Exhibit NN is a correct copy of page 9 of the minutes maintained by the plaintiff International Union of the meeting of September 30, 1966. Exhibit OO attached hereto to a correct copy of pages 2-5 of the minutes maintained by the plaintiff International Union of the meeting of the morning of October 9, 1969, and pages 14-15 of the minutes maintained by the plaintiff International Union of the meeting of the afternoon of October 9, 1969. Both meetings took place as part of the 1969 national negotiations. None of the minutes maintained by either the plaintiff International Union or defendant GE is a verbatim transcript of what transpired at the meetings to which the minutes relate nor do such minutes necessarily reflect everything that was said or the words used.

41. Each of the employees whose name is listed below has the seniority date stated following her name, and ex-



cept for plaintiff Furch was absent for pregnancy, miscarriage or childbirth from the date stated in the column headed Date Went On Pregnancy Leave until the date listed in the column headed Date Returned To Work, at the time of leaving work to go on pregnancy leave had the straight time weekly earnings stated and gave birth to a baby or miscarried on the date indicated:

| Name of Employee | Seniority Date | Date Went on Pregnancy Leave | Straight Time Weekly Earnings Date Went On Pregnancy Leave | Date Baby Born | Date Of Return To Work |
|---|---|---|---|---|---|
| **Salem, Virginia** | | | | | |
| Mary R. Williams | 5-28-71 | 9-13-71 | $109.00 | 2-22-72 | 3-27-72 |
| Martha V. Gilbert | 8-23-65 | 10-29-71 | 133.10 | 12-28-71 | 2-28-72 |
| Johnnie Taylor | 9-19-69 | 10-29-71 | 112.20 | 1-26-72 | 3-20-72 |
| Alberta B. Smith | 10-27-67 | 7-15-71 | 117.80 | 12-1-71 | 1-31-72 |
| Doris B. Wiley | 4-15-66 | 4-30-71 | 119.90 | 7-26-71 | 9-20-71 |
| Sharon E. Godfrey | 3-17-69 | 9-24-71 | 109.00 | 1-17-72 | Did not return |
| Barbara Hall | 4-4-66 | 8-13-71 | 124.52 | 11-22-71 | 1-17-72 |
| **Tyler, Texas** | | | | | |
| Emma M. Furch | 10-13-66 | 4-5-72 | 148.28 | 4-17-72* | 6-6-72 |
| Erma F. Thomas | 6-25-71 | 4-14-72 | 121.20 | 4-14-72 | 5-30-72 |
| **Tell City, Indiana** | | | | | |
| Martha Hess | 1-25-66 | 7-29-71 | 105.80 | 10-17-71 | 12-13-71 |
| Mary Huebschman | 3-2-62 | 1-26-71 | 107.00 | 4-14-72 | Did not return |

* Plaintiffs contend this was a miscarriage at six months; GE contends that she was delivered of a stillborn full term baby.

| Name of Employee | Seniority Date | Date Went On Pregnancy Leave | Straight Time Weekly Earnings Date Went On Pregnancy Leave | Date Baby Born | Date Of Return To Work |
|---|---|---|---|---|---|
| Velma Hubert | 6-7-68 | 7-29-71 | $102.84 | 9-26-71 | 12-6-71 |
| Barbara Richards | 6-13-69 | 9-17-71 | 105.80 | 3-4-72 | 5-1-72 |
| Betty Labhart | 2-4-63 | 1-8-72 | 112.80 | 3-7-72 | 5-1-72 |
| Helen Smith | 7-20-67 | 4-14-72 | 117.72 | 5-11-72 | 8-21-72 |
| Shirley Wiseman | 11-6-65 | 12-23-71 | 119.92 | 1-14-72 | 3-13-72 |
| Fort Wayne, Indiana | | | | | |
| Brenda Christian | 3-31-67 | 4-3-72 | 123.00 | 8-27-72 | 12-4-72 |

42. During August 1971 Robert Friedman, Assistant General Counsel of the plaintiff International Union, telephoned E.S. Willis, the Manager of Employee Benefits at the national level for the defendant GE, and during said telephone conversation Robert Friedman called the attention of E.S. Willis to EEOC Decision No. 71-1474, CCH-EEOC Decision Para. 6221, issued March 19, 1971.

/s/ RUTH WEYAND
Ruth Weyand
Consel for Plaintiffs

/s/ STANLEY R. STRAUSS
Stanley R. Strauss
Counsel for Defendant

Dated: May 23, 1973

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## PRE-TRIAL STIPULATION OF FACTS

[Filed July 24, 1973]

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties hereto that, subject to the right of either the plaintiffs or the defendant to object as to relevancy or materiality as to any fact or facts, the following may be accepted by the Court as admitted fact or facts on the trial of this case:

101. All Answers, Supplemental Answers, and Revised Answers by General Electric Company ("GE") in response to Plaintiffs' Interrogatories dated September 21, 1972, and December 29, 1972, more specifically the Answers by GE dated November 15, 1972, the Supplemental Answers by GE served December 11, 1972, GE's Answers to Plaintiffs' "Third" Interrogatories dated February 27, 1973, GE's Supplemental Answer to Plaintiffs' "Third" Interrogatories dated April 4, 1973, GE's Revised Answer to Plaintiffs' Interrogatories dated April 30, 1973, GE's Further Supplemental Answers dated June 29, 1973, and GE's Answers to Plaintiffs' Fourth Interrogatories dated July 17, 1973, except the following: GE's Answers, Supplemental Answers, and Revised Answers to Plaintiffs' Interrogatories Nos. 41, 45, 57, 59, 61, 62, 68-69, and 70.

102. Prior to the commencement of the action GE was not notified, either verbally or in writing, by the Equal Employment Opportunity Commission that plaintiffs had filed charges with the Equal Employment Opportunity Commission ("EEOC") alleging that GE had engaged in unlawful employment practices as alleged in the complaint.

103. No investigation of plaintiffs' charges was made by the EEOC prior to the commencement of the action.

104. Prior to the commencement of the action no opportunity was afforded GE by the EEOC to eliminate the unlawful employment practices charged by plaintiffs by informal methods of conference, conciliation, and persuasion.

107. Exhibit 3 attached hereto is a true and correct copy of Paragraph 17, 304.44 of CCH Employment Practices, dated December 21, 1966.

108. Exhibit 4 attached hereto is a true and correct copy of Paragraph 1219 of CCH Employment Practices, dated April 22, 1971.

109. Exhibit 5 attached hereto is a true and correct copy of a Petition for Suspension, Hearing, Intervention and Declaration of Unlawfulness, dated January 18, 1971, In the Matter of American Telephone and Telegraph Company (hereinafter "AT&T") before the Federal Communications Commission, Docket No. 19143 (hereinafter "FCC Case No. 19143").

110. Exhibit 6 attached hereto is a true and correct copy of a Memorandum of the Bell Companies received in evidence on August 1, 1972 in FCC Case No. 19143.



111. Exhibit 7 attached hereto is a true and correct copy of Bell Exhibit 5 in FCC Case No. 19143.

112. Exhibit 8 attached hereto is a true and correct copy of pages 5455 - 5557 of the Report of Proceedings in FCC Case No. 19143.

113. Exhibit 9 attached hereto is a true and correct copy of FCC Staff Exhibit 36 dated November 24, 1972, in FCC Case No. 19143.

114. Exhibit 10 attached hereto is a true and correct copy of a letter from James R. Thompson to Honorable Jacob K. Javits, dated April 8, 1971, with attachments, received in evidence in FCC Case No. 19143.

115. Exhibit 11 attached hereto is a true and correct copy of the EEOC's Motion to Terminate Proceedings dated January 19, 1973, in FCC Case No. 19143.

116. Exhibit 12 attached hereto is a true and correct copy of the Memorandum of Agreement between the EEOC, U.S. Department of Labor, and Bell Companies, dated January 18, 1973, in FCC Case No. 19143.

117. Exhibit 13 attached hereto is a true and correct copy of a Complaint in *Communication Workers of America, AFL-CIO, et al.* v. *Illinois Bell Telephone Company,* Civil Action No. 73C 959, Northern District of Illinois, Eastern Division, filed April 13, 1973.

118. Groups or units of employees at various GE plants and locations have, pursuant to Section 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. Section 159, designated plantiff International Union and its affiliated IUE Locals, including plaintiff Local 161, as their exclusive representatives and agents for all em-

ployees in their respective units for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. In addition to the GE employees who have selected plaintiff International and its affiliated IUE Locals as their exclusive representative for purposes of collective bargaining, other groups or units of employees at various GE plants and locations have, pursuant to Section 9(a) of the NLRA, *supra*, designated various other labor organizations as their exclusive representatives and agents for all employees in their respective units for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

119. Plaintiff International Union entered into the 1970 Settlement Agreement with GE (Exhibit A to Pre-Trial Stip.) and the 1970 GE-IUE Pension and Insurance Agreement, pursuant to both of which the General Electric Insurance Plan with Comprehensive Medical Expense Benefits, as amended January 26, 1970, (ERB 32D) (Exhibit C to Pre-Trial Stip.) was made applicable to GE employees represented by plaintiff International Union and its affiliated IUE Locals, in its capacity as exclusive representative of the latter employees for the purposes of collective bargaining pursuant to Section 9(a) of the NLRA, *supra.*

120. Various labor organizations other than plaintiff International Union and its affiliated IUE Locals, acting in their capacities as exclusive representatives of GE employees pursuant to Section 9(a) of the NLRA, *supra*, entered into collective bargaining agreements with GE in 1970 pursuant to which the General Electric Insurance Plan with Comprehensive Medical Expense Benefits, as



amended January 26, 1970 (ERB 32D) (Exhibit C to Pre-Trial Stip.) was made applicable to GE employees represented by such labor organizations other than plaintiff International Union and its affiliated IUE Locals.

121. Exhibit 14 attached hereto is a true and correct copy of United States Civil Service Commission, Federal Personnel Manual, Chapter 630, Subchapter 13, Maternity Leave, as revised July 1969.

122. Exhibit 15 attached hereto is a true and correct copy of the United States Civil Service Commission Personnel Manual, June 1967, Subchapter 3-5, "Granting Sick Leave in Advance of Accrual" and Subchapter 4, "Maternity Leave", pages 630-8, 9, 10, 11.

123. Exhibit 16 attached hereto is a true and correct copy of the National Labor Relations Board, Administrative Policies and Procedure Manual, Title 8, Leave and Attendance, February 1967, Section 3580, "Advance of Sick Leave", and Sections 3680 – 3684, "Maternity Leave".

124. Exhibit 17A attached hereto is a true and correct copy of an Equal Employment Opportunity Commission Memorandum to Employees, dated 12-20-72, re "Advanced Sick Leave". Exhibit 17B attached hereto is a true and correct copy of an EEOC Memorandum to Employees, dated 1-26-73, re "Advance Sick Leave". (Exhibit 17C attached hereto is a true and correct copy of EEOC Notice No. N-566, dated 5-25-73, re "Guidelines on Advance of Sick Leave".) Exhibit 17D attached hereto is a true and correct copy of Section 911, pages 1-6, of the EEOC Manual, dated November 15, 1968 and July 25, 1969, re "Leave".

125. Exhibit 18 attached hereto is a true and correct copy of the United States Department of Justice, "Leave Policy and Regulations", Memo 344, March 8, 1963, Sections dealing with Maternity Leave and Granting Advance Sick Leave.

126. Exhibit 19 attached hereto is a true and correct copy of the United States Department of Agriculture, Forest Service Manual, "Title 6100 - Personnel Management", Section 6163.53, Maternity Leave (Oct. 1971, Amendment No. 59).

127. Exhibit 20 attached hereto is a true and correct copy of American Postal Workers Union Plan 1973 Brochure, BRI 41-206, U.S. Civil Service Commission.

128. Exhibit 21 attached hereto is a true and correct copy of Administrative Instructions for the Office of the Secretary of Defense, Joint Chiefs of Staff, Court of Military Appeals, Defense Security Assistance Agency. Number 67, May 27, 1969.

129. Exhibit 22 attached hereto is a true and correct copy of Group Health Association 1973 Brochure, BRI 41-41, U.S. Civil Service Commission.

130. Exhibit 23 attached hereto is a true and correct copy of NALC Health Benefit Plan 1973 Brochure, BRI 41-51, U.S. Civil Service Commission.

131. Exhibit 24 attached hereto is a true and correct copy of AFGE Health Benefit Plan 1973 Brochure, BRI 41-26, U.S. Civil Service Commission.

132. Exhibit 25 attached hereto is a true and correct copy of Department of Health, Education and Welfare Employee Leave Benefits, dated 11/22/65, Chapter IV,



Guide 5, Supplement 1, item 13 "Advance of Sick Leave" and item 23, "Maternity Leave".

133. Exhibit 26 attached hereto is a true and correct copy of Library of Congress Regulations dated March 8, 1971, Subject: Sick Leave, LCR 2015-5.

134. Exhibit 27 attached hereto is a true and correct copy of pages 276-277 of a book entitled "Sociology", by Broom & Selznick, published by Harper & Row (4th Ed.).

135. Exhibit 28 attached hereto is a true and correct copy of GE Health Bulletin H64-5, "Termination of Active Work During Pregnancy", dated July 7, 1964.

136. Exhibit 29 attached hereto is a true and correct copy of GE Health Bulletin on Pregnancy, Tab: 5, No. 5.8, Issued 11-5-71.

137. Exhibit 30 attached hereto is a true and correct copy of GE Health Bulletin on Pregnancy, Tab: 5, No. 5.8, Issued 5-5-72.

138. Exhibit 31 attached hereto is a true and correct copy of Instruction No. 9.06, issued to non-supervisory employees on 11-10-71 by the Manager-Employee & Community Relations at GE's Salem, Virginia plant.

139. Exhibit 32 attached hereto is a true and correct copy of a Study by Morton D. Miller, entitled "Group Weekly Indemnity Table Study", reprinted from the Transactions of the Society of Actuaries, Volume III (1951).

140. Exhibit 33 attached hereto is a true and correct copy of pages 78-101 of the 1962 Reports of Mortality

and Morbidity Experience of the Transactions of the Society of Actuaries.

141. Exhibit 34 attached hereto is a true and correct copy of pages 120-128 of the 1966 Reports of Mortality and Morbidity Experience of the Transactions of the Society of Actuaries.

142w Exhibit 35 attached hereto is a true and correct copy of pages 190-202 of the 1971 Reports of Mortality and Morbidity Experience of the Transactions of the Society of Actuaries.

143. During 1970, GE's experience, by sex, with respect to claims under its weekly sickness and accident disability insurance coverage was as follows:

| | Male | Female |
|---|---|---|
| No. of claims (new) | 19,045 | 15,509 |
| Average duration of claim | 48 days | 52 days |
| No. of new claims per thousand employees | 77 | 173 |
| Average No. of employees covered | 246,492 | 89,705 |
| Total benefits paid | $11,279,110 | $7,405,790 |
| Average cost per insured employee of total benefits paid | $45.76 | $82.57 |

144. During 1971, GE's experience, by sex, with respect to claims under its weekly sickness and accident disability insurance coverage was as follows:



| | Male | Female |
|---|---|---|
| No. of claims (new) | 22,987 | 17,719 |
| Average duration of claim | 47 days | 52 days |
| No. of new claims per thousand employees | 99 | 217 |
| Average No. of employees covered | 231,026 | 81,469 |
| Total benefits paid | $14,343,000 | $9,191,195 |
| Average cost per insured employee of total benefits paid | $62.08 | $112.91 |

145. GE Employment statistics with respect to childbirth (excluding data concerning ectopic pregnancies, caesarian births, abortions and miscarriages) disclose that the duration of pregnancy absences prior to the date of delivery for employees at all GE plants and locations is as follows:

| Weeks Duration of Pregnancy Absence | 1970 | Cumulative Percent | 1971 | Cumulative Percent |
|---|---|---|---|---|
| Under 1 week | 86 | | 68 | |
| 1 week but less than 2 | 46 | | 52 | |
| 2 weeks but less than 3 | 63 | | 61 | |
| 3 weeks but less than 4 | 76 | | 74 | |
| 4 weeks but less than 5 | 124 | 12% | 106 | 15% |
| 5 weeks but less than 6 | 153 | | 91 | |
| 6 weeks but less than 7 | 195 | | 146 | |
| 7 weeks but less than 8 | 211 | 29 | 167 | 31 |
| 8 weeks but less than 9 | 277 | | 206 | |
| 9 weeks but less than 10 | 246 | 45 | 185 | 47 |
| 10 weeks but less than 11 | 231 | | 162 | |
| 11 weeks but less than 12 | 229 | 59 | 165 | 60 |
| 12 weeks but less than 13 | 275 | | 210 | |
| 13 weeks but less than 14 | 184 | | 153 | |
| 14 weeks but less than 15 | 134 | 78 | 102 | 79 |

| Weeks Duration of Pregnancy Absence | 1970 | Cumulative Percent | 1971 | Cumulative Percent |
|---|---|---|---|---|
| 15 weeks but less than 16 | 117 | | 93 | |
| 16 weeks but less than 17 | 84 | | 58 | |
| 17 weeks but less than 18 | 62 | | 51 | |
| 18 weeks but less than 19 | 52 | | 42 | |
| 19 weeks but less than 20 | 47 | 89 | 36 | 90 |
| 20 weeks but less than 21 | 46 | | 25 | |
| 21 weeks but less than 22 | 42 | | 32 | |
| 22 weeks but less than 23 | 41 | | 23 | |
| 23 weeks but less than 24 | 37 | | 16 | |
| 24 weeks but less than 25 | 14 | | 16 | |
| 25 weeks but less than 26 | 25 | | 20 | |
| 26 weeks but less than 27 | 23 | | 19 | |
| 27 weeks but less than 28 | 27 | | 19 | |
| 28 weeks but less than 29 | 23 | | 15 | |
| 29 weeks but less than 30 | 14 | | 13 | |
| 30 weeks but less than 31 | 16 | | 10 | |
| 31 weeks but less than 32 | 12 | | 17 | |
| 32 weeks but less than 33 | 16 | | 9 | |
| 33 weeks and over | 33 | 100% | 14 | 100% |
| TOTAL | 3,261 | | 2,476 | |

146. GE employment statistics with respect to ectopic pregnancies and caesarian births disclose that the duration of pregnancy absences prior to the date of delivery for employees at all GE plants and locations is as follows:

| | 1970 | 1971 |
|---|---|---|
| Under 1 week | 10 | 5 |
| 1 week but less than 2 | 1 | 3 |
| 2 weeks but less than 3 | 6 | 3 |
| 3 weeks but less than 4 | 3 | – |
| 4 weeks but less than 5 | 4 | 3 |
| 5 weeks but less than 6 | 7 | 3 |



| | 1970 | 1971 |
|---|---|---|
| 6 weeks but less than 7 | 9 | 9 |
| 7 weeks but less than 8 | 5 | 11 |
| 8 weeks but less than 9 | 16 | 14 |
| 9 weeks but less than 10 | 9 | 10 |
| 10 weeks but less than 11 | 9 | 10 |
| 11 weeks but less than 12 | 6 | 7 |
| 12 weeks but less than 13 | 6 | 5 |
| 13 weeks but less than 14 | 6 | 4 |
| 14 weeks but less than 15 | 13 | 10 |
| 15 weeks but less than 16 | 5 | 6 |
| 16 weeks but less than 17 | 6 | 3 |
| 17 weeks but less than 18 | 1 | 2 |
| 18 weeks but less than 19 | 1 | 3 |
| 19 weeks but less than 20 | 3 | 2 |
| 20 weeks but less than 21 | 1 | 1 |
| 21 weeks but less than 22 | 1 | 1 |
| 22 weeks but less than 23 | 1 | 1 |
| 23 weeks but less than 24 | 1 | 1 |
| Over 24 weeks | 10 | 8 |
| TOTAL | 140 | 125 |

147. GE employment statistics with respect to abortions and miscarriages disclose that the duration of pregnancy absences prior to the date of delivery for employees at all GE plants and locations is as follows:

| | 1970 | 1971 |
|---|---|---|
| Under 1 week | 83 | 123 |
| 1 week but less than 2 | 16 | 7 |
| 2 weeks but less than 3 | 8 | 10 |
| 3 weeks but less than 4 | 4 | 5 |
| 4 weeks but less than 5 | 6 | 5 |
| 5 weeks but less than 6 | 5 | 3 |
| 6 weeks but less than 7 | 1 | 3 |

| | 1970 | 1971 |
|---|---|---|
| 7 weeks but less than 8 | 5 | 4 |
| 8 weeks but less than 9 | 6 | 5 |
| 9 weeks but less than 10 | 2 | 2 |
| 10 weeks but less than 11 | 2 | 2 |
| 11 weeks but less than 12 | 1 | 4 |
| 12 weeks but less than 13 | 1 | 1 |
| 13 weeks but less than 14 | 1 | 1 |
| 14 weeks but less than 15 | – | – |
| 15 weeks but less than 16 | – | 2 |
| 16 weeks but less than 17 | – | 1 |
| 17 weeks but less than 18 | 2 | – |
| 18 weeks but less than 19 | – | 1 |
| 19 weeks but less than 20 | 1 | 1 |
| 20 weeks but less than 21 | 1 | – |
| 21 weeks but less than 22 | – | – |
| 22 weeks butless than 23 | 1 | – |
| 23 weeks but less than 24 | 1 | – |
| TOTAL | 147 | 180 |

149. S&A benefits for pregnancy absences during the period approximately 1939-1948 were paid only to employees in certain GE plants. Records relating to coverage in those years are incomplete, but it is believed that the following plants were covered by those provisions:

Plants of the Lamp Department

Electronics Department Plants:

Easthampton (Mass.) Tube Worker
Ken-Rad Division
Wabash (Ind.) Cabinet Works

Appliance and Merchandise Department Plants:

Lowell, Mass., Plant
Poughkeepsie, New York, Plant



York (Pa.) Works
Boundary Avenue Plant (York)
White Plains, New York, Plant
Saugerties, New York, Plant
Millerton, New York, Plant
New Kensington, Pa., Plant
Allentown, Pa., Plant
Electric Sink & Dishwasher Unit (Scranton, Pa.)
Trenton, New Jersey, Plant
Mt. Vernon, New York, Plant
Norfolk, Connecticut, Plant

During that period of time there was no company-wide GE group disability insurance plan and different company components were privileged to adopt insurance coverage as desired.

/s/ RUTH WEYAND
Counsel for Plaintiffs

/s/ STANLEY R. STRAUSS
Counsel for Defendant

Dated: July 21, 1973.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND VIRGINIA

[Title omitted in printing]

* * * * *

## PLAINTIFF'S INTERROGATORIES TO DEFENDANT

[Filed September 25, 1972]

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, as amended, the defendant is hereby requested to answer each of the following interrogatories separately and fully in writing under oath, within thirty days after the service of these interrogatories. These interrogatories shall be deemed continued to the extent required by Rule 26(e) of the Federal Rules of Civil Procedure.

1. List the total number of women working for General Electric.

2. List the number of women working for General Electric plants between the ages of 18-45.

3. List the number of women working for General Electric between the ages of 18-45, at each of its plants located in Virginia.

4. List the number of pregnancies, miscarriages and childbirths respectively of employees reported at each General Electric plant for each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

5. List the total number of pregnancies, miscarriages and childbirths respectively of employees at all General Electric plants for each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.



6. List the amount of time each women employee of General Electric has been off from work because of pregnancy, miscarriage or childbirth since August, 1971.

7. List the number of cases, women have been given weekly non-occupational sickness and accident benefit payments because of abortions in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

8. List the amount of time each woman employee of General Electric has been off from work because of an abortion who has received the above disability benefits.

9. Has any woman employee been given weekly non-occupational sickness and accident benefit payments because of complications resulting from pregnancy, miscarriage or childbirth. If so, list the number of women receiving such benefits in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

10. List the amount of time each woman employee was off from work who had complications and received disability benefits as stated in question 9.

11. List the number of women employees at each of the General Electric plants who do not return to work with General Electric after a pregnancy, miscarriage or childbirth in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

12. List the total number of women employees of General Electric who do not return to work with General Electric after a pregnancy, miscarriage, or childbirth in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

13. List the number of women employees at each of the General Electric plants who do return to work with General Electric after a pregnancy, miscarriage or childbirth in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

14. List the total number of women employees of General Electric who return to work with General Electric after a pregnancy, miscarriage, or childbirth in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

15. List the number of men at each General Electric plant who receive weekly non-occupational sickness and accident benefit payments because of alcoholism in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

16. List the amount of time each of these men were off from work because of alcoholism in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

17. List the number of men at each General Electric plant who receive weekly non-occupational sickness and accident benefit payments because of drugs in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

18. List the amount of time each of these men were off from work because of drugs in each of the



following years: 1967, 1968, 1969, 1970, 1971, and 1972.

19. List the number of men at each General Electric plant who receive weekly non-occupational sickness and accident benefit payments because of venereal disease in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

20. List the amount of time each of these men were off from work because of venereal disease in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

21. List the number of men at each General Electric plant who receive weekly non-occupational sickness and accident benefit payments because of attempted suicide in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

22. List the amount of time each of these men were off from work because of attempted suicide in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

23. List the number of men at each General Electric plant who receive weekly non-occupational sickness and accident benefit payments because of fighting in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

24. List the amount of time each of these men were off from work because of fighting in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

25. List the number of men at each General Electric plant who receive weekly non-occupational sickness and accident benefit payments because of lung cancer in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

26. List the amount of time each of these men were off from work because of lung cancer in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

27. List the number of men at each General Electric plant who receive weekly non-occupational sickness because of emphysema in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

28. List the amount of time each of these men were off from work because of emphysema in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

29. List the number of men at each General Electric plant who receive weekly non-occupational sickness and accident benefit payments because of sterilization in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

30. List the amount of time each of these men were off from work because of sterilization in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

31. List the number of men at each General Electric plant who receive weekly non-occupational sick-



ness and accident benefit payments because of hernias in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

32. List the amount of time each of these men were off from work because of hernias in each of the following years: 1967, 1968, 1969, 1970, 1971, and 1972.

33. State the monthly average number of employees insured for sickness and accident insurance by age and by sex.

34. State the average monthly number of employees insured for hospital, medical, and prescription drug expense by age, sex, number of covered dependents and number of eligible children.

35. State the number of claims paid for hospital, medical and prescription drug expense, amount and average benefit by age and sex of employee (including and excluding spouse and eligible children).

36. State the number of claims paid for maternity services (including pre-natal and post-natal care and initial pediatric examination of newborn child), amount and average benefit by age of employee, showing whether payment is for service for employee or for spouse of employee.

37. State the total annual cost to General Electric Company of all fringe benefits, including pensions, supplemental unemployment insurance, life insurance, sickness and accident insurance, extended disability insurance, hospital, medical and prescription drugs, for each of the past 5

calendar years, for all employees by sex, and average cost per employee by sex.

38. State the total annual payroll of General Electric Company for each of the past 5 calendar years, for all employees and by sex, and average annual wage rate per employee and by sex.

/s/SEYMOUR DUBOW
Seymour Dubow
Suite 502, Insurance Building
10 South Tenth Street
Richmond, Virginia 23219

Ruth Weyand
1126 16th Street, N.W.
Washington, D. C. 20036

Counsel for Plaintiffs

Dated: September 21, 1972

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA

[Title omitted in printing]

* * * * *

PLAINTIFF'S THIRD INTERROGATORIES
TO DEFENDANT
[Filed December 29, 1972]

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, as amended, the defendant is hereby requested to answer each



of the following interrogatories separately and fully in writing under oath, within thirty days after service of these interrogatories.

39. Does the description of the self-insurer status of the defendant GE as agreed to by the defendant GE in paragraph 6 of the Agreed Findings and Conclusions *IUE v. GE*, U.S.D.C.S.D.N.Y. No. 70 Civ. 2893 (MP), 337 F.Supp. 817, 79 LRRM 2403, a copy of the first 10 paragraphs of which is attached hereto as Exhibit A, represent the true facts respecting the relationship of defendand GE and Metropolitan Life Insurance Company insofar as relevant to this case at all times here material? If not, state all the other facts respecting the relationship between the defendant GE and Metropolitan Life Insurance Company which are relevant. If there has been any material change since the agreement of defendant GE to paragraph 6 of said Agreed Findings and Conclusions, state the date or dates on which the change or changes occurred, together with all the pertinent facts.

40. Did the Employee & Community Relations Instructions, bearing issue date 2-1-68, a copy of which is attached hereto marked Exhibit B, state correctly the practice followed by defendant GE at its Salem, Virginia plant in February 1968? If so, for how long did this continue to be the practice followed at the Salem, Virginia plant? If there has been a change in applicable practice, state when the change occurred and what new practices have been followed from the date of the change to the present time.

41. Name the plants of the defendant GE which follow the practice set out in attached Exhibit B. Name the plants which do not follow the practice set out in Exhibit B, and state the practice with respect to leave for pregnancy followed at each such plant at the present time. With respect to

plants which followed the practice set out in Exhibit B or a similar policy at one time but have since changed, state the date or dates on which changes occurred.

42. State the names of the employees, the plant at which they were employed before they went on leave because of pregnancy and all information with respect to each such employee which the defendant GE has received in response to its Employee Benefits Information communication signed by E.S. Willis and dated April 28, 1972, a copy of which is attached hereto marked Exhibit C.

43. Does the figure of 84,056 which defendant GE stated in its Answer to Interrogatory No. 1, include all women who on December 31, 1971 were employed in executive, supervisory and clerical positions in all the offices, plants and service shops of the defendant GE? If not, state the total number of women employed by defendant GE on December 31, 1971 without limitation as to the type of employment.

44. Does the figure of 55, 314 which the defendant GE stated in its Answer to Interrogatory No. 2 include all the women between the ages of 18 and 45 who on December 31, 1971 were employed in executive, supervisory and clerical positions in all the offices, plants and service shops of the defendant GE? If not, state the total number of women between the ages of 18 and 45 employed by defendant GE on December 31, 1971 without limitation as to type of employment.

45. At each plant at which the defendant GE permits women employees to continue at work throughout pregnancy, to the extent they are physically able, instead of requring them to go on leave at an arbitrarily determined time, list the names of the employees who were permitted to continue



to work after the seventh month of pregnancy and state as to each such employee the name of the plant where employed, if she returned to work and the period of time she was off work after childbirth.

46. Has defendant GE ever paid sickness and accident insurance benefits for periods during which a male employe was absent because of alcoholism? If so, does the defendant GE have an established policy of making such payments?

47. Has defendant GE ever paid sickness and accident insurance benefits for periods during which a male employee was absent for purposes of following a program for the cure of alcoholism? If so, does the defendant GE have an established policy of making such payments?

48. Has defendant GE ever paid sickness and accident insurance benefits for periods during which a male employee was absent because of drugs? If so, does the defendant GE have an established policy of making such payments?

49. Has defendant GE ever paid sickness and accident insurance benefits for periods during which a male employee was absent for purposes of following a program for the cure of a drug problem? If so, does the defendant GE have an established policy of making such payments?

50. Has defendant GE ever paid sickness and accident insurance benefits for periods during which a male employee was absent because of venereal disease? If so, does the defendant GE have an established policy of making such payments?

51. Has defendant GE ever paid sickness and accident insurance benefits for periods during which a male employee was absent because of an attempted suicide? If so, does the defendant have an established policy of making such payments?

52. Has defendant GE ever paid sickness and accident insurance benefits for periods during which a male employee was absent because of an injury incurred in a fight? If so, does the defendant GE have an established policy of making such payments?

53. Has defendant GE ever paid sickness and accident insurance benefits for periods during which a male employee was absent because of lung cancer? If so, does the defendant GE have an established policy of making such payments?

54. Has defendant GE ever paid sickness and accident insurance benefits for periods during which a male employee was absent because of emphysema? If so does the defendant GE have an established policy of making such payments?

55. Has defendant GE ever padi sickness and accident insurance benefits for periods during which a male employee was absent because of sterilization? If so, does the defendant GE have an established policy of making such payments?

56. Has defendant GE ever paid sickness and accident insurance benefits for periods during which a male employee was absent because of a hernia? If so, does the defendant GE have an established policy of making such payments?

57. State the number of claims, average number of days of absence for injury or disability and average sickness and accident benefits paid by defendant GE by sex for the years 1970, 1971 and 1972.

58. Did the defendant GE pay any of its employees non-occupational sickness and accident benefits or provide any other form of maintainance in whole or part of income during absences from work due to non-occupational sickness and accident prior to the day its collective bargaining agreements



with the plaintiff IEU contained such provisions? If so, state the date or approximate date when such benefits were first paid and the criteria for determining to whom paid and the amount and duration of the benefit. If there were changes between the time such benefits were first paid and the time that its collective bargaining agreements with the plaintiff IUE contained such provisions, state the dates and substance of such changes.

59. Has the defendant GE ever paid any of its employees sickness and accident benefits or any other form of maintainance in whole or part of income during a period or periods of absence from work due to pregnancy, miscarriage, childbirth, or complications arising therefrom. If so, state the date or approximate date or dates when such benefits were paid and the criteria for determing to whom paid and the amount and duration of all such benefits paid.

60. When did the defendant GE first include in its collective bargaining agreement with the plaintiff IUE or any of its locals an obligation to pay any non-occupational sickness and accident benefits?

61. When did the plaintiff IUE or any of its locals first propose to the defendant GE that sickness and accident benefits be paid to employees absent from work on account of pregnancy, miscarriage, childbirth, or complications arising therefrom? State the dates or approximate dates of all such proposals and the contents of such proposals.

62. State all the reasons upon which the defendant has relied in the past and now relies in refusing to pay non-occupational sickness and accident benefits for periods of time in which employees are disabled from work due

to pregnancy, miscarriage, childbirth, or complications therefrom.

/s/ SEYMOUR DUBOW
Seymour DuBow, Esquire
Suite 502, Insurance Building
10 South Tenth Street
Richmond, Virginia 23219

Winn Newman
Ruth Weyand
1126 16th Street, N.W.
Washington, D. C. 20036

Counsel for Plaintiffs

Dated: December 30, 1972

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EXHIBIT A.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC,

Plaintiff,

-against-

GENERAL ELECTRIC COMPANY and METROPOLITAN LIFE INSURANCE COMPANY,

Defendants.

Civil Action No.
70 Civ. 2893 (MP)

AGREED FINDINGS AND CONCLUSIONS

1 1. The plaintiff (hereinafter "Union") is a "labor organization" engaged in representing "employees" in an "industry affecting commerce," as said terms are defined in Sections 2 and 501 of the Labor-Management Relations Act of 1947, as amended.

2. The defendant General Electric Company (hereinafter "Company"), a New York corporation with its principal office and place of business in the Southern District of New York, is an "employer" in an "industry affecting commerce," as said terms are defined in Sections 2 and 501 of the Labor-Management Relations Act of 1947, as amended.

3. Effective as of October 3, 1966, the Company and the Union entered into a national collective bargaining agreement (hereinafter called the "1966 National Agreement") which provided for and governed wage increases,

hours and other terms and conditions of employment of approximately 90,000 of the Company's employees at locations throughout the United States, and which National Agreement by its terms continued in full force and effect to and including October 26, 1969.

4. Effective as of October 3, 1966, the Company and the Union entered into various other agreements covering the terms and conditions of employment of the represented employees, which other agreements included, but were not limited to, a Pension and Insurance Agreement. The portion of the Pension and Insurance Agreement which provided for insurance coverage was an Insurance Plan negotiated between the parties and dated October 3, 1966. Said Plan was attached to and made part of the Pension and Insurance Agreement as Exhibits B and B-1.

5. The 1966 Insurance Plan provided, *inter alia*, for weekly sickness and accident coverage for participating employees who became totally disabled as a result of non-occupational sickness or accident with weekly benefits equal in amount to one-half of a disabled employee's normal straight-time weekly earnings up to a maximum weekly benefit of $100, commencing on the eighth day of the employee's total disability – or the first day of his confinement in a hospital as a bed patient, if earlier – and continuing during such total disability up to a maximum of 26 weeks. Said coverage (as well as other coverages provided in the Insurance Plan including life insurance, accidental death or dismemberment insurance and comprehensive medical expense insurance) was provided subject to certain conditions and limitations.

6. During the material period since 1966 the Company undertook primary responsibility to furnish the weekly



sickness and accident coverage under the Insurance Plan to certain Union-represented employees and was in effect a self-insurer. With respect to coverage outside of California during this period, the Company obtained an insurance policy covering weekly sickness and accident benefits, among others, whereunder a tentative initial premium was paid to Metropolitan Life Insurance Company (hereinafter "Metropolitan Life") subject to later adjustment in light of actual experience. In California, the Company made no arrangement with any insurance carrier with respect to its weekly sickness and accident undertaking under the 1966 Insurance Plan. With respect to weekly sickness and accident coverage under the Insurance Plan for certain Union-represented employees in California, the Company was a self-insurer in form and in effect.

7. The 1966 Insurance Plan, with respect to weekly sickness and accident insurance during a strike period, provided as follows:

> "If you cease work because of a strike, your insurance coverage will automatically terminate at the end of the period for which your contributions have been paid. However, the Company may, in its discretion, make appropriate arrangements to continue your coverage under this Plan during such strike.
>
> "In any event, Weekly Sickness and Accident coverage will not be continued beyond 31 days from the last day for which your contirbutions are paid and will not be reinstated until you return to active work."

8. Under the 1966 National Agreement, Union-represented employees had the right to strike during the term

of such agreement over certain fully processed but unsettled local grievances.

9. During the terms of the 1966 National Agreement, the 1966 Pension and Insurance Agreement and the 1966 Insurance Plan, certain Union-represented employees at various Company locations did engage in such contractually-permitted local grievance strikes which lasted for more than 31 days.

10. During the course of such grievance strikes, certain striking employees participating in the Insurance Plan filed claims with the Company claiming disability by reason of non-occupational sickness or accident occuring more than 31 days after the last day for which contributions had been deducted from the employees' pay prior to the strike, and such claims were denied.

EXHIBIT B.

**EMPLOYEE & COMMUNITY RELATIONS INSTRUCTION**

| Supersedes | Issue Date | Instruction No. |
|---|---|---|
| 4-1-61 | 2-1-68 | ER-2.31 |

| Subject | Page No. |
|---|---|
| PERSONAL ILLNESS - PREGNANCY | 1 |

The time at which a pregnant employee should terminate active work is a variable one depending on such factors as her general health, the nature of the work she does and the general nature of the working conditions and safety factors in the area in which she works.



It is generally agreed by obstetricians that women may continue to work through the sixth month of pregnancy when the pregnancy is uncomplicated and may resume work at the end of eight weeks following termination of pregnancy. *It will therefore be the policy of the Department that pregnant employees will be required to terminate active work at the end of the sixth month of pregnancy.* The employee may terminate active work any time before the sixth month if she so elects.

It is the Supervisor's responsibility to refer the employee to the plant Dispensary when he learns that the employee is pregnant. The employee will be required to bring a statement from her personal physician indicating the expected termination date of pregnancy.

After review by the Plant Physician, the nurse will prepare a letter addressed to the employee's Supervisor with a copy to the Personnel Office giving the last day that the employee can work (end of 6th month of pregnancy).

The employee's status is indicated as "personal illness" during such absence and is covered by the current rules relating to such absences.

The employee is not required to keep her supervisor advised as to her condition until eight weeks after termination of pregnancy. Failure to resume work after the eight-week period will terminate service unless there is lack of work, illness, complication from pregnancy or some other valid reason, in which case the employee will be required to notify her supervisor once a month, and this reason will then become the reason for absence on employment and payroll records.

In the event the absence following termination of pregnancy exceeds eight weeks due to reasons of health, the employee

must furnish upon her return to work a statement from her physician indicating the reason for the absence. This statement will be forwarded to the dispensary for review and will be filed in the employee's personnel folder.

After the lapse of six weeks after termination of the pregnancy, it is permissible to reinstate a woman who has been out due to pregnancy but only on explicit direction of the employee's physician and with the approval of the plant physician.

| GENERAL ELECTRIC<br>INDUSTRY CONTROL DEPT.<br>SALEM, VA. U.S.A. | Issued By<br>Manager-Employee and Community Relations | Responsibility Of<br>Specialist-Benefits, Health, Safety & Security |
|---|---|---|

EXHIBIT C.

**EMPLOYEE BENEFITS INFORMATION**

**CORPORATE EMPLOYEE RELATIONS**
**NEW YORK, NEW YORK**

No. 72-12

April 28, 1972

Pregnancy Benefits in Insurance Plan

In connection with a pending lawsuit alleging discrimination by the Company because weekly disability benefits are not payable under the Insurance Plan for pregnancy, it will be necessary to collect certain information on absences due to pregnancy.



1. Whenever a female employee leaves because of pregnancy, the following should be ascertained to the extent possible:

   a. Is the employee disabled (physically unable to perform her job) at the date of leaving.

      (Many such employees leave early as a matter of personal convenience to prepare for the birth, though they are not disabled)

   b. If not so disabled, an estimate should be made of the probable later date disability occured.

   c. The expected date of delivery.

2. About 3 weeks after the expected date of delivery (or actual date if known) a determination should be made as to whether disability has, in fact, terminated. (No effort is implied by this to require return.) A record should be made of the results of this inquiry.

3. At a point, 8 weeks after delivery, a record should be made as to:

   a. Has employee returned to work, and if so, what is her date of return.

   b. If employee has not returned

      (a) Has she terminated service?

      (b) Has she been granted a leave of absence? If on a leave, a record should be made as to whether the return is delayed for other reasons, and the nature of the reasons. In the event return is delayed for disability, a later record should be made as to date disability ceases.

The above data will be necessary for all pregnancy cases on absences beginning after January 1, 1972 (retroactive data should be compiled to the fullest extent possible.) Personnel Accounting Operation will ask Personnel Accounting components to report this information and ancillary data for each such absence early in 1973.

Dist. 50ABGH, 58A, 50M,
40AB, Keys 1, 4, 7

E. S. Willis

---

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND VIRGINIA

[Title omitted in printing]

* * * * *

PLAINTIFFS' FOURTH INTERROGATORIES
TO DEFENDANT
(Filed May 24, 1974)

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, as amended, the defendant is hereby requested to answer each of the following interrogatories separately and fully in writing under oath, within thirty days after service of

63. Are any of the 1592 females specified in the Supplemental Answer to Interrogatory No. 12 in Revised Answer by Defendant General Electric Company to Plaintiffs' Interrogatories as not having returned to work with General Electric after a



pregnancy, miscarriage or childbirth in 1970 presently employed by General Electric? If so, specify how many and the average period of time elapsing between the date they went on leave for pregnancy, miscarriage or childbirth and their first return to work for General Electric Company.

64. Did any of the 1592 females specified in the above-mentioned Supplemental Answer to Interrogatory No. 12 who are not presently employed by General Electric return to work for General Electric at any time between their absence for pregnancy, miscarriage or childbirth and the present time? If so, specify how many and the average period of time elapsing between the date they went on leave for pregnancy, miscarriage or childbirth and their first return to work for General Electric.

65. Are any of the 1,147 females specified in the Supplemental Answer to Interrogatory No. 12 in Revised Answer by Defendant General Electric Company to Plaintiffs' Interrogatories as not having returned to work with General Electric after a pregnancy, miscarriage or childbirth in 1971 presently employed by General Electric? If so, specify how many and the average period of time elapsing between the date they went on leave for pregnancy, miscarriage or childbirth and their first return to work for General Electric.

66. Did any of the 1,147 females specified in the above mentioned Supplemental Answer to Interrogatory No. 12 who are not presently employed by General Electric return to work for General Electric at any time between their absence for pregnancy, miscarriage or childbirth and the present time? If so, specify how many and the average period of time elapsing between the dates they went on leave for pregnancy, miscarriage or childbirth and their first return to work for General Electric.

67. Does the defendant General Electric follow the practice of terminating each female who is absent because of pregnancy, miscarriage or childbirth at the end of the eighth week following childbirth unless the female secures an extension of her leave based on proof that her physician has advised her not to return to work? If a different policy is followed, please state what policy is followed respecting the termination of employment of females who do not return to work within eight weeks after childbirth.

68. Has General Electric ever notified its employees that a pregnant female may continue to work until the onset of delivery unless her physician advised her to leave work at an earlier date? If General Electric has so notified its employees, state by which method such notice was given and on what dates.

69. Has General Electric ever notified its employees that subsequent to childbirth an employee may return to work as soon as her physician advises her that she may return to work?If General Electric has so notified its employees, state by what method such notice was given and on what dates.

70. With respect to the answer to Interrogatory No. 59, were sickness and accident benefits for pregnancy absences during the period approximately 1929-1948 paid to employees throughout the General Electric system or only to employees at one or more specified plants? If the latter, specify what plant or plants and the reasons for treating the employees at such plant or plants differently than other General Electric employees.

71. With respect to the answer to Interrogatory No. 59, were sickness and accident benefits for pregnancy absences during the period approximately 1939-1948 paid to



both hourly and salaried employees or only to one or more specified types of employees? If paid only to one or more specified types of employees, specify what type of employee such payments were made to.

72. With respect to the answer to Interrogatory No. 57, would it be correct to divide the $11,279,110 total benefits paid to males in 1970 by the number of claims of males, 19,045, to get an average benefit paid for claim of a male as $592.23 which being paid for 48 days amounts to $12.33 per day or $86.31 per week? If these do not represent correctly the average amount of benefits per claim for males paid in 1970, specify correct figures.

73. With respect to the answer to Interrogatory No. 57, would it be correct to divide the $7,405,790 total benefits paid to females in 1970 by the number of claims of females, 15,509, to get an average benefit paid per claim of a female as $477.51, which being paid for 52 days amounts to $9.18 per day or $64.26 per week? If these do not represent correctly the average amount of benefits per claim per female paid in 1970, specify correct figures.

74. With respect to the answer of Interrogatory No. 57, would it be correct to divide the $14,343,000 total benefits paid to males in 1971 by the number of claims of males, 22,987, to get an average benefit paid per claim of males as $623.95, which being paid for 47 days amounts to $13.27 per day or $92.89 per week? If these do not represent correctly the average amount of benefits per claim for males paid in 1971, specify correct figures.

75. With respect to the answer to Interrogatory No. 57, would it be correct to divide the $9,191,195 total benefits paid to females in 1971 by the number of claims

of females, 17,719, to get an average benefit paid for claim of a female as $518.71, which being paid for 52 days amounts fo $9.97 per day or $69.79 per week? If these do not represent correctly the average amount of benefits per claim per female in 1971, specify correct figure.

76. Has defendant GE ever paid sickness and accident insurance benefits for a period or periods during which an employee was absent because of elective plastic surgery? If so, does the defendant GE have an established policy of making such payments?

77. Has defendant GE ever paid sickness and accident insurance benefits for periods during which an employee was absent because the employee was undergoing a program of psychiatric care? If so, does the defendant GE have an established policy of making such payments?

78. Has defendant GE ever refused to pay sickness and accident insurance benefits for a period or periods during which a male employee was absent because of any cause which admittedly disabled him from work? If so, specify all such causes, state the reason for the refusal as to each cause, and whether the defendant GE has an established policy of refusing so to pay.

79. Does the attached Exhibit B constitute an accurate statement of the turnover experience of the defendant GE as therein specified? If not, specify the accurate figure with respect to each figure which the defendant GE claims is inaccurate.



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Attorneys for Plaintiffs

May 22, 1973

- - - - - - - - - - -

EMPLOYMENT DATA ON IUE-REPRESENTED

EMPLOYEES BY PLANT LOCATION

AS OF THE LAST NORMAL WEEK OF THE FISCAL MONTH OF DECEMBER 1972

| Location | No. of Employees Represented by IUE Total | Hrly | Sal. | No. on Layoff-Less Than One Year Service Total | Hrly | Sal. | No. on Layoff-More Than One Year Service Total | Hrly | Sal. | Average Hours Worked* | Average Straight Time Hourly Earnings* |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Anniston, O. | 64 | 64 | - | | | | | | | 45.0 | 3.661 |
| Athens, O. | 478 | 478 | - | 25 | 25 | - | 30 | 30 | - | 39.8 | 3.457 |
| Bridgeport, Conn. | 2148 | 2148 | - | | | | | | | 41.4 | 3.804 |
| Bridgeville, Pa. | 136 | 136 | - | | | | | | | 45.2 | 3.915 |
| Burgettstown, O. | 352 | 352 | - | 3 | 3 | - | - | - | - | 38.7 | 3.418 |
| Burlington, Vt. | 656 | 656 | - | 4 | 4 | - | 102 | 102 | | 38.3 | 3.886 |
| Cleveland, O. | 1895 | 1895 | - | 10 | 10 | - | - | - | - | 43.0 | 4.168 |
| DeKalb, Ill. | 571 | 571 | - | | | | | | | 44.9 | 3.953 |
| Dover, O. | 120 | 120 | - | 5 | 5 | - | - | - | - | 40.1 | 3.760 |
| Euclid, O. | 492 | 492 | - | 2 | 2 | - | - | - | - | 41.1 | 4.259 |
| Everett, Mass. | 1165 | 1121 | 44 | 5 | 5 | - | - | - | - | 37.1 | 5.380 |
| Fitchburg, Mass. | 497 | 439 | 58 | 3 | 3 | - | - | - | - | 38.4 | 4.256 |
| Ft. Wayne, Ind. | 5912 | 5614 | 298 | | | | | | | 40.1 | 4.261 |
| Hickory, N. C. | 1276 | 1276 | - | | | | | | | 39.7 | 3.440 |
| Holland, Mich. | 922 | 922 | - | 8 | 8 | - | - | - | - | 38.6 | 3.540 |
| Houston, Tex. | 77 | 77 | - | | | | | | | 53.4 | 3.909 |
| Jonesboro, Ark. | 962 | 962 | - | | | | | | | 37.8 | 3.247 |
| Lebanon, Ind. | 445 | 445 | - | | | | | | | 39.3 | 3.198 |
| Louisville, Ky. | 15904 | 15872 | 32 | 8 | 8 | - | - | - | - | 41.6 | 4.034 |
| Memphis, Tenn. | 1140 | 1140 | - | | | | | | | 38.4 | 3.583 |
| Newark, N.J. | 506 | 468 | 38 | - | - | - | - | - | - | 40.2 | 3.555 |
| Nutley, N.J. | 36 | 36 | - | - | - | - | - | - | - | 41.3 | 3.755 |
| Oakland, Calif. | 85 | 83 | 2 | - | - | - | - | - | - | 40.0 | 4.077 |
| Philadelphia, Pa. | 4552 | 3985 | 567 | 165 | 161 | 4 | 57 | 57 | - | 40.4 | 4.562 |
| Pittsfield, Mass. | 5160 | 4641 | 519 | 35 | 33 | 2 | 161 | 129 | 32 | 41.1 | 4.235 |
| Providence, R. I. | 832 | 832 | - | 29 | 29 | - | - | - | - | 38.8 | 3.547 |

*The figures listed are not limited to the IUE bargaining unit but are applicable to all hourly employees at the locations indicated with the exception of Shelbyville for which the figures shown are applicable to the Wire Mill only.

EXHIBIT B-8

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EMPLOYMENT DATA ON IUE-REPRESENTED

EMPLOYEES BY PLANT LOCATION

AS OF THE LAST NORMAL WEEK OF THE FISCAL MONTH OF DECEMBER 1972

| Location | No. of Employees Represented by IUE Total | Hrly | Sal. | No. on Layoff-Less Than One Year Service Total | Hrly | Sal. | No. on Layoff-More Than One Year Service Total | Hrly | Sal. | Average Hours Worked* | Average Straight Time Hourly Earnings* |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Rome, Ga. | 1010 | 1010 | - | 2 | 2 | - | 10 | 10 | - | 39.6 | 4.510 |
| Salem, Va. | 2313 | 2313 | - | - | - | - | 1 | 1 | - | 46.1 | 3.495 |
| San Jose, Calif. | 264 | 264 | - | | | | | | | 41.3 | 4.530 |
| Schenectady, N.Y. | 12063 | 12063 | - | 6 | 6 | - | 1 | 1 | - | 40.0 | 4.287 |
| Shelbyville, Ind. | 157 | 157 | - | | | | | | | 40.2 | 3.638 |
| Somerset, Ky. | 105 | 105 | - | 1 | 1 | - | - | - | - | 42.3 | 3.285 |
| Springfield, N.J. | 140 | 140 | - | | | | | | | 39.6 | 4.550 |
| Syracuse, N.Y. | 2939 | 2939 | - | 26 | 26 | - | 698 | 698 | - | 41.0 | 3.723 |
| Tell City, Ind. | 1107 | 1107 | - | - | - | - | 75 | 75 | - | 39.4 | 3.211 |
| Tiffin, O. | 1290 | 1290 | - | | | | | | | 38.4 | 3.745 |
| Trenton, N.J. | 602 | 594 | 8 | | | | | | | 37.7 | 3.836 |
| Tyler, Tex. | 1563 | 1563 | - | | | | | | | 39.4 | 3.534 |
| Warren, O. | 930 | 930 | - | | | | | | | 39.0 | 3.816 |
| Waterford, N.Y. | 604 | 501 | 103 | | | | | | | 42.2 | 4.095 |
| West Lynn, Mass. | 8695 | 7544 | 1151 | 90 | 57 | 33 | 15 | 12 | 3 | 40.1 | 4.615 |
| Youngstown, O. | 711 | 711 | - | | | | | | | 41.7 | 3.693 |
| Offices ** | 2408 | 1875 | 533 | 29 | 28 | 1 | - | - | - | | |
| TOTAL | 83385 | 80012 | 3373 | 466 | 436 | 40 | 1150 | 1115 | 35 | | |

*The figures listed are not limited to the IUE bargaining unit but are applicable to all hourly employees at the locations indicated with the exception of Shelbyville for which the figures shown are applicable to the Wire Mill only.

**Offices other than plant locations.

EXHIBIT B-9

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EXHIBIT B-10

Data on Number of New Employees, Number Laid Off, Number recalled from Layoff and Total Number of Employees whose service was terminated at General Electric Plant Locations at which the principal production and maintenance of salaried employees for the three-month period ending December, 1972.

| Location | New Employees | Layoffs | Recalls From Layoffs | Terminations* Hrly. | Sal. |
|---|---|---|---|---|---|
| Andover, O. | 12 | - | - | 8 | |
| Austintown, O. | 63 | - | - | 10 | |
| Bridgeport, Conn. | 94 | 27 | 24 | 45 | |
| Bridgeville, Pa. | 1 | - | - | 1 | |
| Bucyrus, O. | 6 | - | 1 | 3 | |
| Burlington, Vt. | 1 | 85 | 17 | 73 | |
| Cleveland, O. | 37 | 3 | 1 | 36 | |
| DeKalb, Ill. | 57 | - | - | 40 | |
| Dover, O. | - | 4 | - | 7 | |
| Euclid, O. | 7 | - | - | 3 | |
| Everett, Mass. | 57 | 2 | 31 | 31 | 1 |
| Fitchburg, Mass. | 34 | - | - | 8 | |
| Ft. Wayne, Ind. | 385 | - | - | 136 | 11 |
| Hickory, N. C. | 94 | - | - | 104 | |
| Holland, Mich. | 25 | 8 | 73 | 45 | |
| Houston, Tex. | 11 | - | - | 3 | |
| Jonesboro, Ark. | 13 | - | - | 23 | |
| Linton, Ind. | - | - | 6 | 6 | |
| Louisville, Ky. | 520 | 10 | - | 226 | - |
| Memphis, Tenn. | 31 | 3 | 4 | 13 | |
| Newark, N.J. | 17 | - | - | 7 | - |
| Nutley, N.J. | 1 | - | - | 3 | |
| Oakland, Calif. | 4 | - | - | 2 | |
| Philadelphia, Pa. | 15 | 22 | 33 | 71 | 9 |
| Pittsfield, Mass. | 83 | 11 | 24 | 34 | 3 |
| Providence, R. I. | 33 | 29 | 11 | 39 | |
| Rome, Ga. | - | 8 | - | 10 | |
| Salem, Va. | 37 | - | 1 | 8 | |
| San Jose, Calif. | 18 | 1 | 6 | 1 | |
| Schenectady, N.Y. | 197 | 3 | 1 | 172 | |
| Shelbyville, Ind. | 18 | - | - | 6 | |
| Somerset, Ky. | 1 | - | - | - | |
| Springfield, N.J. | - | - | 3 | 3 | |
| Syracuse, N.Y. | 6 | 363 | 197 | 351 | |
| Toll City, Ind. | 15 | 90 | 13 | 16 | |
| Tiffin, O. | 52 | - | 3 | 41 | |
| Trenton, N.J. | 88 | - | - | 63 | 3 |
| Tyler, Tex. | 152 | - | - | 45 | |
| Warren, O. | 34 | - | - | 17 | |
| Waterford, N.Y. | 67 | - | - | 13 | |
| W. Lynn, Mass. | 385 | 47 | 62 | 184 | 88 |
| Youngstown, O. | 34 | - | - | 13 | |
| | 2695 | 718 | 668 | 1858 | 109 |

*Includes employees who still have recall rights.

3/16/73

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND VIRGINIA

[Title omitted in printing]

* * * * *

## ANSWERS BY DEFENDANT GENERAL ELECTRIC COMPANY TO PLAINTIFFS' INTERROGATORIES

(Filed November 20, 1972)

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant General Electric Company (hereafter "GE"), by E. S. Willis, Manager - Employee Benefits, submits the following answers to plaintiffs' interrogatories dated September 21, 1972:

### Answer to Interrogatory No. 1

84,056 women were working for GE on December 31, 1971.

### Answer to Interrogatory No. 2

On December 31, 1971, 55,314 women between the ages of 18 - 45 were working in GE plants.

### Answer to Interrogatory No. 3

On the dates shown, the number of women between the ages of 18 - 45 employed at GE plants in Virginia was as follows:

| | | |
|---|---|---|
| Portsmouth plant: | 3,676 | (Oct. 30, 1972) |
| Richmond plant: | 128 | (Sept. 30, 1972) |
| Lynchburg plant: | 1,591 | (Oct. 30, 1972) |
| Roanoke plant: | 947 | (Sept. 30, 1972) |

Answer to Interrogatory No. 4

Data to answer this interrogatory with respect to the years 1970 and 1971 is presently being compiled, and the answer with respect to these years will be furnished plaintiffs on or about December 1, 1972. Data sufficient to answer this interrogatory with respect to the year 1972 is not available. To retrieve and review the relevant records for the years 1967, 1968, and 1969 would be unduly burdensome; in any case, the information sought with respect to the latter years is irrelevant and does not appear reasonably calculated to lead to the discovery of admissible evidence.

Answer to Interrogatory No. 5

See answer to Interrogatory No. 4

Answer to Interrogatory No. 6

See answer to Interrogatory No. 4

Answer to Interrogatory No. 7

With the possible exception of claims by employees working in GE plants in New Jersey, where a Temporary Disability Benefits Law was in effect, during the years



1970, 1971, and 1972 there were no instances where women employees of GE received weekly benefit payments under GE's non-occupational sickness and accident insurance coverage because of abortions. With respect to the years 1967, 1968, and 1969, the information sought is irrelevant and does not appear reasonably calculated to lead to the discovery of admissible evidence.

Answer to Interrogatory No. 8

See answer to Interrogatory No. 7. In view of such answer, no further response is made to this interrogatory.

Answer to Interrogatory No. 9

With the possible exception of women employees in GE's New Jersey plants, as to whom a supplemental response will be furnished plaintiffs on or about December 1, 1972, the answer to this interrogatory with respect to the years 1970, 1971, and 1972 is "No". With respect to the years 1967, 1968, and 1969, the information sought is irrelevant and does not appear reasonably calculated to lead to the discovery of admissible evidence.

Answer to Interrogatory No. 10

See answer to Interrogatory No. 9. In view of such answer, no further response is made to this interrogatory.

Answer to Interrogatory No. 11

See answer to Interrogatory No. 4.

Answer to Interrogatory No. 12

See answer to Interrogatory No. 4.

Answer to Interrogatory No. 13

See answer to Interrogatory No. 4

Answer to Interrogatory No. 14

See answer to Interrogatory No. 4.

Answer to Interrogatory No. 33

No data is available which provides a direct answer to this interrogatory. During the year 1971, an average of 311,744 employees had personal coverage under GE's Insurance Plant. The following shows the number of GE employees by age and sex on December 31, 1971:

| Age | Male | Female | Total |
|---|---|---|---|
| Under 20 | 3,050 | 2,038 | 5,088 |
| 20-24 | 26,157 | 13,495 | 39,652 |
| 25-29 | 34,616 | 10,755 | 45,371 |
| 30-34 | 26,414 | 8,354 | 34,768 |
| 35-39 | 24,744 | 8,525 | 33,269 |
| 40-44 | 27,375 | 9,913 | 37,288 |
| 45-49 | 28,245 | 11,493 | 39,738 |
| 50-54 | 25,613 | 10,231 | 35,844 |
| 55-59 | 18,984 | 6,526 | 25,510 |
| 60-64 | 8,994 | 2,726 | 11,720 |
| | 224,192 | 84,056 | 308,248 |



Answer to Interrogatory No. 34

See answer to Interrogatory No. 33. The information sought with respect to dependents and children is irrelevant and does not appear reasonably calculated to lead to the discovery of admissible evidence.

Answer to Interrogatory No. 36

No data is available which provides a direct answer to this interrogatory. According to statistics compiled by Metropolitan Life Insurance Company and reported to GE, during 1971 there were 5,545 claims for maternity expenses incurred by GE employees and 20,558 claims for maternity expenses incurred by dependents of GE employees. Metropolitan has not reported to GE the dollar amount of such claims, nor has it reported the average benefit by age of the employees filing the claims.

/s/ E.S. WILLIS
E. S. Willis

[Affidavit and jurat omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND VIRGINIA

[Title omitted in printing]

* * * * *

## SUPPLEMENTAL ANSWERS BY DEFENDANT GENERAL ELECTRIC COMPANY TO PLAINTIFFS' INTERROGATORIES
(Filed December 12, 1972)

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant General Electric Company (hereafter "GE"), by E. S. Willis, Manager - Employee Benefits, submits the following supplemental answers to plaintiffs' interrogatories dated September 21, 1972:

### Supplemental Answer to Interrogatory No. 4

No data is available to answer this interrogatory: GE's records are maintained not on a plant basis, but rather on the basis of GE's administrative components which are fixed without reference to plant location.

### Supplemental Answer to Interrogatory No. 5

| Year | Miscarriages and Abortions | Childbirths | Total Pregnancies |
|---|---|---|---|
| 1970 | 132 | 3,263 | 3,395 |
| 1971 | 160 | 2,520 | 2,680 |

Note: Figures shown for the year 1970 are complete: only partial figures are shown for the year 1971, for which year complete figures will not be available until early 1973.



### Supplemental Answer to Interrogatory No. 6

The requested data is not available, and it would be unduly burdensome to supply the information sought at this time. Available data shows, however, that the average duration of pregnancy absences during 1970 was 136 days, and in 1971 the average duration for such absences was 131 days.

### Supplemental Answer to Interrogatory No. 11

See supplemental answers to Interrogatories Nos. 4 and 12.

### Supplemental Answer to Interrogatory No. 12

| Year | Did Not Return to Work |
|---|---|
| 1970 | 1,489 |
| 1971 | 1,093 |

Note: Figures shown for the year 1970 are complete; only partial figures are shown for the year 1971, for which year complete figures will not be available until early 1973.

### Supplemental Answer to Interrogatory No. 13

See supplemental answers to Interrogatories Nos. 4 and 14.

Supplemental Answer to Interrogatory No. 14

| Year | Returned to Work |
|---|---|
| 1970 | 1,906 |
| 1971 | 1,587 |

Note: Figures shown for the year 1970 are complete; only partial figures are shown for the year 1971, for which year complete figures will not be available until early 1973.

E. S. Willis

[Affidavit, jurat and certificate of service ommitted in printing]

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

ANSWERS BY DEFENDANT
GENERAL ELECTRIC COMPANY
TO PLAINTIFFS' THIRD INTERROGATORIES
(Filed February 28, 1973)

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant General Electric Company (hereafter "GE"), by J. F. Duncan, Consultant-Employee Benefits, submits the following answers to plaintiffs' interrogatories



dated December 29, 1972, and designated "Plaintiffs' Third Interrogatories":

Answer to Interrogatory No. 39

Yes. Paragraph 6 of the said Exhibit A represents the true facts respecting the self-insurer status of defendant GE.

Answer to Interrogatory No. 40

Yes. The said Exhibit B correctly states the practices followed by GE at its Salem, Virginia, plant in February 1968. Such policy continued until November 10, 1971. On the latter date, a policy was placed in effect allowing pregnant employees to continue to work as long as they wish and as long as they are physically able to work efficiently.

Answer to Interrogatory No. 41

To my knowledge, no GE plants follow the practice set out in the said Exhibit B, and all GE plants follow the practice of allowing pregnant employees to continue to work as long as they wish and as long as they are physically able to work efficiently.

Answer to Interrogatory No. 42

No information has been received in response to the said Exhibit C.

Answer to Interrogatory No. 43

Yes.

Answer to Interrogatory No. 44

Yes.

Answer to Interrogatory No. 45

Details to the extent requested are not available. However, reports of normal deliveries for 1970 and 1971 with respect to female employees at all GE plants and locations show that in about 50% of such cases the baby was born within 11 weeks of the time the employee began her pregnancy absence.

Answer to Interrogatory No. 46

The answer to both questions is "Yes". However, such benefits are paid only if approved by the involved insurance carrier and if the absence is medically certified to be the result of a totally disabling sickness. Moreover, the number of total disabilities resulting from such causes are infinitesimal and payment for such disabilities rarely occur. In addition, the same policy applies with respect to female employees.

Answer to Interrogatories Nos. 47-51, Inclusive

See answer to Interrogatory No. 46.



Answer to Interrogatory No. 52

The answer to both questions is "Yes". However, such benefits are paid only if approved by the involved insurance carrier and if the absence is medically certified to be the result of a totally disabling sickness or accident. In addition, the same policy applies with respect to female employees.

Answer to Interrogatory No. 53

The answer to both questions is "Yes". However, such benefits are paid only if approved by the involved insurance carrier and if the absence is medically certified to be the result of a totally disabling sickness. In addition, the same policy applies to female employees.

Answer to Interrogatory No. 54

See answer to Interrogatory No. 53.

Answer to Interrogatory No. 55

See answer to Interrogatory No. 46.

Answer to Interrogatory No. 56

See answer to Interrogatory No. 53.

## Answer to Interrogatory No. 57

| | | Male | Female |
|---|---|---|---|
| 1970 - | No. of claims (new) | 19,045 | 15,509 |
| | Average duration of claim | 48 days | 52 days |
| | No. of new claims per thousand employees | 77 | 173 |
| | Total benefits paid | $11,279,110 | $7,405,790 |
| | Average benefits paid per employee | $45.76 | $82.57 |
| 1971 - | No. of claims (new) | 22,987 | 17,719 |
| | Average duration of claim | 47 days | 52 days |
| | No. of new claims per thousand employees | 99 | 217 |
| | Total benefits paid | $14,343,000 | $9,191,195 |
| | Average benefits paid per employee | $62.08 | $112.91 |

1972 - No figures available

## Answer to Interrogatory No. 58

The first agreement between plaintiff IUE and GE was signed in September 1950. Prior to that time, GE provided its employees with non-occupational sickness and accident benefits in amounts and under eligibility rules which varied from time to time.

## Answer to Interrogatory No. 59

GE has paid certain employees sickness and accident benefits for pregnancy absences during the period approximately



1939-1948. These benefits were for maximum periods of 6 weeks, and varied from $10.00 to $15.50 per week depending on earnings. No records currently exist identifying the individuals who received such payments or the time or amounts of the payments made.

## Answer to Interrogatory No. 60

September 1950.

## Answer to Interrogatory No. 61

Pursuant to the agreement of counsel, this interrogatory is not answered at this time.

## Answer to Interrogatory No. 62

For answer to this Interrogatory, see the Answer to the Complaint herein.

[Affidavit and jurat omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## SUPPLEMENTAL ANSWER BY DEFENDANT GENERAL ELECTRIC COMPANY TO PLAINTIFFS' THIRD INTERROGATORIES

(Filed April 10, 1973)

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant General Electric Company (hereafter "GE"), by J. F. Duncan, Consultant-Employee Benefits, submits the following supplemental answer to Interrogatory No. 45 of plaintiffs' interrogatories dated December 29, 1972, and designated "Plaintiffs' Third Interrogatories":

### Supplemental Answer to Interrogatory No. 45

A. The following tabulation with respect to normal deliveries during the years 1970 and 1971 shows the duration of pregnancy absences (in weeks) prior to the datesof delivery for employees at all GE plants and locations:



| | 1970 | Cumulative Percent | 1971 | Cumulative Percent |
|---|---|---|---|---|
| No. of cases less than 1 wk | 77 | | 66 | |
| No. of cases 1 wk-less than 2 wks | 46 | | 50 | |
| 2 wks-less than 3 | 58 | | 60 | |
| 3 wks-less than 4 | 74 | | 72 | |
| 4 wks-less than 5 | 115 | 12% | 100 | 15% |
| 5 wks-less than 6 | 148 | | 90 | |
| 6 wks-less than 7 | 188 | | 141 | |
| 7 wks-less than 8 | 204 | 29% | 164 | 31% |
| 8 wks-less than 9 | 263 | | 204 | |
| 9 wks-less than 10 | 239 | 45% | 176 | 47% |
| 10 wks-less than 11 | 223 | | 159 | |
| 11 wks-less than 12 | 232 | 60% | 162 | 60% |
| 12 wks-less than 13 | 261 | | 206 | |
| 13 wks-less than 14 | 178 | | 150 | |
| 14 wks-less than 15 | 129 | 78% | 97 | 79% |
| 15 wks-less than 16 | 115 | | 91 | |
| 16 wks-less than 17 | 82 | | 57 | |
| 17 wks-less than 18 | 60 | | 48 | |
| 18 wks-less than 19 | 50 | | 41 | |
| 19 wks-less than 20 | 45 | 89% | 36 | 91% |
| 20 wks-less than 21 | 45 | | 22 | |
| 21 wks-less than 22 | 39 | | 32 | |
| 22 wks-less than 23 | 39 | | 21 | |
| 23 wks-less than 24 | 36 | | 15 | |
| 24 wks-less than 25 | 12 | | 14 | |
| 25 wks-less than 26 | 24 | | 17 | |
| 26 wks-less than 27 | 22 | | 17 | |
| 27 wks-less than 28 | 27 | | 19 | |
| 28 wks-less than 29 | 22 | | 14 | |
| 29 wks-less than 30 | 12 | | 13 | |
| 30 wks-less than 31 | 16 | | 8 | |
| 31 wks-less than 32 | 12 | | 14 | |
| 32 wks-less than 33 | 14 | | 7 | |
| over 33 wks | 28 | 100% | 13 | 100% |
| | 3,126 | | 2,396 | |

B. Exhibit "A" attached hereto shows the duration of reported pregnancy absences during the years 1970 and 1971 for individual employees at GE's Salem, Virginia, plant. Also shown are individual delivery dates.

Key to Symbols

PU – Pension Unit ("369" - Salem Plant)
SSN – Social Security Number
START – Date Pregnancy Absence Began (e.g., "700102" - January 2, 1970)
END – Date Pregnancy Absence Terminated
DOB – Date of Birth
TP – Type of Birth ("N" - normal birth; "C" - Caesarian birth; "A" - abortion or - miscarriage)

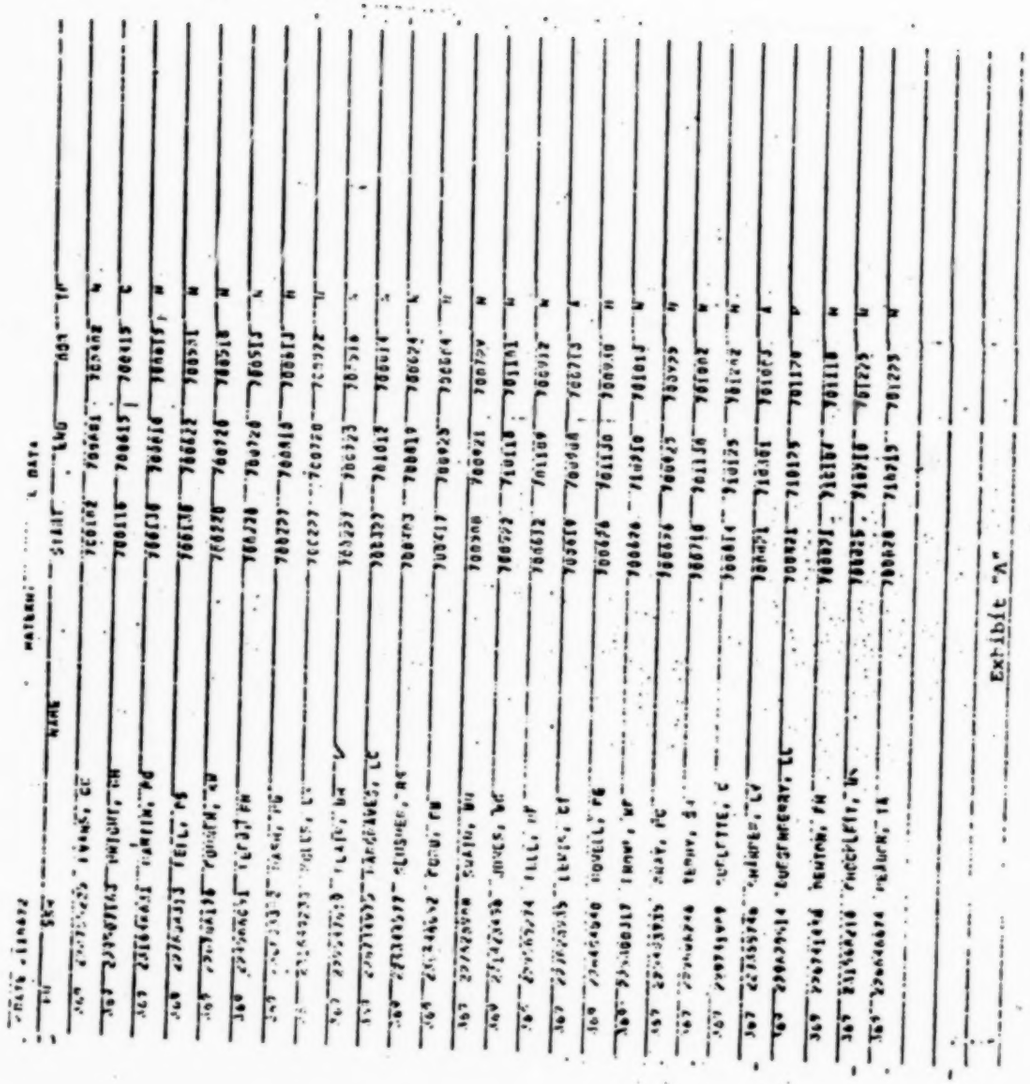
C. Exhibit "B" attached hereto shows the duration of reported pregnancy absences during period 1972 - March 3, 1973, for individual employees at GE's Salem, Virginia, plant.

/s/ J. F. DUNCAN
J. F. Duncan

[Affidavit and jurat omitted in printing]

- - - - - - - - - -





BEST COPY AVAILABLE

Table "A"

| No. | Name | Start | End | Age | Sex |
|---|---|---|---|---|---|
| 1 | Kumar, Rajesh | 710001 | 710045 | 44 | M |
| 2 | Singh, Harpreet | 710002 | 710046 | 31 | F |
| 3 | Patel, Mahesh | 710003 | 710047 | 52 | M |
| 4 | Sharma, Deepak | 710004 | 710048 | 27 | M |
| 5 | Gupta, Anita | 710005 | 710049 | 39 | F |
| 6 | Verma, Suresh | 710006 | 710050 | 61 | M |
| 7 | Reddy, Kavitha | 710007 | 710051 | 24 | F |
| 8 | Nair, Vijayan | 710008 | 710052 | 48 | M |
| 9 | Iyer, Lakshmi | 710009 | 710053 | 35 | F |
| 10 | Joshi, Pankaj | 710010 | 710054 | 57 | M |
| 11 | Mehta, Rohan | 710011 | 710055 | 29 | M |
| 12 | Desai, Nirmala | 710012 | 710056 | 63 | F |
| 13 | Kapoor, Vikram | 710013 | 710057 | 41 | M |
| 14 | Bose, Sanjay | 710014 | 710058 | 55 | M |
| 15 | Das, Priyanka | 710015 | 710059 | 26 | F |
| 16 | Roy, Subhash | 710016 | 710060 | 70 | M |
| 17 | Chatterjee, Meera | 710017 | 710061 | 33 | F |
| 18 | Banerjee, Arun | 710018 | 710062 | 49 | M |
| 19 | Mukherjee, Lata | 710019 | 710063 | 38 | F |
| 20 | Ghosh, Tapan | 710020 | 710064 | 66 | M |
| 21 | Sen, Rekha | 710021 | 710065 | 42 | F |
| 22 | Pillai, Suresh | 710022 | 710066 | 54 | M |
| 23 | Menon, Geeta | 710023 | 710067 | 30 | F |
| 24 | Krishnan, Vijay | 710024 | 710068 | 59 | M |
| 25 | Iyengar, Padma | 710025 | 710069 | 45 | F |
| 26 | Rao, Venkatesh | 710026 | 710070 | 62 | M |
| 27 | Naidu, Sunita | 710027 | 710071 | 37 | F |
| 28 | Choudhary, Ramesh | 710028 | 710072 | 51 | M |
| 29 | Agarwal, Neha | 710029 | 710073 | 28 | F |
| 30 | Bansal, Ashok | 710030 | 710074 | 64 | M |
| 31 | Goyal, Meenakshi | 710031 | 710075 | 40 | F |
| 32 | Malhotra, Vinod | 710032 | 710076 | 58 | M |
| 33 | Kapur, Sunita | 710033 | 710077 | 34 | F |
| 34 | Sethi, Rajiv | 710034 | 710078 | 47 | M |
| 35 | Arora, Kiran | 710035 | 710079 | 25 | F |
| 36 | Khanna, Deepak | 710036 | 710080 | 69 | M |
| 37 | Bhatia, Sonia | 710037 | 710081 | 32 | F |
| 38 | Tandon, Rakesh | 710038 | 710082 | 53 | M |
| 39 | Saxena, Pooja | 710039 | 710083 | 27 | F |
| 40 | Mishra, Alok | 710040 | 710084 | 60 | M |
| 41 | Dubey, Ritu | 710041 | 710085 | 36 | F |
| 42 | Pandey, Manoj | 710042 | 710086 | 46 | M |
| 43 | Tiwari, Sarita | 710043 | 710087 | 31 | F |
| 44 | Srivastava, Anil | 710044 | 710088 | 56 | M |
| 45 | Singh, Vandana | 710045 | 710089 | 29 | F |
| 46 | Yadav, Ramesh | 710046 | 710090 | 67 | M |
| 47 | Kumari, Sushma | 710047 | 710091 | 43 | F |
| 48 | Prasad, Hari | 710048 | 710092 | 71 | M |
| 49 | Devi, Lakshmi | 710049 | 710093 | 22 | F |
| 50 | Thakur, Bhupendra | 710050 | 710094 | 50 | M |



Table "A"

| No. | Name | Start | End | Age | Sex |
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| 1 | Kumar, Rajesh | 710001 | 710045 | 44 | M |
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| 6 | Verma, Suresh | 710006 | 710050 | 61 | M |
| 7 | Reddy, Kavitha | 710007 | 710051 | 24 | F |
| 8 | Nair, Vijayan | 710008 | 710052 | 48 | M |
| 9 | Iyer, Lakshmi | 710009 | 710053 | 35 | F |
| 10 | Joshi, Pankaj | 710010 | 710054 | 57 | M |
| 11 | Mehta, Rohan | 710011 | 710055 | 29 | M |
| 12 | Desai, Nirmala | 710012 | 710056 | 63 | F |
| 13 | Kapoor, Vikram | 710013 | 710057 | 41 | M |
| 14 | Bose, Sanjay | 710014 | 710058 | 55 | M |
| 15 | Das, Priyanka | 710015 | 710059 | 26 | F |
| 16 | Roy, Subhash | 710016 | 710060 | 70 | M |
| 17 | Chatterjee, Meera | 710017 | 710061 | 33 | F |
| 18 | Banerjee, Arun | 710018 | 710062 | 49 | M |
| 19 | Mukherjee, Lata | 710019 | 710063 | 38 | F |
| 20 | Ghosh, Tapan | 710020 | 710064 | 66 | M |
| 21 | Sen, Rekha | 710021 | 710065 | 42 | F |
| 22 | Pillai, Suresh | 710022 | 710066 | 54 | M |
| 23 | Menon, Geeta | 710023 | 710067 | 30 | F |
| 24 | Krishnan, Vijay | 710024 | 710068 | 59 | M |
| 25 | Iyengar, Padma | 710025 | 710069 | 45 | F |
| 26 | Rao, Venkatesh | 710026 | 710070 | 62 | M |
| 27 | Naidu, Sunita | 710027 | 710071 | 37 | F |
| 28 | Choudhary, Ramesh | 710028 | 710072 | 51 | M |
| 29 | Agarwal, Neha | 710029 | 710073 | 28 | F |
| 30 | Bansal, Ashok | 710030 | 710074 | 64 | M |
| 31 | Goyal, Meenakshi | 710031 | 710075 | 40 | F |
| 32 | Malhotra, Vinod | 710032 | 710076 | 58 | M |
| 33 | Kapur, Sunita | 710033 | 710077 | 34 | F |
| 34 | Sethi, Rajiv | 710034 | 710078 | 47 | M |
| 35 | Arora, Kiran | 710035 | 710079 | 25 | F |
| 36 | Khanna, Deepak | 710036 | 710080 | 69 | M |
| 37 | Bhatia, Sonia | 710037 | 710081 | 32 | F |
| 38 | Tandon, Rakesh | 710038 | 710082 | 53 | M |
| 39 | Saxena, Pooja | 710039 | 710083 | 27 | F |
| 40 | Mishra, Alok | 710040 | 710084 | 60 | M |
| 41 | Dubey, Ritu | 710041 | 710085 | 36 | F |
| 42 | Pandey, Manoj | 710042 | 710086 | 46 | M |
| 43 | Tiwari, Sarita | 710043 | 710087 | 31 | F |
| 44 | Srivastava, Anil | 710044 | 710088 | 56 | M |
| 45 | Singh, Vandana | 710045 | 710089 | 29 | F |
| 46 | Yadav, Ramesh | 710046 | 710090 | 67 | M |
| 47 | Kumari, Sushma | 710047 | 710091 | 43 | F |
| 48 | Prasad, Hari | 710048 | 710092 | 71 | M |
| 49 | Devi, Lakshmi | 710049 | 710093 | 22 | F |
| 50 | Thakur, Bhupendra | 710050 | 710094 | 50 | M |

| Social Security Number | Name | Date Pregnancy Absence Commenced | Date Return From Pregnancy Absence |
|---|---|---|---|
| 224466255 | Ellis, DH | 720114 | 720508 |
| 229464873 | Robertson, IC | 720121 | 720523 |
| 231647808 | Gilbert, GP | 720128 | 720530 |
| 227609549 | Lucado, LH | 720120 | -- |
| 227609127 | Parker, IS | 720204 | 720505 |
| 228600719 | Nutter, BH | 720211 | 720803 |
| 229324777 | Fraction, RB | 720310 | 720626 |
| 244561778 | Basham, ER | 720314 | 721002 |
| 224562557 | Jones, BG | 720414 | 720731 |
| 230406352 | Griffith, JH | 720414 | 720821 |
| 229542810 | Greene, DW | 720428 | 720823 |
| 229628179 | Schowalter, JD | 720429 | 720814 |
| 229728252 | Webster, JJ | 720505 | 720905 |
| 229728014 | Townsend, SB | 720512 | 720918 |
| 230652115 | Poff, BB | 720331 | 720613 |
| 228489298 | Jackson, PP | 720607 | -- |
| 229729946 | Dillon, DT | 720629 | 721023 |
| 230662476 | Barlow, S.L. | 720728 | 730122 |
| 229486724 | McDaniel, JE | 720728 | 721204 |
| 229567658 | Burwell, MA | 720731 | 721016 |
| 226589416 | Deaner, AF | 720908 | 721227 |
| 226706176 | Conner, KW | 720915 | -- |
| 230661892 | Anderson, SA | 720929 | 730115 |
| 227609426 | Hale, WS | 720929 | 730212 |
| 223760132 | Eversole, CL | 721027 | 730108 |
| 225645143 | Peters, RF | 721103 | -- |
| 227622306 | Grisso, MK | 721027 | -- |
| 229507263 | Dickerson, ND | 721110 | -- |
| 227622102 | Fontz, HB | 721201 | -- |
| 229569274 | Bell, NP | 721201 | -- |
| 224828065 | Tuck, DF | 721127 | -- |
| 223600243 | Half, RL | 721202 | -- |
| 229687275 | Brammer, LR | 721215 | -- |
| 225801240 | Stevens, JG | 730105 | -- |
| 231649452 | Kelley, JF | 730126 | -- |
| 229729544 | Kimberlin, PB | 730126 | -- |
| 229647323 | Sarver, LB | 730111 | -- |
| 229686937 | Aker, CF | 730126 | -- |
| 228461778 | Thompson, JF | 730202 | -- |
| 227447786 | Colpman, YR | 730302 | -- |

Exhibit "B"



UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## REVISED ANSWER BY DEFENDANT GENERAL ELECTRIC COMPANY TO PLAINTIFFS' INTERROGATORIES

(Filed May 2, 1973)

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant General Electric Company (hereafter "GE"), by J. F. Duncan, Consultant-Employee Benefits, submits the following revised answers to plaintiffs' interrogatories dated September 21, 1972 and December 29, 1972.

### Supplemental Answer to Interrogatory No. 5

| | Miscarriage & Abortion | Childbirth | Total Pregnancies |
|---|---|---|---|
| 1970 | 147 | 3401 | 3548 |
| 1971 | 180 | 2601 | 2781 |

### Supplemental Answer to Interrogatory No. 12

| | Did Not Return to Work |
|---|---|
| 1970 | 1592 |
| 1971 | 1147 |

## Supplemental Answer to Interrogatory No. 14

| | Returned to Work |
|---|---|
| 1970 | 1956 |
| 1971 | 1634 |

## Supplemental Answer to Interrogatory No. 45

A. The following tabulation with respect to normal deliveries during the years 1970 and 1971 shows the duration of pregnancy absences (in weeks) prior to the date of delivery for employees at all GE plants and locations:

Pregnancy Absences Prior to Delivery
Total Company - Normal Delivery

| Weeks Duration of Pregnancy Absence | 1970 | Cumulative Percent | 1971 | Cumulative Percent |
|---|---|---|---|---|
| Under 1 week | 86 | | 68 | |
| 1 week but less than 2 | 46 | | 52 | |
| 2 weeks but less than 3 | 63 | | 61 | |
| 3 weeks but less than 4 | 76 | | 74 | |
| 4 weeks but less than 5 | 124 | 12% | 106 | 15% |
| 5 weeks but less than 6 | 153 | | 91 | |
| 6 weeks but less than 7 | 195 | | 146 | |
| 7 weeks but less than 8 | 211 | 29 | 167 | 31 |
| 8 weeks but less than 9 | 277 | | 206 | |
| 9 weeks but less than 10 | 246 | 45 | 185 | 47 |
| 10 weeks but less than 11 | 231 | | 162 | |
| 11 weeks but less than 12 | 229 | 59 | 165 | 60 |
| 12 weeks but less than 13 | 275 | | 210 | |
| 13 weeks but less than 14 | 184 | | 153 | |
| 14 weeks but less than 15 | 134 | 78 | 102 | 79 |
| 15 weeks but less than 16 | 117 | | 93 | |
| 16 weeks but less than 17 | 84 | | 58 | |



| Weeks Duration of Pregnancy Absence | 1970 | Cumulative Percent | 1971 | Cumulative Percent |
|---|---|---|---|---|
| 17 weeks but less than 18 | 62 | | 51 | |
| 18 weeks but less than 19 | 52 | | 42 | |
| 19 weeks but less than 20 | 47 | 89 | 36 | 90 |
| 20 weeks but less than 21 | 46 | | 25 | |
| 21 weeks but less than 22 | 42 | | 32 | |
| 22 weeks but less than 23 | 41 | | 23 | |
| 23 weeks but less than 24 | 37 | | 16 | |
| 24 weeks but less than 25 | 14 | | 16 | |
| 25 weeks but less than 26 | 25 | | 20 | |
| 26 weeks but less than 27 | 23 | | 19 | |
| 27 weeks but less than 28 | 27 | | 19 | |
| 28 weeks but less than 29 | 23 | | 15 | |
| 29 weeks but less than 30 | 14 | | 13 | |
| 30 weeks but less than 31 | 16 | | 10 | |
| 31 weeks but less than 32 | 12 | | 17 | |
| 32 weeks but less than 33 | 16 | | 9 | |
| 33 weeks and over | 33 | 100% | 14 | 100% |
| TOTAL | 3,261 | | 2,476 | |

/s/ J. F. DUNCAN
J. F. Duncan

[Affidavit and jurat omitted in printing

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA

[Title omitted in printing]

* * * * *

## FURTHER SUPPLEMENTAL ANSWERS BY DEFENDANT GENERAL ELECTRIC COMPANY TO PLAINTIFFS' INTERROGATORIES

(Filed July 5, 1973)

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant General Electric Company (hereafter "GE"), by J. F. Duncan, Consultant-Employee Benefits, submits the following supplemental answers to plaintiffs' interrogatories dated September 31, 1972:

### Supplemental Answer to Interrogatory No. 5

| Year | Miscarriages | Childbirths | Total Cases |
|---|---|---|---|
| 1972 | 130 | 2206 | 2336 |

Note: Figures shown for the year 1972 are not complete; complete figures will not be available until early 1974.

### Supplemental Answer to Interrogatory No. 6

Available data shows the the average duration of pregnancy absences during 1972 was 122 days.



### Supplemental Answer to Interrogatory No. 12

| Year | Did Not Return To Work |
|---|---|
| 1972 | 928 |

Note: Figures shown for the year 1972 are not complete; complete figures will not be available until early 1974.

### Supplemental Answer to Interrogatory No. 14

| Year | Returned To Work |
|---|---|
| 1972 | 1408 |

Note: Figures shown for the year 1972 are not complete; complete figures will not be available until early 1974.

/s/ J. F. DUNCAN
J. F. Duncan

[Affidavit and jurat omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## ANSWERS BY DEFENDANT GENERAL ELECTRIC COMPANY TO PLAINTIFFS' FOURTH INTERROGATORIES
(Filed July 19, 1973)

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant General Electric Company (hereafter "GE"), by J. F. Duncan, Consultant - Employee Benefits, submits the following answers to plaintiffs' interrogatories dated May 22, 1973, and designated "Plaintiffs' Fourth Interrogatories":

### Answer to Interrogatories Nos. 63-66

Information in response to these Interrogatories is in the process of being collected from operating locations and will be supplied shortly.

### Answer to Interrogatory No. 67

No. An employee is terminated if she either does not return to work by the end of the 8th week following childbirth or does not request an extension of leave within that period.



### Answer to Interrogatories Nos. 68-69

Yes. Such notice is normally given orally to a pregnant employee by the plant doctor after she has informed management of her pregnancy. In addition, in many plants, such notification has been given in written form addressed to all employees. Examples of such written notifications are attached hereto, marked Exhibits A-1 through A-9.

### Answer to Interrogatory No. 70

S&A benefits for pregnancy absences during the period approximately 1939-1948 were paid only to employees in certain GE plants. Records relating to coverage in those years are incomplete, but it is believed that the following plants were covered by those provisions:

Plants of the Lamp Department

Electronics Department Plants:

Easthampton (Mass.) Tube Works
Ken-Rad Division
Wabash (Ind.) Cabinet Works

Appliance and Merchandise Department Plants:

Lowell, Mass., Plant
Poughkeepsie, New York, Plant
York (Pa.) Works
Boundary Avenue Plant (York)
White Plains, New York, Plant
Saugerties, New York, Plant
Millerton, New York, Plant
New Kensington, Pa., Plant
Allentown, Pa., Plant

Electric Sink & Dishwasher Unit (Scranton, Pa.)
Trenton, New Jersey, Plant
Coxsackie, New York, Plant
Mt. Vernon, New York, Plant
Norfolk, Connecticut, Plant

During that period of time there was no companywide GE insurance plan and different company components were privileged to adopt insurance coverage as desired.

Answer to Interrogatory No. 71

S&A benefits for pregnancy absences during the period approximately 1939-1948 were paid in the plants listed above to both hourly and salaried employees.

Answer to Interrogatories Nos. 72-75

No. The calculations set forth in plaintiffs' Interrogatories are not correct in that the number of claims set out in the answer to Interrogatory No. 57 were only new claims, whereas the amount set out as total benefits paid included payments on pre-existing as well as new claims. It would be difficult, if not impossible, at this time to reconstruct precise figures, but we estimate that a reconstruction would show a difference of no more than 2 percent in the result of plaintiffs' calculations. In this connection we note the attached fact sheet, dated December 1971, prepared by the Womens Bureau, U.S. Department of Labor, shows that in the years 1965-1971 women's median earnings have been approximately 60 percent of men's earnings. (Exhibit B)



Answer to Interrogatories Nos. 76-77

Claims of the type of total disability referred to in these Interrogatories are very infrequent, but would be paid. Electronic records maintained by Metropolitan Life Insurance Company with respect to GE weekly S&A claims do not reflect the cause of disability. A manual review of such records was made of approximately 750 randomly selected current claims (the average number of GE claims received per week). None of these claims included claims for elective plastic surgery or for psychiatric care.

Answer to Interrogatory No. 78

S&A benefits are paid only where an employee (male or female) is under the actual care of a physician who can certify as to a disability being caused by sickness or accident and where all the conditions of the Insurance Plan are complied with.

Answer to Interrogatory No. 79

To the extent that certain parts of Exhibit B contain data which pertains to some elements of turnover and to some plants of the company, such parts are accurate.

[Affidavit and jurat omitted in printing]

EXHIBIT A-1.

**Management Newsletter**

Lighting Systems Business Dept.
No. 73-5
March 22, 1973

## PURCHASES FROM EMPLOYEE STORE

Any purchase of material from the new Employee Store – for business, rather than personal, use – requires a properly signed Purchase Order. (Refer to Operating Instruction 22.31 on Short Orders.)

The assigned vendor number is S374; and the order should be made to:

Skyland TV and Stereo Service
1214 Hendersonville Road
Asheville, North Carolina 28885

If the material is picked up directly from the vendor (at the Employee Store), the recipient must sign a packing slip – indicating that the material has been received. It is necessary for the recipient to obtain his manager's signature and to forward the packing slip to the Receiving Component.

Purchases from this particular vendor do not differ in any way from any other purchases made from local vendors, with regard to documentary requirements described in Operating Instruction 22.31. Additional copies of this instruction are available from the Materials secretary.



INFORMATION SOURCE: David R. Mason, Purchasing Systems Specialist, Extension 287.

* * *

## CERTIFICATION OF PREGNANCY

As you undoubtedly know, it is the position of the Lighting Systems Department, that pregnant employees may discontinue working at any time during the course of their pregnancy, and be placed on "Ilness-Pregnancy" status.

It is important, however, that once pregnancy has been established, the employee notify both the Medical Unit and the employee's supervisor.

Those pregnant emplcyees who wish to continue at work may do so, providing the job assignment is considered appropriate and non-hazardous . . . work efficiency is maintained . . . and they have the approval of their attending physicians and the concurrence of the General Electric physician.

INFORMATION SOURCE: C. C. Boot, Specialist, Employee Relations,

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EXHIBIT A-2.

MURFREESBORO

N E W S

D I G E S T

SITE OF THE BATTLE OF STONES RIVER – 1862

Vol. 17 Thursday, February 15, 1973 (69 7/8) No. 32

## DAVE'S QUESTION CORNER – CORRECTION

In the DIGEST of January 15th, there was a question concerning absence of employees due to pregnancy to which my answer may have been misleading. The question and the correct answer are as follows:

Q. Is it Company policy that all pregnant female employees take their leave of absence at the beginning of their sixth month?

A. Pregnant employees may discontinue working at any time during the course of their pregnancy, and be placed on "Illness-Pregnancy" status.

Those employees who desire to continue at work may do so as long as they want providing the job assignment is considered appropriate and non-hazardous, work efficiency is maintained and they have the approval of their attending physician and the concurrence of the GE physician.

PUBLISHED EVERY WORKING DAY FOR THE MEN AND WOMEN OF THE GENERAL ELECTRIC COMPANY, MURFREESBORO, TENNESSEE



EXHIBIT A-3.

## APPLIANCE PARK - EAST, COLUMBIA, MARYLAND EMPLOYEE HANDBOOK ISSUED SINCE 1972

### I. MILITARY SERVICE

A military leave of absence, which will protect your employment with the Company and continue your service while on leave, may be obtained if you enlist, are inducted, or are recalled to active duty in the armed forces of our country. Your job, or a comparable one, will be waiting for you when you return, unless circumstances have so changed as to make it impossible or unreasonable. However, you must reapply for your job within 90 days after you are honorably discharged or released from active duty.

A separate document explaining the benefits for employees entering the armed forces is available in the Employee Relations office.

### J. MATERNITY

Subject to the continuing approval of the plant physician and the approval of her attending physician, a female employee who becomes pregnant may continue to work up to two weeks prior to the expected date of delivery. The length of time that a pregnant female employee may continue to work will vary from case to case and will depend on a variety of factors including general health, safety, the nature of the employee's work, and the like. To allow sufficient time to plan for the continuation of your work, please notify your supervisor as soon as your pregnancy is confirmed by your physician.

Continuity of service is protected during absence due to pregnancy, and service credits are granted upon return for as much as six months if you have continuity of service at the time you leave and if you return or make arrangements to return within eight weeks after delivery.

In the event that you are physically unable to return to work at the end of eight weeks following the delivery or should the doctor recommend that your child needs your care for a few additional weeks, it is important that you contact your supervisor to request approval of an extension of your protected absence.

K. JURY DUTY

If you are called for jury duty, you will be paid the difference between the jury fee and your current straight-time earnings. Similar make-up pay is granted to employees who lose time from work because of appearance in court in answer to a subpoena, except when the employee is either a plaintiff, defendant or other party in the court proceedings. The limit on such earnings is eight hours a day and forty hours a week, for as long as you are required to perform jury duty. Your service is protected for any time lost. To qualify for this payment, you must supply a statement from the court certifying the time you spend on jury duty and the fees received.

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EXHIBIT A-4.

A wide variety of in-house Company courses is available to employees who are interested in pursuing other developmental activities. Listings of these courses and and start dates are publicized in the Astronote.

**Leave of Absence**

A leave of absence, without pay, may be granted to an employee to protect his continuity of service during a temporary absence from work. For the period of the leave of absence you may continue all insurance coverage (except Weekly Sickness and Accident benefits) by payments of regular contribution monthly in advance, as long as you maintain continuity of service. Of course, re-employment upon return from a leave of absence is subject to business conditions at that time.

**Educational Leave of Absence**

Leave may be granted to employees to pursue undergraduate or graduate studies. Employee must have a minimum of two year's service to apply. The course work to be pursued must lead to either an undergraduate or graduate degree related to the employee's work.

**Maternity Absence**

Employees who are pregnant may work through the end of their sixth month, or through the eighth month if they have permission from their personal doctor and the Company physician.

An absence for pregnancy is treated as an absence for illness, except that no weekly sickness and accident payment is made. Unless there are verified medical compli-

cations, employees returning to work must report back no later than eight weeks after the delivery date. It may be possible to return earlier if you have the written consent of your doctor and the approval of the Company physician.

**Military Service**

While you are on military leave of absence, you do not break your Company service. You continue to build service credits for up to four years. When you are honorably discharged, you are entitled to be re-employed on your former job or on a job having the same status, pay, and seniority if you are still able to do the work.

If you enter U.S. military service for active duty after one year of continuous service with GE, you are eligible for a military duty allowance equal to one month's straight-time pay. Effective January 1, 1971, continuous service requirement will be reduced to 30 days.

If you are called into service for a reason other than active military duty (summer encampment, emergency duty or training, for instance), you are eligible for military pay differential for the first 17 days of military service in a calendar year, based on the number of working days included in such 17 days. Effective January 1, 1971, military pay differential will be increased.



EXHIBIT A-5.

**HANDBOOK**

**for NON–EXEMPT HOURLY EMPLOYEES**

**Covering Personnel Policies and Practices**

**GENERAL ELECTRIC**

## 5.6 MATERNITY

Female employees may leave because of pregnancy at any time from the start of the pregnancy up to, but no later than, the end of the 7th month of pregnancy. The maternity leave extends to 8 weeks after the pregnancy ends.

Continuity of service is protected during absence due to pregnancy, and service credits are granted upon return for as much as 12 months if you have continuity of service at the time you leave.

Should your health or the health of the child make it impossible for you to return to work, a statement from your doctor explaining the medical circumstances should be presented to the Dispensary for consideration of an approved extension of your protected absence. (The request must be made no later than 8 weeks after termination of pregnancy.)

## 5.7 JURY DUTY

You will be paid the difference between the jury fee and your last straight-time earnings. The limit on such earnings is 8 hours a day and 40 hours a week, for as long as you are required to perform jury duty. Your service is protected for any time lost. You must supply a statement certifying the time you spend on jury duty and the fees received.

EXHIBIT A-6.

**BRIDGEPORT PLANT**

### MATERNITY ABSENCE

A female employee is not required to begin a maternity leave at any specific time during her pregnancy. She may work as long as her doctor and the Plant Physician consider it safe.

If you leave on Maternity Absence, your service with the Company will be automatically protected for 8 weeks after the birth of your child or termination of pregnancy.

In order to be considered for reinstatement there are several notifications to E & CR and medical releases required. Before you go on Maternity Absence be sure you discuss these with E & CR so you know exactly what your responsibilities are.

### REPORTING FOR WORK AFTER ILLNESS

Any employee who returns to work following an illness or injury must obtain clearance from the plant dispensary



before going back on the job – if he has been hospitalized, or if he has been absent for five or more consecutive working days. Normally, presentation of a note from your physician stating that he feels you are capable of returning to work on a given day is sufficient.

Examinations by the Plant Physician are required, before returning to work, if:

1) It appears necessary to match your job with your health capabilities.
2) You have been away from work two weeks or more, for any reason.
3) You have been injured in an accident.

Appointments with the Plant Physician may be made through the dispensary.

EXHIBIT A-7.

**EMPLOYEE INFORMATION**

**INSULATOR PRODUCTS DEPARTMENT**

**GENERAL ELECTRIC**
**Baltimore, Maryland**

6. Your are absent from work for a continuous period of more than one year for any reason other than a leave of absence granted in advance.

## PHYSICAL EXAMINATIONS FOLLOWING EXTENDED ABSENCE

If you are out of work for more than fourteen (14) consecutive calendar days, for any reasons other than vacation, you must receive clearance from the company doctor before you can report to work.

## MATERNITY ABSENCES

Women employees who are pregnant may work through the period of their pregnancy for which they have the approval of their personal physician and the plant physician.

An absence caused by pregnancy is treated the same as an absence for illness except that weekly sickness and accident payment is not made. Unless there are verified medical complications, employees desiring to maintain their continuity of service must make themselves available for work within eight weeks after delivery date.
after delivery date.

## CHANGE OF ADDRESS

Any time you change your address or telephone number, you must notify the Relations Section at once, so that in case of any emergency we will know where to reach your family.

## MARITAL STATUS

Should you change your marital status or have additional dependents, you also should notify the Relations Section.



## IF YOU LEAVE THE COMPANY

If you should find it necessary to leave the Department, notify your foreman or manager at least one week in advance. Obtain a removal slip from him and report to the Relations Office for an Exit Interview. You will be required to turn in your locker key, safety glasses, any any other company property. Your final pay will be arranged at that time.

## GOOD HOUSEKEEPING

A clean place to work is a better, easier, safer and more pleasant place. Keep your work area clean and orderly. Keep aisles clear, help keep washrooms neat. Throw rubbish in the containers provided, not just at them. In short, be a good housekeeper on the job. You are expected to keep your own work area and your tools and machines clean.

Personal neatness and proper attire are expected.

## VISITORS

You may not visit units other than your own during working hours without permission unless it is required as a part of your assigned work. You will not be called away from your work station for visitors except in case

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EXHIBIT A-8

AUGUST 25, 1972 RE-ENTRY & ENVIRONMENTAL SYSTEMS DIVISION VOL. 7, NO. 18
GENERAL ELECTRIC COMPANY

MEDICAL NOTES

## PREGNANCY POLICY LIBERALIZED

A Revised, liberalized Division policy on absences for pregnancy has been issued to permit female employes, who meet certain requirements, to continue working until two weeks prior to their expected date of delivery.

The employe's doctor and the Division Medical Director must agree that the employe's assugnment will have no adverse effect on her health and safety.

The policy requires that the employe's physician sign a "Certificate to Work During Pregnancy" form specifying the expected delivery date. The forms are available at all Division medical clinics.

Following a review by the Division Medical Director, the employe will be permitted to continue work for as long as she is able to perform her job satisfactorily. However, under no circumstances will she be permitted to work beyond the two weeks prior to the expected delivery.

Questions regarding benefits during absences for pregnancy should be directed to the Employe Benefits Office, ext. 3818 at Division Headquarters or 1234 at the Operational Manufacturing Center (for all RESD Valley Forge area employes).



EXHIBIT A-9.

THE GENERAL ELECTRIC COMPANY
Burlington, Iowa

**SWITCHGEAR HIGH–LIGHTS**

VOLUME XII Thursday, February 10, 1972 Number 12

### Have You Filed Your 1971 GE Medical Insurance Claim?

### "Deadline is March 31st"

Employees who have not as yet filed their 1971 medical insurance claims should do so as soon as possible before March 31st. The Insurance Plan provides that proof of claim must be filed not later than 90 days after the end of the calendar year in which the expense occurs.

To submit a claim for benefits, you should:

1) Assemble all your bills for covered medical expenses (doctor, drug, hospital, x-rays, etc.)
2) Get a blue claim form from the Plant Nurse and complete it carefully, following the instructions provided with the form.
3) Return the form and your bills to the Nurse.
4) If you have any questions about the Insurance Plan benefits or your claim, please contact E & CR.

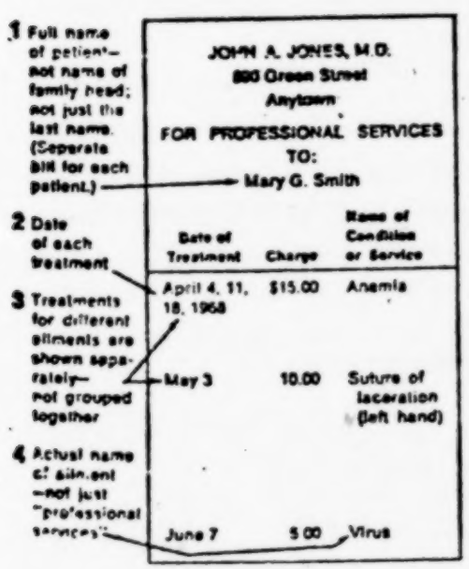
- Doctor and Druggist Bills Must Be Complete

Bills are the "evidence" needed to pay claims. Any hospital bills you receive will usually present full information. But doctor and druggist bills are sometimes incomplete. You can

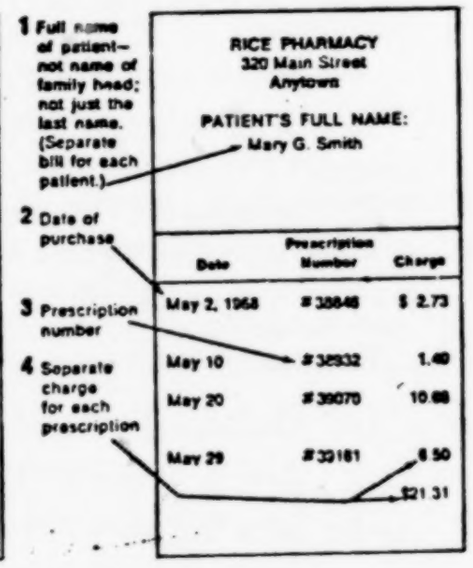
same time and assure your self of quicker payment of benefits by having these bills complete and correct before you submit them.

## FOR PROMPT CLAIM PAYMENT, MAKE SURE –

Doctor Bills Look Something Like This:




Druggist Bills Look Something Like This:




QUESTION BOX –

*(Editor's Note – Three questions were received on this subject, each worded a little differently. This answer is intended to explain what all 3 questions were asking. If there is anyone who wishes further information or clarification, we suggest contacting Ray Hibler in E & CR.*

Question: "Why can one person work six weeks before the baby is due and anyone else has to quit at six months?"



Answer: Thanks for your question. It's a timely one and we checked carefully our practices here as well as the latest guidance from the Corporate Medical Operation in New York. Here's what we found out.

* The decision to permit pregnant employees to continue at work involves many considerations. These include: 1) the desire of the individual, 2) approval of her physician and concurrence by the General Electric physician, 3) maintenance of good health and well being, 4) appropriate and safe work assignment, and 5) continued efficient work performance. Because these factors vary from one employee to another, each case must be decided individually.

* While pregnant employees in this plant have generally left work at the end of the sixth month, some leave in the 2nd or 3rd month and some may work beyond the sixth month. It's an individual matter based on all the factors above.

* Pregnant employees who have chosen to continue at work, and who have been certified, may thereafter elect at any time to discontinue working and may be on "Illness-Pregnancy" status. Those pregnant employees who continue at work beyond the sixth month of pregnancy should have the approval of their attending physician and be followed closely by company medical personnel to determine continued well being and job safety. Pregnant employees will of course be required to discontinue working and will be placed on "Pregnancy" status in cases where the attending or plant physician determines it is unwise to continue at work because of medical reasons,

when suitable work is no longer available, and when through inefficient performance, the employee demonstrates inability to perform work satisfactorily.

* Above all, it is an individual matter and the decision to continue work or not is based on several factors.

*Published for the Men and Women of the General Electric Company by Employee and Community Relations*

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EXHIBIT B.

**U.S. DEPARTMENT OF LABOR**

**Employment Standards Administration**

**WOMEN'S BUREAU**

**Washington, D. C. 20210**

## FACT SHEET ON THE EARNINGS GAP

Women who work at full-time jobs the year round earn, on the average, only $3 for every $5 earned by similarly employed men. The ratio varies slightly from year to year, but the gap is greater than it was 15 years ago. From 64 percent in 1955, women's median wage or salary income as a proportion of men's fell to 61 percent by 1959 and 1960 and since then has fluctuated between 58 and 60 percent. Women's median earnings of $5,323 in 1970 were 59 percent of the $8,966 received by men.



Median Earnings of Full-Time Year-Round Workers,[1] by Sex, 1955-70[2]

| Year | Median earnings | | Women's median earnings as percent of men's |
|---|---|---|---|
| | Women | Men | |
| 1971[3] | $5,593 | $9,399 | 59.5 |
| 1970 | 5,323 | 8,966 | 59.4 |
| 1969 | 4,977 | 8,227 | 60.5 |
| 1968 | 4,457 | 7,664 | 58.2 |
| 1967 | 4,150 | 7,182 | 57.8 |
| 1966 | 3,973 | 6,848 | 58.0 |
| 1965 | 3,823 | 6,375 | 60.0 |
| 1964 | 3,690 | 6,195 | 59.6 |
| 1963 | 3,561 | 5,978 | 59.6 |
| 1962 | 3,446 | 5,794 | 59.5 |
| 1961 | 3,351 | 5,644 | 59.4 |
| 1960 | 3,293 | 5,417 | 60.8 |
| 1959 | 3,193 | 5,209 | 61.3 |
| 1958 | 3,102 | 4,927 | 63.0 |
| 1957 | 3,008 | 4,713 | 63.8 |
| 1956 | 2,827 | 4,466 | 63.3 |
| 1955 | 2,719 | 4,252 | 63.9 |

[1]Worked 35 hours or more a week for 50 to 52 weeks.

[2]Data for 1967-70 are not strictly comparable with those for prior years, which are for wage and salary income only and do not include earnings of self-employed persons.

Source: U.S. Department of Commerce, Bureau of the Census: Current Population Reports, P-60.

[3]Report P60, No. 85 (Dec. 1972) Table 5b.

The gap in earnings varies by major occupation group. It was largest in 1970 for sales workers (women earned only 43 percent of what men earned) and smallest for

professional and technical workers (women earned 67 percent of what men earned). Wage or salary incomes of women in relationship to those of men were somewhat higher in 1970 than in 1969 for managerial workers, sales workers, and professional workers, but lower for service workers outside the home.

Median Wage or Salary Income of Full-Time Year-Round Workers, by Sex and Selected Major Occupation Group, 1970

| Major occupation group | Median wage or salary income | | Women's median wage or salary income as percent of men's |
|---|---|---|---|
| | Women | Men | |
| Professional and technical workers | $7,878 | $11,806 | 66.7 |
| Nonfarm managers, officials, and proprietors | 6,834 | 12,117 | 56.4 |
| Clerical workers | 5,551 | 8,617 | 64.4 |
| Sales workers | 4,188 | 9,790 | 42.8 |
| Operatives | 4,510 | 7,623 | 59.2 |
| Service workers (except private household) | 3,953 | 6,955 | 56.8 |

Source: U.S. Department of Commerce, Bureau of the Census: Current Population Reports, P-60, No. 80.

Another measure of the gap in the earnings of women and men full-time year-round workers is a distribution of these workers by earnings levels. For example, 12 percent of the women but only 5 percent of the men earned less than $3,000 in 1970. Moreover, 45 percent of the women but only 14 percent of the men earned less than $5,000. At the upper end of the scale, only 7 percent of the women but 40 percent of the men had earnings of $10,000 or more.



Earnings of Full-Time Year Round Workers, by Sex, 1970

| Earnings | Women | Men |
|---|---|---|
| Number with earnings | 15,476,000 | 36,132,000 |
| Percent distribution | 100.0 | 100.0 |
| Less than $3,000 | 12.2 | 5.1 |
| $3,000 to $4,999 | 32.5 | 8.8 |
| $5,000 to $6,999 | 29.2 | 16.2 |
| $7,000 to $9,999 | 19.3 | 30.1 |
| $10,000 to $14,999 | 5.9 | 26.5 |
| $15,000 and over | 1.1 | 13.5 |

Source: U.S. Department of Commerce, Bureau of the Census: Current Population Reports, P-60, No. 80.

The educational background of a worker often determines not only the type of work but also the level of job within an occupation for which he or she can qualify. However, women who work full time the year round earn substantially less than similarly employed men who have the same amount of education. Among workers who had completed only grade school or 1 to 3 years of high school, women's incomes in 1970 were only 55 percent of men's. Among those who had 5 years or more of college, the proportion was 65 percent.

Median Income in 1970 of Full-Time Year-Round Workers,
by Sex and Years of School Completed
(Persons 25 years of age and over)

| Years of school completed | Median income | | Women's median income as percent of men's |
|---|---|---|---|
| | Women | Men | |
| Elementary school: | | | |
| Less than 8 years | $3,798 | $ 6,043 | 62.8 |
| 8 years | 4,181 | 7,535 | 55.5 |
| High school: | | | |
| 1-3 years | 4,655 | 8,514 | 54.7 |
| 4 years | 5,580 | 9,567 | 58.3 |
| College: | | | |
| 1-3 years | 6,604 | 11,183 | 59.1 |
| 4 years | 8,156 | 13,264 | 61.5 |
| 5 years or more | 9,581 | 14,747 | 65.0 |

Source: U.S. Department of Commerce, Bureau of the Census: Current Population Reports, P-60, No. 80.

The previous figures do not necessarily indicate that women are receiving unequal pay for equal work. For the most part, they reflect the fact that women are more likely than men to be employed in low-skilled, low-paying jobs. For example:

In public elementary and secondary schools, women are less than 20 percent of the principals; superintendents; deputy, associate, and assistant superintendents; and other central office administrators in 1970-71.

Among professional and technical workers in business, women are concentrated in the class B and class C computer programer positions, while men are more frequently employed in the higher paying class A



positions. Similarly, women are usually in the lowest category of draftsmen and engineering technicians.

Among managers and proprietors, women frequently operate small retail establishments, while men may manufacturing plants or wholesale outlets.

In the manufacturing of men's and boys' suits and coats, women are likely to be employed as hand finishers, thread trimmers and basting pullers, and sewing machine operators–jobs where their average hourly earnings are less than $2.70–while men are likely to be employed as finish pressers (hand or machine), underpressers, cutters, and markers–with average hourly earnings of $3.50 to $4.25.

In the service occupations, women are likely to be cooks, nurses' aides, and waitresses, while men are likely to be employed in higher paying jobs as bartenders, guards, custodians, firemen, policemen, and detectives.

Nevertheless, within some of these detailed occupations, men usually are better paid. For example, Bureau of Labor Statistics surveys of earnings in major office occupations showed that during the period July 1969 to June 1970 men's average weekly earnings were substantially higher than those of women among class A and class B accounting and payroll clerks. The weekly salary differentials between women and men class A accounting clerks ranged from $6.50 to $42.50 in 60 of the important centers of business and industry surveyed.

Median salaries of women scientists in 1970 were from $1,700 to $5,100 less than those of men in the same

fields. The greatest gap was in the field of chemistry, where the median annual salary of women was $10,500 as compared with $15,600 for men. Additional details are given in the following table.

Median Salary of Full-Time Employed Civilian Scientists, by Sex and Field, 1970

| Field | Median salary | | Women's median salary as percent of men's |
|---|---|---|---|
| | Women | Men | |
| All fields | $11,600 | $15,200 | 76.3 |
| Chemistry | 10,500 | 15,600 | 67.3 |
| Earth and marine sciences | 10,500 | 15,000 | 70.0 |
| Atmospheric and space sciences | 13,000 | 15,200 | 85.5 |
| Physics | 12,000 | 16,000 | 75.0 |
| Mathematics | 10,000 | 15,000 | 66.7 |
| Computer sciences | 13,200 | 16,900 | 78.1 |
| Agricultural sciences | 9,400 | 12,800 | 73.4 |
| Biological sciences | 11,000 | 15,500 | 71.0 |
| Psychology | 13,000 | 15,500 | 83.9 |
| Statistics | 14,000 | 17,100 | 81.9 |
| Economics | 13,400 | 16,500 | 81.2 |
| Sociology | 11,000 | 13,500 | 81.5 |
| Anthropology | 12,300 | 15,000 | 82.0 |
| Political science | 11,000 | 13,500 | 81.5 |
| Linguistics | 11,300 | 13,000 | 86.9 |

Source: National Science Foundation: "National Register of Scientific and Technical Personnel." 1970.

The jobs and salaries expected to be offered by 191 companies to June 1971 college graduates were reported in a survey conducted in November 1970. Salaries to be offered to women were consistently below those to be



offered to men with the same college major. A comparison with 1970, however, shows a marked reduction in the spread between salaries for women and men. For 1970 the monthly gap ranged from $86 down to $18; for 1971 the gap ranged from $68 down to only $1 in engineering. These figures do not indicate that different salaries are being offered to women and men hired by the same company for the same job, but are averages of offers by all companies planning to employ graduates in that field.

Average Starting Monthly Salary for June 1970 and 1971 College Graduates, by Sex and Selected Field

| Field | 1971 | | 1970 | |
|---|---|---|---|---|
| | Women | Men | Women | Men |
| Accounting | $793 | $845 | $746 | $832 |
| Chemistry | 812 | 826 | 765 | 806 |
| Economics, finance | 700[1] | 768 | 700 | 718 |
| Engineering | 884 | 885 | 844 | 872 |
| Liberal arts | 688 | 690 | 631 | 688 |
| Mathematics, statistics | 776 | 806 | 746 | 773 |

[1]Average based on only six companies planning to employ women.

Source: Endicott, Frank S., Dr.: "Trends in Employment of College and University Graduates in Business and Industry." Northwestern University. 24th Annual Report, December 1969; 25th Annual Report, December 1970.

* * * * *

Federal legislation requires equal pay for equal work and prohibits six discrimination in employment by covered employers, labor unions, and employment agencies. In

addition to enforcement of these laws, equality of earnings for qualified men and women will require an expansion of the occupational opportunities for women. Because it is good business to make the most efficient use of available labor resources, it would be highly advantageous for employers to reconsider their recruitment, on-the-job training, and promotion policies with a view toward giving well-qualified and talented woemn the opportunity to move into more of the better paying jobs than they now hold.

December 1971 (rev.) 3134

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A UNITED STATES DEPARTMENT OF COMMERCE PUBLICATION

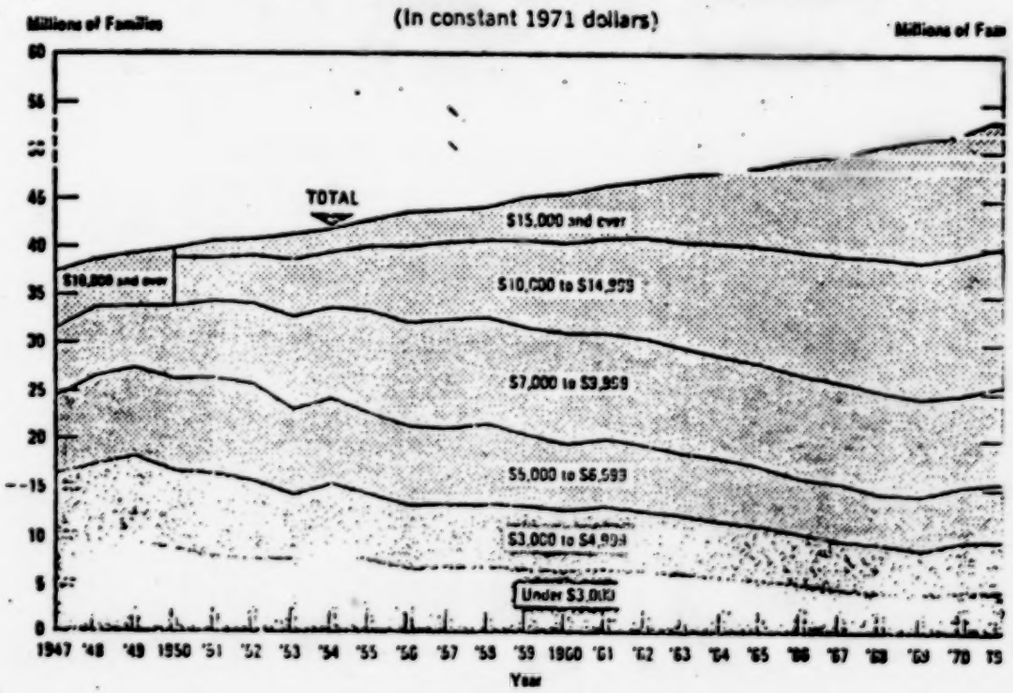
CURRENT POPULATION REPORTS

Consumer Income

Series P-60, No. 85
December 1972

# MONEY INCOME IN 1971 OF FAMILIES AND PERSON IN THE UNITED STATES

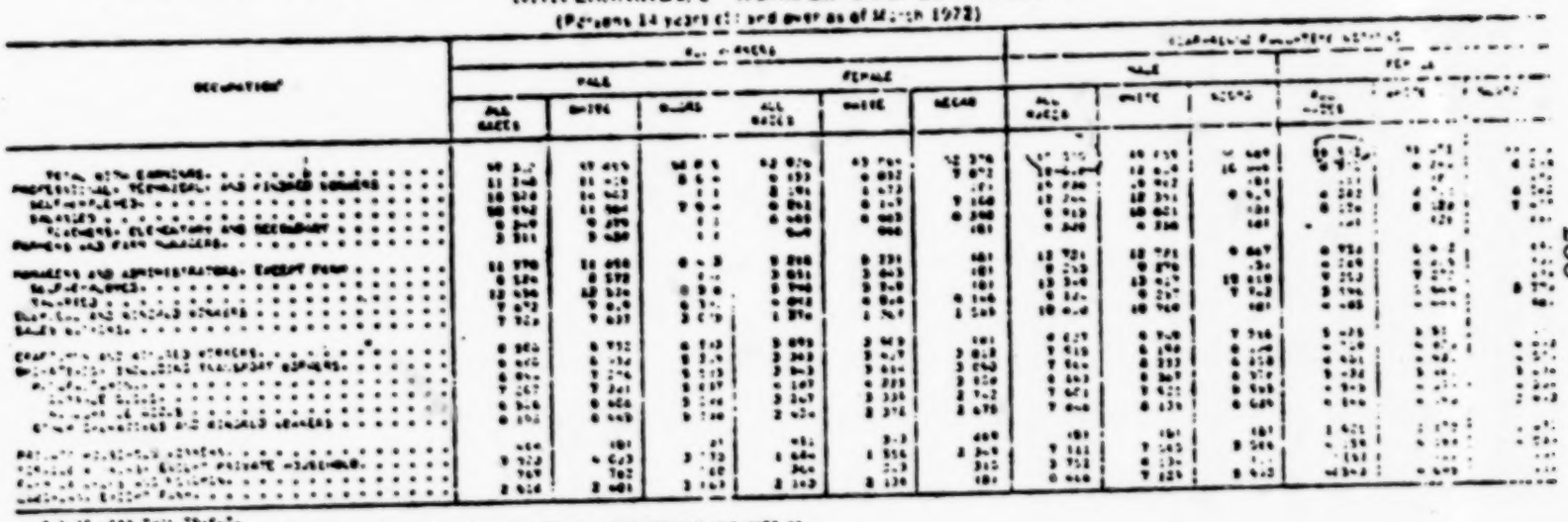
## Number of Families by Family Income in 1947 to 1971




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Table 55. RACE AND OCCUPATION OF LONGEST JOB IN 19[illegible]—MEDIAN EARNINGS IN 1971 OF CIVILIANS 14 YEARS OLD AND OVER WITH EARNINGS, BY WORK EXPERIENCE AND SEX

(Persons 14 years old and over as of March 1972)



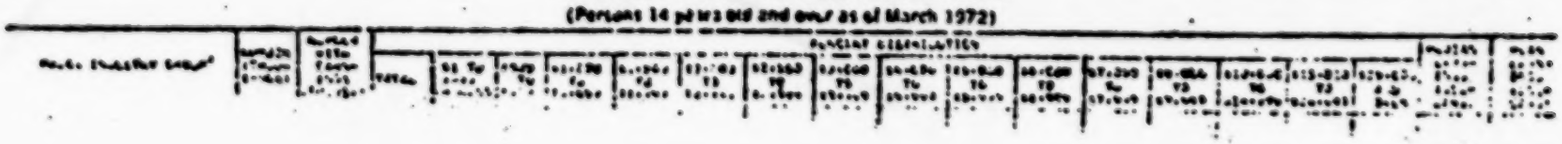
[1] Base less than 75,000.

[2] Data may not be directly comparable with those of previous years. For details see page 11.



Table 57. INDUSTRY AND OCCUPATION OF LONGEST JOB IN 197[illegible]—CIVILIAN WORKERS 14 YEARS OLD AND OVER BY TOTAL MONEY EARNINGS IN 1971, BY SEX AND WORK EXPERIENCE

(Persons 14 years old and over as of March 1972)





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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## SUPPLEMENTAL ANSWER BY DEFENDANT GENERAL ELECTRIC COMPANY TO PLAINTIFFS' INTERROGATORY NO. 45
(Filed July 20, 1973)

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant General Electric Company (hereafter "GE"), by J. F. Duncan, Consultant-Employee Benefits, submits the following supplemental answer to Interrogatory No. 45 of plaintiffs' interrogatories dated December 28, 1972, and designated "Plaintiffs' Third Interrogatories":

### Supplemental Answer to Interrogatory No. 45

D. The tabulation set forth in paragraph A of defendant's Supplemental Answer to Interrogatory No. 45 related to normal childbirths only.

The following tabulation with respect to ectopic pregnancies and caesarian births during the years 1970 and 1971 shows the duration of pregnancy absences (in weeks) prior to the date that the condition terminated for employees at all GE plants and locations.



| | 1970 | 1971 |
|---|---|---|
| Under 1 week | 10 | 5 |
| 1 week but less than 2 | 1 | 3 |
| 2 weeks but less than 3 | 6 | 3 |
| 3 weeks but less than 4 | 3 | – |
| 4 weeks but less than 5 | 4 | 3 |
| 5 weeks but less than 6 | 7 | 3 |
| 6 weeks but less than 7 | 9 | 9 |
| 7 weeks but less than 8 | 5 | 11 |
| 8 weeks but less than 9 | 16 | 14 |
| 9 weeks but less than 10 | 9 | 10 |
| 10 weeks but less than 11 | 9 | 10 |
| 11 weeks but less than 12 | 6 | 7 |
| 12 weeks but less than 13 | 6 | 5 |
| 13 weeks but less than 14 | 6 | 4 |
| 14 weeks but less than 15 | 13 | 10 |
| 15 weeks but less than 16 | 5 | 6 |
| 16 weeks but less than 17 | 6 | 3 |
| 17 weeks but less than 18 | 1 | 2 |
| 18 weeks but less than 19 | 1 | 3 |
| 19 weeks but less than 20 | 3 | 2 |
| 20 weeks but less than 21 | 1 | 1 |
| 21 weeks but less than 22 | 1 | 1 |
| 22 weeks but less than 23 | 1 | 1 |
| 23 weeks but less than 24 | 1 | 1 |
| Over 24 weeks | 10 | 8 |
| TOTAL | 140 | 125 |

[Affidavit and jurat omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

## SUPPLEMENTAL ANSWER BY DEFENDANT GENERAL ELECTRIC COMPANY TO PLAINTIFFS' INTERROGATORY NO. 45

(Filed July 20, 1973)

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant General Electric Company (hereafter "GE"), by J. F. Duncan, Consultant - Employee Benefits, submits the following supplemental answer to Interrogatory No. 45 of plaintiffs' interrogatories dated December 29, 1972, and designated "Plaintiffs' Third Interrogatories":

Supplemental Answer to Interrogatory No. 45

D. The tabulation set forth in paragraph A of defendant's Supplemental Answer to Interrogatory No. 45 related to normal childbirths only.

The following tabulation with respect to abortions and miscarriages during the years 1970 and 1971 shows the duration of pregnancy absences (in weeks) prior to the date that the abortion or miscarriage occurred for employees at all GE plants and locations.



| | 1970 | 1971 |
|---|---|---|
| Under 1 week | 83 | 123 |
| 1 week but less than 2 | 16 | 7 |
| 2 weeks but less than 3 | 8 | 10 |
| 3 weeks but less than 4 | 4 | 5 |
| 4 weeks but less than 5 | 6 | 5 |
| 5 weeks but less than 6 | 5 | 3 |
| 6 weeks but less than 7 | 1 | 3 |
| 7 weeks but less than 8 | 5 | 4 |
| 8 weeks but less than 9 | 6 | 5 |
| 9 weeks but less than 10 | 2 | 2 |
| 10 weeks but less than 11 | 2 | 2 |
| 11 weeks but less than 12 | 1 | 4 |
| 12 weeks but less than 13 | 1 | 1 |
| 13 weeks but less than 14 | 1 | 1 |
| 14 weeks but less than 15 | – | – |
| 15 weeks but less than 16 | – | 2 |
| 16 weeks but less than 17 | – | 1 |
| 17 weeks but less than 18 | 2 | – |
| 18 weeks but less than 19 | – | 1 |
| 19 weeks but less than 20 | 1 | 1 |
| 20 weeks but less than 21 | 1 | – |
| 21 weeks but less than 22 | – | – |
| 22 weeks but less than 23 | 1 | – |
| 23 weeks but less than 24 | 1 | – |
| TOTAL | 147 | 180 |

[Affidavit and jurat omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND VIRGINIA

[Title omitted in printing]

* * * * *

## OBJECTIONS BY DEFENDANT GENERAL ELECTRIC COMPANY TO PLAINTIFFS' INTERROGATORIES

(Filed November 20, 1972)

Defendant, General Electric Company (hereafter "GE"), objects as follows under Rule 33 of the Federal Rules of Civil Procedure to plaintiffs' interrogatories dated September 21, 1972:

### Objections to Interrogatories Nos. 4, 5, and 6

Insofar as these interrogatories seek to elicit information with respect to the years 1967, 1968, and 1969, the interrogatories are objectionable because: (1) the information sought is irrelevant and does not appear reasonably calculated to lead to the discovery of admissible evidence; and (2) even assuming the relevancy of the information sought, it would be unduly burdensome to furnish such information.

In explanation of GE's position that it would be unduly burdensome to supply the information sought for the years 1967, 1968, and 1969, the following facts are stated: GE's average yearly employment complement is more than 300,000 employees, with about a 40 percent turnover of employees each year. In order to supply the



requested information, the payroll records of these numerous employees would have to be reviewed and the resulting data would have to be collated. Such payroll records are separated into 90 separate payroll components, the records of which are maintained by GE at 90 separate localities throughout the United States. The payroll components vary in size: the largest includes about 43,000 employees; the smallest about 150 employees. In addition, there are three separate payroll files which would have to be reviewed: one file includes the payroll records of all GE employees who are currently in a working status; a second includes the payroll records of so-called Protected Service Employees–employees who are not currently in a working status but who may return to that status in the future (e.g. employees on leaves of absence); and a third file, actually a series of records, which is stored away and which includes the payroll records of former GE employees.

### Objections to Interrogatories Nos. 7, 8, 9, and 10

Insofar as these interrogatories seek to elicit information with respect to the years 1967, 1968, and 1969, the interrogatories are objectionable because they seek information which is irrelevant and does not appear reasonably calculated to lead to the discovery of admissible evidence.

### Objections to Interrogatories Nos. 15-32, Inclusive

These interrogatories are objectionable because they seek information which is irrelevant and does not appear

reasonably calculated to lead to the discovery of admissible evidence.

In addition, these interrogatories are also objectionable because it would be unduly burdensome, and possibly futile, for GE to attempt to furnish the information that is sought. Thus GE could attempt to answer the interrogatories only by the onerous process of examining, on a case by case basis, each of the approximately 40,000 Claim Statements for non-occupational Sickness and Accident insurance benefits that are filed each year by GE employees. Such Claim Statement, samples of which are attached, are complex in form; and filed Claim Statements are not retained at a central location, but are on file at various places throughout the United States. Moreover, an examination of the filed Claim Statements would not necessarily show a diagnosis consistent with the information sought by plaintiffs. For example, a diagnosis of cirrhosis of the liver shown on a Claim Statement would not indicate that the underlying cause of the cirrhosis was in fact alcoholism, the factor with which Interrogatories Nos. 15 and 16 are concerned; similarly, a diagnosis of head contusions appearing on a Claim Statement would not indicate that the underlying cause of the contusions was in fact fighting, the factor with which Interrogatories Nos. 23 and 24 are concerned. In sum, to attempt to provide the information sought by plaintiffs with respect to the years 1970 and 1971 alone would entail the examination of more than 80,000 filed Claim Statements located at various places throughout the United States, and such examination would not necessarily elicit the information that is sought.



Objection to Interrogatory No. 34

Insofar as this interrogatory seeks to elicit information with respect to dependents and children of GE employees, the interrogatory is objectionable because it seeks information which is irrelevant and does not appear reasonably calculated to lead to the discover of admissible evidence.

Objections to Interrogatories
Nos. 35, 37, and 38

These objections are objectionable because the information sought is irrelevant and does not appear reasonably calculated to lead to the discovery of admissible evidence.

/s/ JOHN S. BATTLE, JR.
John S. Battle, Jr.
Robert H. Patterson, Jr.
McGuire, Woods & Battle
1400 Ross Building
Richmond, Virginia 23219

Theophil C. Kammholz
Laurence I. Wood
Stanley R. Strauss
1750 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Attorneys for General Electric Company

Dated: November 15, 1972.

Group Health Claims

Metropolitan Life Insurance Company

NEW YORK EMPLOYEE

# STATEMENT OF CLAIM

FOR

## ACCIDENT AND SICKNESS WEEKLY BENEFITS

### TO BE COMPLETED BY THE EMPLOYEE

(Please answer all questions)

Shift_____

Work Phone_____

Bldg._____

1. Employee's name (Print) Mr. / Mrs. / Miss _____ Age_____ Pay number_____ Dept._____
2. Present address_____ (Number) (Street) (City) (State) (Zip Code)
3. Date you were first disabled by this sickness or injury_____ 19____
4. If you were Hospitalized *as a bed patient*, answer the following:
   (a) Name and Address of Hospital_____
   (b) Date Admitted_____ 19____ at_____ (Hour) {a.m. / p.m.} (c) Date Discharged_____ 19____ at_____ (Hour) {a.m. / p.m.}
5. Was your disability caused by an accident? ☐ Yes ☐ No
   If your answer is "Yes," answer the following:
   (a) When did the accident happen? Date_____ 19____ at_____ (Hour) {a.m. / p.m.}
   (b) Were you at work when the accident happened? ☐ Yes ☐ No
   (c) Give a brief description of the accident_____

I hereby authorize the Physician to release any information requested with respect to this Claim.
I certify that the information furnished by me in support of this claim is true and correct.

Date_____ 19____ Employee's Signature_____

### TO BE COMPLETED BY THE EMPLOYER

(Please answer all questions)

1. Employee's name_____ Social Security No. _____
2. Amount of Weekly Benefits—(½ of Employee's Normal Straight-Time Weekly Earnings Rate) $_____
3. Indicate Payroll Classification: ☐ Salary Exempt ☐ Salary Non-Exempt ☐ Hourly
4. If the employee was not actively in your employ when this disability began, indicate below the reason for stopping work
   ☐ Laid off ☐ On leave of absence ☐ Discharged or resigned ☐ Other_____ (Please explain)
5. If this coverage has been canceled, give the date and reason_____
6. (a) Date last worked_____ 19____ (b) Date returned to work_____ 19____
7. If Salaried Employee, give the date through which salary continuance is payable_____ 19____
8. If claim is being considered in connection with Workmen's Compensation coverage answer the following:
   (a) Workmen's Compensation Weekly Benefit Rate $_____
   (b) Period covered by Workmen's Compensation Benefits: From_____ (Date) 19____ to and including_____ (Date) 19____
9. Give information which might assist the Company in the consideration of this claim_____

17500 00 XXX 0

Pension Unit No. (Branch)_____ GENERAL ELECTRIC COMPANY

Location_____

Date_____ 19____ By_____ (Name) (Title)

ON SCHEDULE (Pay Station Number)

FN-435 B



## DOCTOR'S STATEMENT

The doctor's statement must be filled in completely. For item 3-d, give approximate date. Make some estimate. Delay in the payment of Disa Benefits may be prevented.

1. Claimant's Name_____ (First Middle Last) 2. Age____ 3. ☐ Male ☐ Fema
4. Diagnosis:
   a. Claimant's Symptoms_____
   b. Objective Findings_____
5. Operation Indicated? ☐ YES ☐ NO a. Type_____ b. Date_____
6. Enter Dates for the following:
   a. Dates of treatment for this disability:
      Office_____
      Home_____
      Hospital_____
   b. Date Claimant was unable to work because of this disability_____
   c. Date Claimant will be able to perform usual work_____

| Month | Day | Year |
|---|---|---|
| | | |
| | | |

7. In your opinion, is this disability the result of injury arising out of and in the course of employment or occupational disease? ☐ YES ☐ NO
   Remarks_____

I am a physician duly authorized by the Chairman of the Workmen's Compensation Board to render medical care under the New York Workmen's Compensation Law.

8. Physician's Name (please print)_____
   a. Office address_____ (Number Street City or Town State Zip Code Phone)
   b. W.C.B. Authorization Registration No._____ W.C.B. Rating Code_____
9. Date_____ 10. Physician's Signature_____

### REMARKS

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Group Health Claims—Metropolitan Life

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# STATEMENT OF CLAIM
## FOR
## ACCIDENT AND SICKNESS WEEKLY BENEFITS

**TO BE COMPLETED BY THE EMPLOYEE**
*(Please answer all questions)*

Work: Shift ____ Phone ____ Bldg. ____

1. Employee's name *(Print)* First Name ____ M.I. ____ Last Name ____

Pay number ____ Department ____

2. Present address ____ (Number) (Street) (City) (State) (Zip Code)

Employee's description. ☐ Male ☐ Female Age ____ ☐ Single ☐ Married ☐ Widowed ☐ Divorced

3. Date you were first disabled by this sickness or injury ____ 19____

4. If you were Hospitalized *as a bed patient*, answer the following:

(a) Name and Address of Hospital ____

(b) Date Admitted ____ 19____ at (Hour) {a.m. / p.m. (c) Date Discharged ____ 19____ at (Hour) {a.m. / p.m.

5. Was your disability caused by an accident? ☐ Yes ☐ No

If your answer is "Yes," answer the following:

(a) When did the accident happen? Date ____ 19____ at (Hour) {a.m. / p.m.

(b) Were you at work when the accident happened? ☐ Yes ☐ No

(c) Give a brief description of the accident ____

I hereby authorize the Physician to release any information requested with respect to this Claim.
I certify that the information furnished by me in support of this claim is true and correct.

Date ____ 19____ Employee's Signature ____

**TO BE COMPLETED BY THE EMPLOYER**
*(Please answer all questions)*

1. Employee's name ____ Social Security No. ____

2. Amount of Weekly Benefits—(60% of Employee's Normal Straight-Time Weekly Earnings Rate) $ ____

3. Indicate Payroll Classification: ☐ Salary Exempt ☐ Salary Non-Exempt ☐ Hourly

4. If this coverage has been canceled, give the date and reason ____

5. (a) Date last worked ____ 19____

(b) Date returned to work ____ 19____

6. If Salaried Employee, give the date through which salary continuance is payable ____ 19____

7. If claim is being considered in connection with Workmen's Compensation coverage answer the following:

(a) Workmen's Compensation Weekly Benefit Rate $ ____

(b) Period covered by Workmen's Compensation Benefits: From (Date) ____ 19____ to and including (Date) ____ 19____

8. Give information which might assist the Company in the consideration of this claim ____

17500 00 XXX 0

Pension Unit No. (Branch) ____ GENERAL ELECTRIC COMPANY

Location ____

Date ____ 19____ By (Name) ____ (Title) ____



322

# ATTENDING PHYSICIAN'S STATEMENT

Patient's name ____ Age ____

Nature of sickness or injury (Describe complications, if any) ____

Did this sickness or injury arise out of patient's employment? ☐ Yes ☐ No
If "Yes," explain ____

Is disability due to pregnancy? ☐ Yes ☐ No
If "Yes," what was the approximate date of commencement of pregnancy? ____ 19____

Nature of surgical or obstetrical procedure, if any (Describe fully) ____

Date performed ____ 19____

Give dates of treatments:
Office ____
Home ____
Hospital ____

The patient has been continuously disabled (unable to work) from ____ 19____ through ____ 19____
If still disabled, when should patient be able to return to work? ____ 19____

Remarks: ____

Date ____ 19____

Name (Please Print) (Attending Physician) ____

Address ____

Phone Number (Include Area Code) ____

Signature ____

FOR USE BY METROPOLITAN LIFE

| DIAG. CODE | EMP. DATE | CALL UP WEEKS | DAYS WORKED | ACC. | LETTER NO. | DISP. | SUPR. | CTL. | | APPR. NO. | DATE OF REVIEW |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | | | | YES ☐ | | | | | | | |
| 2 | | | | NO ☐ | | | | | | | |
| 3 | | | | | | | | | | | |

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Group Health Claims Division

Metropolitan Life Insurance Company

# NEW JERSEY EMPLOYEE STATEMENT OF CLAIM FOR ACCIDENT AND SICKNESS WEEKLY BENEFITS

## TO BE COMPLETED BY THE EMPLOYEE
*(Please answer all questions)*

Work: Shift ____ Phone ____ Bldg. ____

1. Employee's name *(Print)* Mr. / Mrs. / Miss ____ Age ____ Pay number ____ Dept. ____
2. Present address ____ (Number) (Street) (City) (State) (Zip Code)
3. Date you were first disabled by this sickness or injury ____ 19 ____
4. If you were Hospitalized as a bed patient, answer the following:
   (a) Name and Address of Hospital ____
   (b) Date Admitted ____ 19 ____ at (Hour) ☐ a.m. ☐ p.m. (c) Date Discharged ____ 19 ____ at (Hour) ☐ a.m. ☐ p.m.
5. Was your disability caused by an accident? ☐ Yes ☐ No
   If your answer is "Yes," answer the following:
   (a) When did the accident happen? Date ____ 19 ____ at (Hour) ☐ a.m. ☐ p.m.
   (b) Were you at work when the accident happened? ☐ Yes ☐ No
   (c) Give a brief description of the accident ____

I hereby authorize the Physician to release any information requested with respect to this Claim.
I certify that the information furnished by me in support of this claim is true and correct.

Date ____ 19 ____ Employee's Signature ____

## TO BE COMPLETED BY THE EMPLOYER
*(Please answer all questions)*

1. Employer's name ____ Social Security No. ☐☐☐☐☐☐☐☐☐
2. Amount of Weekly Plan Benefit, $ ____ Supplementary Benefit, $ ____
3. Indicate Payroll Classification ☐ Salary Exempt ☐ Salary Non-Exempt ☐ Hourly
4. If this coverage has been canceled, give the date and reason ____
5. (a) Date last worked ____ 19 ____
   (b) Date returned to work ____ 19 ____
6. If Salaried Employee, give the date through which salary continuance is payable ____ 19 ____
7. If claim is being considered in connection with Workmen's Compensation coverage answer the following:
   (a) Workmen's Compensation Weekly Benefit Rate $ ____
   (b) Period covered by Workmen's Compensation Benefits: From (Date) ____ 19 ____ to and including (Date) ____ 19 ____
8. Give information which might assist the Company in the consideration of this claim ____

17500 05 XAX 0

Employer Unit No. (Branch) ____ GENERAL ELECTRIC COMPANY

Location ____

Date ____ 19 ____ By ____



## ATTENDING PHYSICIAN'S STATEMENT

Patient's name ____ Age ____

Nature of sickness or injury (Describe complications, if any) ____

Did this sickness or injury arise out of patient's employment? ☐ Yes ☐ No
If "Yes," explain ____

Is disability due to pregnancy? ☐ Yes ☐ No
If "Yes," what was the approximate date of commencement of pregnancy? ____ 19 ____

Nature of surgical or obstetrical procedure, if any (Describe fully) ____

Date performed ____ 19 ____

Give dates of treatments:
Office ____
Home ____
Hospital ____

The patient has been continuously disabled (unable to work) from ____ 19 ____ through ____ 19 ____
If still disabled, when should patient be able to return to work? ____ 19 ____

Remarks ____

Date ____ 19 ____ Signed ____ (Attending Physician)
Address ____
Phone ____

REMARKS

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA

[Title omitted in printing]

* * * * *

## OBJECTIONS OF PLAINTIFFS TO EXHIBITS WHICH DEFENDANT GENERAL ELECTRIC COMPANY PROPOSES TO OFFER

[Filed July 23, 1973]

Pursuant to the Court's Pre-Trial Order entered herein on October 31, 1972, the plaintiffs object to the following exhibits which the defendant General Electric Company proposes to offer:

1. Defendant GE's proposed Exhibits 3, 10, 13, 42, 44, 45 and 46 are immaterial and irrelevant. These exhibits all relate to the cost of providing sickness and accident benefits for pregnancy-related disabilities. The defendant GE has not plead business necessity, bona fide occupational qualification or any other defense which makes cost relevant. Nor could the defendant have plead cost as a defense for there is no available defense under Title VII to the discrimination at issue. Evidence of cost obviously has no bearing on the question of whether the exclusion of these benefits constitutes discrimination on the basis of sex. Where, as here, the alleged violation of Title VII is overt and no issue of bona fide occupational qualification is presented, the cost of providing the disadvantaged discriminatees with the same advantages as the favored employees, is irrelevant both to the issue of violation and the issue of remedy. *Johnson* v. *Pike Co. of America,* 332 F. Supp. 490 3 FEP Cases 1025, 1029-



10-30 (U.S.D.C. Calif. 1971). Only where the discrimination results from the disparate effect of a neutral policy have the courts considered the defense of business necessity (see *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 91 S. Ct. 849 (1971) and even in such cases they have uniformly held cost is not a defense. See *Robinson* v. *Lorillard Corp.,* 444 F. 2d 701, 799 and fn. 8 (4th Cir. 1971). Moreover the defendant GE at all times from 1960 through 1970, during bargaining negotiations with the plaintiff International Union refused to bargain about costs and insisted that the defendant GE bargained only level of benefits. Respecting the 1960 negotiations see *N.L.R.B.* v. *General Electric Co.,* 418 F. 2d 736, 750 (2d Cir. 1969), cert. denied 357 U.S. 965 (1970). Plaintiffs' proposed Exhibits 42B, 42C, 55, 56, 57, and Exhibits LL, MM, NN and OO to the Pre-Trial Stipulation (Par. 40) are minutes of negotiotion meetings which show the same position was taken by defendant GE in 1966 and 1969-1970 negotiations.

2. Defendant GE's proposed Exhibit 10, to which objection is made on the ground that cost is irrelevant as set forth in Paragraph 1 hereof, is also inadmissible because it constitutes hearsay evidence as to matters which, if true, should be proved by the records of the defendant GE or by testimony.

* * *

4. Defendant GE's proposed Exhibit 12 is objected to for lack of any evidence that the purported letters were ever signed or issued by Charles Duncan and for lack of evidence as to whom, if anyone, the letters were addressed. Counsel for plaintiffs has made inquiry of the EEOC as to the authenticity of said purported

letters and has been unable to verify their authenticity. When counsel for plaintiffs inquired of counsel for defendant as to the source of said letters, the reply was that the letters were received from some law publishing firm, probably from the Chicago, Illinois office of Commerce Clearing House.

5. Defendant GE's proposed Exhibits 27, 28, 31, 32, 33, 34, 35 and 38 are objected to as irrelevant and, if relevant, not the best evidence. If as defendant GE has indicated, these exhibits are offered to show that EEOC has departed from its Guidelines, the fact that the settlement negotiated between EEOC and AT and T does not include a remedy for discrimination by failing to pay sickness and accident benefits, has no evidential value. There are so many possible reasons why the settlement did not include this matter as to make the proffered exhibits immaterial

6. Defendant GE's proposed Exhibit 15 is based on an inadequate sample, does not accord with the statement on pages 1 and 2 of objections by Defendant General Electric Company to Plaintiffs' Interrogatories dated November 15, 1972, that "GE's average yearly employment complement is more than 300,000 employees, with about a 40 percent turnover of employees each year", and is ambiguous and misleading in that it does not disclose the manner in which the conclusions therein stated were reached.



Respectfully submitted,

Seymour DuBow
Suite 302
Insurance Building
10 South 10th Street
Richmond, Virginia 23219
Phone: 703-649-3415

Winn Newman
Ruth Weyand
1126 16th Street, N.W.
Washington, D.C. 20036
Phone: 202-296-1200

Attorneys for Plaintiffs

July 20, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

**EXCERPTS FROM TRANSCRIPTS OF PROCEEDINGS**

* * * *

327 (July 24, 1973) (Tuesday at 10 o' clock)

THE CLERK: Civil Action 142-72-R. Martha V. Gilbert, et al., versus General Electric Company.

Ms. Ruth Weyand and Mr. Seymour DuBow and Robert Friedman represent the plaintiffs.

Mr. John S. Battle, Jr., Mr. J. Robert Brame, Mr. Theophil Kammholz and Mr. Stanley Strauss represent the defendant.

Are counsel ready to proceed?

THE COURT: Is plaintiff ready?

MS. WEYAND: Yes, plaintiffs are, Your Honor.

MR. BATTLE: Defendants are ready, Your Honor.

THE COURT: Would you, for the record, for the benefit of the court reporter, please, state your name, starting on this side, if you will, please, Mr. Friedman?

MR. FRIEDMAN: Robert Friedman.

MR. DUBOW: Seymour DuBow.

MR. WEYAND: Ruth Weyand.

MR. BATTLE: John S. Battle, Jr.

MR. KAMMHOLZ: T.C. Kammholz.

MR. STRAUSS: Stanley Strauss.

MR. BRAME: Robert Brame.

THE COURT: Thank you.

Are there any motions at this time?



328 MR. BATTLE: I have a preliminary matter, if Your Honor please.

THE COURT: I will be delighted.

MR. BATTLE: If Your Honor please, may I present Theophil C. Kammholz of the Chicago and Washington firm of Vedder, Price, Kaufman & Kammholz. Mr. Kammholz has not previously been introduced to the Court. He was former General Counsel of the National Labor Relations Board and I am satisfied he satisfies the requisite qualifications to practice before this Honorable Court.

THE COURT: Delighted to have you.

MR. KAMMHOLZ: Thank you, Your Honor.

THE COURT: Mr. DuBow?

MR. DUBOW: I wish to intorduce at this time Mr. Robert Friedman as General Counsel for the IUE and member of the Fourth Circuit and the New York bar.

THE COURT: Delighted to have you as well, Mr. Friedman.

MR. FRIEDMAN: Thank you, Your Honor.

THE COURT: Now, there is a motion that was filed this morning on behalf of the Chamber of Commerce of the United States for leave to participate as an amicus. That motion will be granted in accordance with the Court's memorandum of April 20.

329 Are there any other motions in reference to an amicus.

Now, as a preliminary matter, I have gone over the plaintiffs' list of proposed exhibits, as well as the objections filed thereto.

I have one or two questions, and then I will give you my rullings on those objections.

I have not had an opportunity to go over the defendant's proposed exhibits, but I will before you have need for them.

Addressing myself now to plaintiffs, is Brenda Christian referred to in Proposed Exhibit 21 a member of the class?

MS. WEYAND: She is, and she is a named plaintiff.

THE COURT: Thank you.

MS. WEYAND: Of those whom the Court allowed to admit, and she did not withdraw.

THE COURT: But tell me in reference to Exhibit Number 46, who is Owen D. Young?

MS. WEYAND: He at the time he made the speech was the President of General Electric Company.

THE COURT: Thank you.

And Proposed Exhibit 50, Mr. Pettey?

330 MS. WEYAND: Mr. Pettey is the President of the Local at Tyler, Texas, in which this letter refers to the fact that one of the named plaintiffs received a notice telling her that she had to cease work on the given date. And he wrote the Court calling the – the company, calling their attention to your decision in the Cohen case, and they let her work.

THE COURT: All right. Thank you.

On the plaintiffs' exhibits, the objections are sustained as to the following: 59, 60, 61, 62, 63, 64, and 65.

As to 88-C, 88-D, 88-E.

All other objections are overruled.

I might add, Ms. Weyand, and gentlemen, many of the things that are marked as exhibits I don't think really ought to be exhibits, although that is not to preclude one from using them as authoritative sources in argument, research, and matters of that kind.

MS. WEYAND: Could I make a remark on my putting in the group of 59 to 65?

One of the grounds, pleaded grounds, of defense was a good faith reliance upon decisions of the earlier decisions and opinions of the EEOC.



And it would be my contention that these, 59 through

331 64, did not stand in the status of authorities in this case, but I wish to use them in cross-examining the witness they are going to put on in their good faith reliance as to his expertise, his knowledge of what the law was that people had been holding for 10 or 15 years, that sickness and accident was to be treated the same as any other, that a pregnancy illness was to be treated.

THE COURT: You will not be precluded from using them for that purpose.

MR. STRAUSS: I gather you are not going to bear individual arguments on these exhibits?

THE COURT: Not if I can avoid it.

MR. STRAUSS: I would like therefore to note for the record - - well, I would like to ask that the company's objections to the proposed exhibits be incorporated in the record, and I would like further to note that the company's position that we stand on the objections which have been brought to the Court's attention by that document.

THE COURT: Yes, of course.

MR. STRAUSS: Your Honor, may I also at this time make on further observation? Perhaps I am anticipating.

The parties have filed stipulations, as you know, to which there are attached exhibits.

Now, the exhibits, some of the exhibits, also appear

332 on the party's exhibit list. Some of them I am afraid do not.

I would like to know whether or not you are going to go through that at this time and how that would be handled.

THE COURT: No. I have not had an opportunity as yet to go through those.

I will go through them, however, prior to our getting into the meat of anything that is in this stipulation.

All right, I am ready, if you are ready.

MS. WEYAND: I would like to call as the first witness for the plaintiff Dr. David Forrest.

Dr. David Forrest, will you, please, take the witness stand.

DAVID FORREST was called as a witness by and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified on his oath as follows:

THE COURT: I take it that each side has had an opportunity to examine the biographical sketches of the respective witnesses with reference to their expertise.

Does anybody wish to examine the Doctor on his qualifications? If not, and that is the procedure we will use, Ms. Weyand and gentlemen, if not, the Doctors will be qualified.

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333

DR. DAVID C. FORREST
DR. FRANK S. KNIGHT
MONUMENT MEDICAL BUILDING
4908 MONUMENT AVENUE
RICHMOND, VIRGINIA 23230

CURRICULUM VITA
DAVID C. FORREST, M.D.

BORN:
June 10, 1918

MARRIED:
Barbara Ann Rodewald, four children

EDUCATION:
Randolph-Macon College, B.S. degree, 1939-1943
Medical College of Virginia, M.D. degree, 1946-1950
Graduate training, residency in Obstetrics and Gynecology, Mt. Carmel Mercy Hospital, Detroit, Michigan
Affiliated residency University of Michigan, Ann Arbor, Michigan, 1951-1954
Licensed to practice medicine in the state of Virginia, 1950

FACULTY APPOINTMENTS:
Medical College of Virginia
Virginia Commonwealth University

SOCIETIES:
Diplomat, American Board of Obstetrics and Gynecology
Fellow, American Obstetrical and Gynecological Society
Member, American Society of Fertility and Sterility
Member, Virginia Medical Society
Member, Richmond Academy of Medicine

Member, Richmond Obstetrical and Gynecological Society
Member, American Medical Association
Memcer, American Cancer Society, President Richmond Division
Member, Richmond Chamber of Commerce
Chairman of the Department of Obstetrics and Gynecology, St. Mary's Hospital.

334 I take it nobody wishes to examine?

MR. BATTLE: No, sir.

THE COURT: The Doctor is qualified as an expert in his field.

All right, you may examine.

DIRECT EXAMINATION

BY MS. WEYAND:

Q. I would like to show the witness the vitae and have him state whether he prepared it.

I show you the vitae of curricula that has been filed here and ask you if you prepared that biographical sketch?
A. Yes, ma'am.

Q. Have there been any changes since you prepared this biographical sketch which should be made to make the statement accurate as of the present time?
A. None to my knowledge.

Q. How many babies have you delivered during your practice? A. Perhaps somewhere in the neighborhood of five to six thousand.

Q. Do you know how many you have delivered in the last six or seven years? A. I asked the hospital to prepare a memorandum for me as to the exact number.

335 Since 1966 at St. Mary's Hospital I have delivered 2,824, not including one this morning at eight o'clock.

320 since the first of January this year.

Q. Does your practice represent a specialty within the



field of obstetrics and gynecology? A. My practice is both gynecological and obstetrical and a fairly large segment of the practice is devoted to the study, treatment, and management, of patients who have special problems. That is, they are experiencing difficulty in becoming pregnant and/or having children.

They are problem cases. And perhaps 10 to 15 percent of my practice are problem cases.

Q. Then from that I would take it your percentage of complicated cases is higher than that of the average practitioner of obstetrics, is that correct? A. Well, I don't like to make myself that much of an expert, but perhaps in my own mind I probably am.

Q. Could you state the ratio of complicated and non-routine cases of your practice as compared with that of the non-specialized practitioner? A. I don't like the

336 term "non-specialized practitioner" except in the sense that one who delivers children, who is not a member of the specialty of obstetrics and gynecology, but within the ranks of my colleagues, I would not like to speak for them, I can only speak for myself, but I would say that it is in the neighborhood of 10 or 20 percent.

Q. Do your patients come from any particular socio-economic group? A. I think they come from all social stratas, from the highest to the lowest.

Q. Approximately what percentage of your patients were employed in paid jobs outside the home when they became pregnant? A. Of those girls who are having their first pregnancy, I would say probably 50 to 60 percent are employed.

Q. Do you have occasion to advise pregnant patients with respect to whether they should continue their employment during pregnancy? A. Yes. Most of the time the question is put to me through their employer

when they bring in written inquiries asking me how long they can work and when is the expected date of confinement.

Yes, I do have requests.

337 Q. What advice do you give such pregnant patients? A. I usually say that they may continue to work as long as they feel able and they can work right up to the time of delivery barring any complications.

Q. Does pregnancy itself unaccompanied by any complications in the normal healthy woman require her to cease engaging in the same activities after pregnancy as she was accustomed to engaging in prior to pregnancy? A. I woud say no.

Q. How do you define disease? A. The term disease, and I intentionally looked up the definition in Dorland's 25th Edition of Medical Dictionary and was quite surprised. I would like to just read it out, if I may.

The first statement under the word "disease" they say, "Is a definite morbid process having a characteristic train of symptoms. It may affect the whole body or any of its parts, and its etiology, pathology, and prognosis may be known or unknown."

Then under this there are 18 columns listing numerous diseases.

In my own mind I like to break the word "disease" down to the "dis" and the "ease." And the prefix, "dis," meaning the reverse, and I think of it in terms of the patient's, the individual being in a comfortable state, is

338 suddenly conscious of certain stresses that have been placed on the body mechanism and he now becomes diseased or undomfortable, sufficient to seek out or ask for medical attention.

Q. In the list that appears in Dorland is fractures listed as a disease? A. No, it is not.



Q. Are all fractures a result of accident? A. No, not necessarily. I am not an orthopedist, but I can assure you that not all fractures are the result of accidents.

Q. Some fractures are a result of a morbid condition, are they? A. Yes. There can be spontaneous fractures, secondary to spontaneous degeneration of bone structure which may be secondary to a pathological state.

Q. Is alcoholism included in the list of diseases in Dorland's Medical Dictionary? A. No, it was not listed.

Q. Is obesity listed in the definition? A. Not to my knowledge.

Q. Are migraine headaches listed as a disease? A. Not under the term "disease."

339 Q. Is it uniform medical practice to advise pregnant women to seek medical assistance and advice as early as they know they are pregnant? A. I think that over the ensuing years there have been more and more emphasis placed on encouraging the woman who thinks that she may be early pregnant, that she should seek medical attention as early as possible, yes.

Q. Could you state the medical reasons for such encouragement to women? A. When she places herself in the hands of a physician she immediately would have a complete history taken, physical examination carried out, and any concomitant diseases that she may have, or any past family history of diseases would be picked up.

And she can be cautioned about the hazards of certain drugs and, X-ray exposures and so forth.

But more importantly, I think she can have a confidante, someone that she can ask rather than get across the back fence consultation.

And the early signs or symptoms that may develop suggesting a complication, can be attended to.

Q. Is it important that these signs be noted at the earliest possible time? A. Oh, I would think so be-
340 cause the earlier the complications are picked up the better the chance of proper management.

Q. Does the medical profession consider it conducive to the successful termination of a pregnancy that good medical managment and supervision take place throughout the pregnancy? A. I would say that is true, yes.

Q. What type of medical management and supervision is customary in your practice and in the profession?
A. Well, I can speak better for my own practice.

We see these young ladies as soon and as early as — well, they present themselves, but those patients that we are studying, we encourage them to report to us within two weeks after their missed menstrual period.

And a pregnancy test is usually performed.

Then the patient is given a series of instructions and within a short period of time she has a complete physical examination, complete history.

A complete blood count, complete urinalysis, tests for syphilis, and some patients that may show some signs that suggest it, smears for gonorrhea, a cancer smear if one has not been done recently.

341 This is at the time of the initial workup.

Now, do you want me to go on?

Q. Yes. I wanted you to go on as to what management and supervision is given throughout the course of a pregnancy in your practice. A. Well, at the time of the initial visit we usually ask her if she is having any side effects, such as morning sickness, nausea.

And if she is we would prescribe an antinausea preparation.

She is instructed on proper diet. She is instructed on the length of time that she may have intercourse, tub baths, douches, cleanliness, etc.



She is instructed in the fact that we do not want her to take any drugs of any type other than the ones that are prescribed. And if she is taking any drugs or has taken any drugs prior to the time we see her we will note this fact and discourage her if it perhaps is an over-the-counter type of preparation.

We warn them against X-ray exposure, even X-rays.

We tell them that they may continue as close as possible their usual routines. And this is about as much as is carried out at the time of the first examination.

342 Q. Could you in very general terms indicate what kind of management and supervision takes place throughout the pregnancy? A. Well, at the time of the first examination, of course a complete examination including a pelvic examination is done. And then she seen at monthly intervals if the patient is not having any particular problem.

She has been instructed to write out any questions that she might have that have come up in the meantime and these questions are answered.

We pay particular attention to the growth of the uterus, simply measuring the abdomen, if the pregnancy has reached the point where it can be measured.

We listen for the fetal heart rate. We check for any signs of edema. We check for weight gain, elevation in blood pressure.

This goes on until about the seventh month. At the seventh month they have been seen every month. At the time of the seventh month a complete reevaluation of the pelvis is carried out, that is to the bony structure. And then at that time, or in the meantime, we have been keeping close contact as to her hemoglobin and watched her very carefully for any signs of urinary tract infections.

343 We have tried to check on these things. And now we become a little bit closer in the sense that we begin to see them at two-week intervals. Then in the last month we see them each week – at each visit they have a pelvic examination to determine the condition of the internal organs, whether or not the cervix is beginning to dilate, what position the head is taking in the birth canal, and so forth.

Q. Is there any medical reason that the normal pregnant woman should discontinue her employment anytime before the onset of labor? A. Would you restate that?

Q. Is there any medical reason that the normal pregnant woman should discontinue here employment anytime before the onset of labor? A. Yes. There are certain complications that may come up.

I think if we note elevation in blood pressure, she is beginning to spill any protein in her urine, that might suggest tht she is beginning to become slightly toxic. We may encourage more rest and try to take off some of the stresses that would aggravate this.

344 If the woman has any bleeding problems, particularly in the last trimester, if we find that the cervix is dilating prematurely such that it would suggest that she will have perhaps a premature birth, if she has twins and we diagnose her having twins, certainly in that last month to six weeks we encourage more bedrest and less standing.

I think that about covers it. There probably are others.

Acute urinary tract infection where the patient develops fever, chills, and so forth, this may be another complication.

Q. Except for some complications or indications of something unusual, is there any medical reason for a normal pregnant woman to discontinue her employment



at anytime before the onset of labor? A. When you say medical reason I presume that you are implying that there is some abnormality in the pregnancy.

Q. I meant as a medical man do you think she can work unless there is something wrong until she goes into labor? A. If the pregnancy is progressing normally I would suggest these people could go right along and continue working.

Q. As far as a medical reason there is no medical reason why she shouldn't progress that way if she has nothing that you regard as a deviation from a completely normal healthy pregnancy, is that correct? A. That is correct.

345 Q. Has it been your experience that patients who continue to be gainfully employed on a full-time job outside the home during pregnancy have a greater incidence of complications during pregnancy than women who stay at home? A. I would say it is my over-all general impression that the patients who work seemingly tolerate their pregnancy much better than those who do not.

Whether this is because of the fact that they are in gainful employment, that they are not as conscious of themselves, are not constantly looking for problems, but they seemingly complain considerably less than those who are not employed.

Q. Do you personally know or have you treated anyone whose employment during her pregnancy has had a detrimental effect either on her physical health or the health of the child to which she gave birth as a result of that pregnancy? A. I don't understand what you are trying to ask me.

Q. Did you know of anyone who had anything go wrong that you thought wouldn't have happened if she hadn't been working that you attributed to the fact she

worked, is what I want to ask you? A. There may have been, but right at this moment I can't – I don't have a specific case that I could quote that I can truly
346 say that I would relate to that.

I can't say that I really do have any particular cases that I could call to mind.

I am sure there may have been, but I don't know.

Q. Do you recall having at the time that some complications occurred, having decided, without remembering the specific case, do you have a recollection of having decided that this woman had a complication that arose because she worked, which she might not have had had she not worked? A. I am trying. I really cannot.

I can reverse this and tell you that there are instances when the complication arises and I turn to the patient and say, "Are you working," and if she says she is I say, "Well, what kind of work are you doing?" Then I may relate my treatment, to the fact that she is employed, to the extent of saying, "Well, I think that you perhaps should stop." But to actually have someone call me and say, you know, that I am working at this particular thing and it is causing me to have so and so, aside from perhaps swelling of the feet, I have some woman who on standing, particularly in the last trimester of pregnancy, where her occupation requires her to stand in one position, this is perhaps the only – and this is a minor complaint. But as far as a major complaint, I really cannot.

347 Q. In the normal, healthy woman does pregnancy usually result in any period of disability prior to the onset of labor? A. In the normal patient does pregnancy what?

Q. Result in any disability, inability to conduct her usual activities? A. I would think not.

Q. It has been your experience that that does not happen?



A. That is correct. Abnormal complaints, not normal complaints.

Q. Is there anything about pregnancy of a normal, healthy woman which requires any restrictions on her usual activities prior to the onset of labor? A. I can't think of any. I may not be answering that question correctly.

Q. You can't think of it. Well, that is the best you can do.

Do all non-routine and complicated cases of pregnancy require the woman to stop working outside the home? A. No. I don't understand your question. The way you frame them confuses me.

Q. I am sorry. A. So I apologize for having to ask you to repeat them, but would you state the question again?

348 Q. Yes.

The question is whether every condition which the medical professtion regards as a complication necessarily requires her to stop working at her usual paid job outside the home? A. My answer to that is still no because there are different types of complications and some of them are minor complications and they would not of necessity require them to quit work.

Q. So not every complication means that she has to stop work.

Do you have any idea what percentage of complications are of the type that require a woman to stop work? A. Well, I think we would assume that most of the major complications, and I have to divide them between major and minor and the different meaning, say, for example a major complication would be a woman who in the last or, say, approximately six months or seven months pregnant suddenly starts experiencing cramping, excessive bleeding. That would prompt you to hospitalize this

patient and manage her in the hospital for several days. That would be a major complication. On the minor side,
349 if she has frequency and urgency and a urinalysis shows she has a low-grade urinary infection, you would treat the urinary infection and advise her to increase fluid and let her go on to work. That would be a minor type of complication. Does that answer your question?

Q. That answers my question. Could you make a general list of the major complications? A. Hypertension associated particularly with any edema and weight gain, particularly in the last trimester of pregnancy. Hemorrhage, vaginal hemorrhage, and severe or acute urinary tract infections. These are the things I think of. I am sure there are others, but it is not easy when you are sitting here thinking from one of these questions to the other.

Q. And on the minor complications which do not indicate you should stop work, would you list the ones that come to your mind in that regard? A. Urinary tract infections with minor symptoms. In the first trimester of pregnancy some slight bleeding, I would manage and still let the girl go to work if she felt she wanted to go and she wasn't concerned. Headaches,
350 fatigue, particularly if it is secondary to anemia. These I would consider – oh, vaginal tract infections. I am sure that they – they are increased in certain individuals during pregnancy. I wouldn't consider this a major consequence. Under a major, which I didn't mention, would be premature rupture of the membranes. I would have to include that. And signs of premature dilation of the cervix would be another major one. The minor ones I believe I have compteted [sic].

Q. Have you had pregnant patients who failed to follow your advice that they should cease work?



A. Yes.

Q. Have they on occasion–can you generalize about the kind of reasons they give you for failing to follow your advice? A. Generally it is economic pressures at home. "I just can't quit, Doctor, we just have to have the income." And that would perhaps be the major one. Every now and then you get some dedicated soul who feels more that she should stay at work rather than take good care of herself, but that is a medical rarity.

351 Q. Have you been visited by women who had suspected they were pregnant but delayed their first visit to a doctor until the later months of pregnancy?
A. Oh, yes.

Q. Have you had them explain their reasons for so conducting themselves? A. Well, the first one that comes to my mind is the fact that they didn't want to believe that they were pregnant and they just obviously couldn't believe that they were pregnant. But the other reason that comes to my mind immediately is that they shun the diagnosis, particularly those who might be working, and sometimes if they are, certainly if they are pregnant out of wedlock, they may not want it known. But most instances that I am thinking about, and I think what you are asking me, is do they seem to delay if they are working. I think many times these girls, because of certain company rules, will hold back, hoping that they can disguise the fact. And they even go so far as to ask us would we cheat a little and say they are not as far pregnant as they are, and so forth.

Q. And have they complained further why they
352 wanted you to do that, what those company rules are?
A. Most of the time they just don't want to have to quit so early and they give this as their reason for not wanting their employers to know.

Q. Are a substantial number of the pregnant women who come to you covered by insurance policies which would cover their hospital and medical expenses, including your bills? A. I would say the majority of them are under some type of insurance coverage, either through their own, most of them, or their husband's and not necessarily through their own company.

Q. Have you had occassions where a pregnant patient asked you not to send a bill for your services to the insurance company? A. Yes.

Q. What reasons have they given you? A. Well, they were pregnant and did not want the company to know that they were pregnant. Either they were pregnant out of wedlock, for example, or in some instances they just don't want the people at the plant to know about it. These health forms you have to turn in sometimes through the front office and everybody and his brother soon finds out everything about your disease.
353 You can't be sick privately anymore.

Q. Is it accepted medical practice in this country that a woman needs to be hospitalized immediately prior to childbirth and for a period of several days following childbirth? A. I think that the trend over the past 20 to 25 years has been to hospital-type delivery and care, yes.

Q. How often do you perform episiotomies?
A. Probably 95 per cent of the time.

Q. What is an episiotomy? A. An episiotomy is that incision which is made between the posterior opening of the vagina and the rectum. And this incision releases muscles and fiberour tissue, and allows a larger opening for delivery of the baby. It is not an absolute necessity. There are still women who can have babies without episiotomies, but in most instances, particularly with the first baby, if you don't make it



nature will make it for you and a tear is much harder to repair than an incision. So we try to relieve the tension on the vaginal outlet by doing an episiotomy.

Q. Do you perform an episiotomy at the same time
354 that the canal is fully dilated, or do you perform it before the birth canal is fully dilated? A. This is almost the last thing you do before you deliver the baby. The baby's head is now at the outlet, or actually, you can frequentiy see as much as a quarter's worth of the top of the baby's head when we make the incision. Sometimes with forcep deliveries we will pull the head down and then make the incision after we have applied the forceps.

Q. Do you ever shorten labor by performing episiotomy? A. Oh, I think the labor can be shortened by an episiotomy, but more importantly it can be shortened with a controlled forceps delivery.

Q. You use both of them to shorten the labor period, is that correct? A. Yes.

Q. Do you use an anesthesia when you perform an episiotomy? A. Yes, an anesthetic is required, or should be. There are occasions when it is not done because you can't and this is usually in the case of a precipitous delivery, one who arrives at the hospital at
355 the last minute. And surprisingly enough, you can make this incision and the girl doesn't complain too much at the time, but in the repair of it, she wants something so you would anesthetize the area.

Q. What methods of repair do you use? A. I use absorbable sutures.

Q. Are those the same that are used inside other types of surgical incisions? A. Yes. Same cat gut.

Q. And the same type of anesthesia is used as is used in other surgical incisions? A. It may be the same type. Most, I would say that 99 per cent of the

patients that I deliver are delivered under an epidural or block type of anesthesia. And we also use that at the time of hysterectomies, for removal of ovarian tumors, cysts.

Q. Used for other types? A. Yes, ma'am.

Q. In addition to those you have mentioned?

A. Yes, ma'am. It is used in surgery on the male as well as the surgery on the female.

Q. If there is not an episiotomy and the tears occur, do you use the same form of sutures to repair the tears?

356 A. Yes.

Q. And you use an anesthesia at the time you repair the tears, do you? A. Yes ma'am.

Q. How many women do you have delivered that neither tear nor have an episiotomy? A. A very small proportion.

Q. Could you estimate? A. I would say somewhere, maybe as low as one per cent. There is a reason for this. With the routine use of the episiotomy the woman's anatomy is replaced, and in such a manner that each succeeding pregnancy she comes back with good pelvic support. If she were not repaired, in the succeeding pregnancies she would not have any tear because there she would have opened herself up so completely that this would increase her chances of not having an episiotomy. In other words, I am implying that if she is not properly repaired.

Q. Does the birth of a child always result in a period of restriction of usual physical activities on the part of the woman? A. Yes. We place certain restrictions on patients immediately following delivery.

357 Q. What restrictions do you place? A. Well, we usually tell them they cannot get up for at least six hours. That is primarily to allow the anesthetic to wear



off so that their motor systems have returned to normal. And at the end of six hours, usually with a nurse in attendance, they are encouraged to get up and go to the bathroom, to void. And by 12 hours, 12 to 18 to 24 hours they are back taking care of themselves pretty well. They may take a shower the next morning. This is in the hospital restrictions. We are primarily concerned with them not getting infected.

Q. How long, on the average, does the period of restrictions on the normal activity after childbirth continue? A. There are some restrictions placed on them, on the physical activity, up through the six-weeks checkup. Do you want me to elaborate on that?

Q. I would appreciate it if you would, yes.

A. Well, generally after four to five days these patients are usually discharged home to their own home care, and they are told that they should avoid tub baths, douches, intercourse, until they are checked at six weeks. They are advised to continue their vitamin and iron supplement. In our practice we do not encourage them to

358 take a lot of exercises, because we find that this is fatiguing and can sometimes cause bleeding. They are allowed to go home. They may go up and down the steps. They may go out. We try to keep them from driving a car for three weeks, primarily so they don't assume a lot of chores at home that other people would help them do and get out and run around too much. But they could probably drive. Until the six-weeks checkup, at which time, at the time of that examination, we would determine whether any further restrictions are placed on them. And of course the nursing mothers, surprisingly enough, we give them a little more liberties than the ones who are not nursing.

Q. Based on your experience, how many weeks after childbirth do you usually certify a patient as capable of

going back to her paid job outside the home?
A. Six weeks.

Q. Do you ever certify a woman earlier than six weeks? A. Yes. On occasions, if there has been—if she happened to have had a premature birth or had a still born or a birth and she did not have an infant, these
359 girls come in and beg to go back to work early. They want to go back. So we think for their psychological benefit the quicker they get back into their normal routine the better for them. So these individuals we will encourage. We do have requests from other patients who want to go back earlier, but because of the community acceptance we generally stick to the six-weeks rule.

Q. What is the minimum period between childbirth and the date which you have certified a patient as capable of returning to her job? A. By that do you mean that if in my past experience I have ever allowed a person to return?

Q. That was the question. A. I think three weeks.

Q. Given the opportunity to follow a patient through pregnancy, do the complications which sometimes occur require any different medical procedures than illnesses which occur in non-pregnant patients? A. A pregnant patient is no different than anyone else. She has certain diseases which are peculiar to her pregnant state, but she is still liable to all of the other diseases that anyone else can have; and they are managed as much as possible as you would manage them if the girl were not pregnant. With certain restrictions on drugs, X-ray diag-
360 nosis and so forth, generally speaking the management is the same.

Q. Is the management the same of the pregnant condition, the conditions that are due solely to pregnancy, is there a different medical type of approach to pregnancy



complications, different types of procedures, terms of basic medical attitudes towards management and supervision of those related to pregnancy than those not related to pregnancy? A. Well, I think good medical attention is good medical attention and it has to be designed around the specific problem. And the attention to the details and the management would be the same, as far as I am concerned.

Q. Can you name various complications of pregnancy which actually represent illnesses suffered by non-pregnant women and males? A. Would you state that again?

Q. I believe you said that pregnant woman does get various of the diseases which she would get if she wasn't pregnant, which some people regard as related to pregnancy and may occur a little different type than a pregnant woman. Would you name some of those?
A. Say for a streptococcus sore throat, a gall bladder
361 disease? Diabetes?

Q. Diabetes is the same in a pregnant woman as the non-pregnant? A. A patient that has the diagnosis of diabetes and is pregnant is considered high risk. These people are placed in a high-risk category because the pregnant—the stress of pregnancy plus the stress of diabetes makes them have a very high fetal mortality. And if they are not closely managed they can get into trouble. We work closely with a specialist in the field of diabetes who just treats diabetes or is particularly interested in diabetes, and we manage the pregnancy and he manages the diabetes.

Q. Are there other conditions besides diabetes which exist prior to pregnancy that require the same additional attention during pregnancy because of the pregnancy?
A. Patients who present themselves with any type of chronic illness that requires medications. For example, a

thyroid disease. A patient who has certain types of colon diseases, certain types of kidney diseases, heart diseases. You have to treat the whole person and consider the disease and consider the pregnancy. And they are managed in accordance with good medical treatment.

362 Q. In a wound inflicted by a Caesarean operation or medical incision involved in a Caesarean operation basically different from the medical incision involved in other abdominal operations? A. No.

Q. Does the effect on a woman of surgery for a Caesarean delivery differ medically speaking from the effect on her of other surgery? A. If you are speaking just of the wound, I don't think there is any difference, but the extent of the surgery that is carried out after you open the abdominal cavity might be different and the period of recovery and management would be different. But as far as the wound itself, I think it would be the same.

Q. Are there other abdominal operations that have as small a wound and as short a period of recovery as that from a Caesarean operation? A. Hysterectomy, removal of an ovarian cyst, you can do a lot of work through the same type of incision.

Q. Are there non-pregnant related conditions through which you use as small as an incision? A. Yes.

Q. For instance? A. Fibroid tumors where we

363 would do a myomectomy for the removal of the fibroid tumor. In our practice we do tubal reconstructive surgery, that is tubal plastic surgery in young ladies who, because of some concomitant disease or congenital deformity have a failure of the ability to pick up the ovum from the ovary. An appendectomy can be done through this small incision. Certain types of bladder operations may be done through this same incision.



Q. Do you know the reasons upon which employers rely to support their practice of affording income maintenance such as sick pay during periods of absence from work?

MR. BATTLE: Objection, Your Honor. I don't believe that is within the scope of this witness' expertise.

THE COURT: Objection sustained.

MS. WEYAND: I asked if he was acquainted with the grounds on which they make payment. The question is does he know what grounds they–if he doesn't know I can put some hypothetical –

THE COURT: He can only know what might have been said to him as to what grounds were asserted to him.

MS. WEYAND: All right. I would like to put some hypothetical questions based then on the grounds which appear in the – give him a hypothetical question with

364 his medical application of the reasons.

THE COURT: Now, Ms. Weyand, the rule, and perhaps it is unfair to invoke it against you at this stage of the proceedings, but the rule in the district is that any hypothetical must be in writing and submitted beforehand. Will it take you very long to write it down?

MS. WEYAND: I have it written, as a matter of fact. And as a matter of fact I will see if I have an extra copy here.

THE COURT: We can get a copy.

MS. WEYAND: Yes.

THE COURT: Have you seen it, Mr. Battle?

MR. BATTLE: No, Your Honor.

THE COURT: Suppose we take a brief recess so you may look at it. Dr. Forrest, you may step down, Sir.

(The witness stood aside.)

THE COURT: The court will stand in a brief recess.

(A recess was taken at 11 o'clock to reconvene at 11:12.)

THE COURT: All right. (The witness resumed the stand)

365 BY MS. WEYAND:

Q. During the recess you indicated to me that you felt you had not made clear your answer about the per cent of complications which occured in your practice and stated you wished to explain more fully what you meant. Would you, please, do that now? A. I would like to clarify the statement to imply that the patients, by past history of problems, would require additional management during pregnancy. I didn't mean to imply that 15 per cent of my deliveries were complicated. And of necessity they require some specialized care and management, but not necessarily that the deliveries themselves were 15 per cent complicated.

Q. Thank you. I am going to ask you to assume the following facts for the purposes of the next several questions. Assume that the defendant, GE, provides income maintenance in the form of sickness and accident benefits for non-occupational disease; that non-occupational sickness and absences because such payments are believed to increase production in three ways, one, an employee who does not need to worry about the possibility of a period of illness without any pay is a happier employee and therefore produces more, two,

366 an employee who fails to go home because he cannot afford to forego his income when he feels below par not only produces less but has a bad effect on the productivity of other employees and, three, an employee who has income maintenance is able to take proper care of himself or herself by being economically free to take off work and stay off work as long as necessary to get well so that he or she comes back fully recovered at an earlier date, the theory being that



if he or she has no income maintenance he or she will continue working when he or she should be away from work and under medical treatment. Now, those are the facts I wish you to assume. In terms of these three reasons for granting sickness and accident benefits, is there any less reason to pay sickness and accident benefits for disabilities from pregnancy and childbirth than in cases of other disabilities having regard to the medical aspects?

MR. BATTLE: If Your Honor please, I object to the question. It assumes many facts not in evidence. In addition, it calls for an opinion in the field of sociology or economics, possibly employee-relations, but certainly not for an opinion in obstetrics.

THE COURT: I understood it was limited, though, to the medical reasons.

367 MR. BATTLE: I hear no mention of medical reasons nor any inference that that has anything to do with obstetrics.

THE COURT: The objection is overruled.

MR. BATTLE: May I ask that counsel read or show me where the term "medical" is used.

MS. WEYAND: I added it on the end when I asked him the question.

THE COURT: Excuse me.

MR. BATTLE: It wasn't in the draft, Your Honor.

THE COURT: Address yourselves to the bench. It was not in the hypothetical, but she did restrict it to medical. If not, I do. Can you answer it, Doctor? Can you remember it?

THE WITNESS: The question, the last part of the question will be sufficient, if you would restate that.

BY MS. WEYAND:

Q. In terms of these reasons for granting sickness and accident benefits, is there, from a medical point of view, any less reason to pay sickness and accident benefits for disabilities from pregnancy and childbirth than in
368 cases of other disabilities? A. I can think of no differences.

Q. From a medical point of view do the disabilities which a woman suffers from in the normal childbirth differ from disabilities from any other cause in any way which would make sick leave with pay any less reasonably related to increased production in cases of absence due to childbirth than in cases of any other disability?

MR. BATTLE: If Your Honor please, may it be understood that my objection is a continuing one?

THE COURT: Yes. Of course.

MR. BATTLE: To all subsequent questions based on the hypothetical.

THE WITNESS: I can think of no particular reason that there would be any difference.

BY MS. WEYAND:

Q. Would the same be true as to a complication of pregnancy? A. No. If a patient is uncomfortable and is in a state that requires medical attention, I don't see that there is any difference.

Q. Are there any diseases which occur only in members of one sex and not in persons of the other sex?
369 A. Oh, I think so.

Q. Can you name some of these diseases? A. Well, I think we can take off with the simple –

THE COURT: I am sorry, I didn't hear your last answer, Doctor.

THE WITNESS: I think we can assume, first off, that males do not get pregnant. The complications that would ensue from that would be one. Males get breast



cancer, breast cysts. I don't recall of a male ever having Bartholin's abscess. I don't think males develop vaginitis. There are tumors of the pituitary that may in time produce Galactorrhea, which is milk secretion. I don't believe there are reported cases of that occurring in the male. Any diseases relating to the specific organs such as the ovaries, the uterus, the vagina I think would be unique to the female of the species and not to the male. There is one exception. There is a condition of chorio-carcinoma in which there is a related disease in the male that develops in fetal breast tissue, but this is spontaneous in the male as a result of, probably embryonic rest. That
370 is about as far as I dare go. I don't treat males.

Q. Excuse me. Can you name some diseases which occur only in males? A. I remind you, I have not treated a male for 20-some years, but I think prostatitus, and balanitis – I am not very good on male diseases.

Q. But there are diseases which occur only in males?

A. That's right.

Q. That is not in your specialty? A. That is correct.

Q. Is it easier for an employee to malinger with respect to a disability for pregnancy with the object of receiving sickness and accident benefits from his ability to malinger with respect to other disabilities?

A. I don't believe there would be a great deal of difference since I think malingering in itself is psychologically oriented. I don't believe there would be any difference between the female and the male if that is what your implication was.

Q. Is there anything about the medical aspects of pregnancy which would contribute to the ability to malinger as compared to other diseases? A. I don't think so.

371 I think that among laymen there is probably a tendency towards protecting motherhood and the ladies perhaps might use this pregnant state to encourage a little bit more sympathy, but I don't think so, no.

Q. From a medical point of view, do you advise a woman who cannot afford a period of several months without income to have an abortion? A. No.

Q. Why not? A. Well, first of all I am opposed to abortion per se. Secondly, those who seek this form of management are liable to certain complications pursuant to that type of treatment which I am acutely aware of. Except in those specific instances where there are strong medical indications for this, I think it is sometimes used as a mechanism to failsafe after having not taken proper precautions to that point.

Q. What are the medical reasons for not having an abortion? A. What are the medical reasons for not having an abortion?

Q. The complications you mentioned that might arise. A. Well, infection in the uterine tract is one.

372 Perforation of the uterus during the procedure with subsequent hysterectomy to manage this problem in some instances is another. I think these are the two major ones. The psychological consequences are still there, but they are discounted by many authorities.

Q. Do the perforations and infections occur even when the abortion is managed under hospital and licensed doctor conditions? A. Unfortunately yes.

Q. Does a person who becomes pregnant voluntarily bring on herself the disabilities that may befall a pregnant woman in any different respect than the manner in which a person who drinks alcohol voluntarily brings himself a problem of alcoholism? A. Now, you are talking in terms of the voluntary act that precipitated



the consequence? I don't think there is a great deal of difference.

Q. Does a person who becomes pregnant voluntarily bring on herself disabilities that may befall a pregnant woman in any different respect than the manner in which a person who smokes voluntarily brings on himself lung cancer or emphysema? A. Accepting the fact that excessive smoking contributed to lung cancer and emphysema, the fact that the patient is knowledge-

373 able these things are detrimental, and after medical advice continues, I don't think that that would be a great deal different than the girl who allows herself to become pregnant for purposes of procreating.

Q. Are all women able safely to take the pill?

A. No.

Q. What conditions disqualify a woman for use of the pill? A. This is a very broad question and there is considerable literature that has been written on this subject and any comments that I make will have to be very limited. Those who should be advised against the use of the pill would be patients with hypertension, hypertensive disease, the diabetic, certain patients with thyroid disease, young girls who present themselves with a poor menstrual history, that is their ovulation mechanism already is in jeopardy, patients with varicosities or certain types of muscular disease, some patients who cannot handle them because of the psychological changes that occur such as severe migraine headaches and personality changes. Also the patient who has certain other endocrine diseases where they may be contraindicated, past history of cancer of the breast, for example, where the estrogen would be contraindicated. These are some of the ones that I think about.

374 Q. From your answer you would indicate that the pill has quite an effect on a very large portion of the woman's glandular and psychological system. Could you speak about the effect of the pill and how it operates?
A. The pill, as it is known, comes in various forms. Generally it includes a form of female estrogen. This estrogen is a chemical estrogen and it may or may not be combined with small doses of a second hormone substance, progesterone. The dosage varies with various of these pills, but in the final analysis the mechanism is thought to be the interference with the signal system that comes by way of the pituitary to the ovary to say, "Do not produce any more eggs or any more ovum." Much as what would happen to a young lady who is in her early stages of pregnancy. Once a woman becomes pregnant she ceases producing ovum or bringing the ovum to maturation. So the mechanism is then to interfere with the production of ovum. And in some authors' way of putting it, they are kept in very, very early stages of pregnancy as far as the physiodynamics of their body is concerned.

Q. How extensive is the effect on the physiodynamics of their body? A. Here again it is an individual reaction. Some individuals just cannot tolerate them because of the nausea that they produce. Others cannot
375 tolerate them because of the headaches. Others complain of swelling, breast changes and weight gain. There is some indication that it suppresses the thyroid. It has a deleterious or suppressive action on the pancreas such that people who are diabetics should perhaps not take these agents, depending on the degree of diabetes. There is thought to be somewhat higher incidence of urinary and vaginal tract infections because of the change in the alkalinity and the acidity of the vagina. These are a few of the changes. The psychological changes. there have



been reports that they are sufficient in some individuals to produce Rorschach changes.

Q. I didn't get that, what kind of changes?
A. Rorschach changes, this is a psychological testing mechanism. Then of course the ones that everyone knows about are the embolic formation, which is a very serious complication, so much so that in England they warn against taking them past the age of 35 years. This
376 is where some small clot is released from the vascular system and lodges in the lung or in the lung itself, or in one of the vessels of the lung and can cause considerable amount of problem. In some ladies after taking the pills, for even short periods of time, there is what we refer to as the ovulation suppression syndrome where they will not now produce any ovum. Their mechanism has been somewhat cemented to the state while they were taking the pills. These are just superficial comments.

Q. Do you prescribe an IUD for women who have never delivered a baby? A. I do in rare instances. We found that they are not tolerated well by the patient who has not had a baby. We have some in, but generally speaking we don't strongly recommend it. We are still looking for that ideal intra-uterine device that will be accepted. There are those places around the country that do use them, however, it has not been our experience that they are working as satisfactorily as they do in the patient who has had a baby.

377 Q. That is all the questions I have.
THE COURT: Any cross-examination, gentlemen?
MR. BATTLE: Yes, Your Honor.
THE COURT: Mr. Battle.

CROSS EXAMINATION

BY MR. BATTLE:

Q. Dr. Forrest, at the conclusion of your direct testimony you were responding to certain questions

concerning contraception, and I think I might start with that because it is fresh in both of our minds. A. All right.

Q. Do you have any hesitancy in the normal case in prescribing the pill as a satisfactory method of birth control? A. Yes, I do.

Q. You do? A. I do.

Q. Do you think that your hesitancy is shared twroughout the field of obstetrics? A. No, sir, it is not.

Q. So you would place yourself as a more conservative member of the field with respect to the use of the pill? A. Yes. And if I may explain, it is on the
378 basis of the fact that our practice is oriented around treating the complications, the complications that develop as a result of it, and I think we have taken a more conservative opinion than most.

Q. When you use the pronoun "we" to whom do you refer in addition to yourself? A. That is an editorial we. It is I.

Q. Dr. Forrest? A. That is correct.

Q. Would you agree with me, Doctor, that from a statistical point of view woman of childbearing age who utilize the pill, so called, for the purpose of birth control, reduce the chances of pregnancy to practically zero? A. I would say yes.

Q. And would you also agree with me that from a statistical point of view, and I appreciate your opinions on this, but from a statistical point of view the instances of complications resulting in disability or hospitalization or even medical attention from the use of the pill are less than in normal—are less than in the total number of pregnancies? Did you understand my question?
379 A. Yes, I did. This has been an argument on the side



of those who feel strongly about the use of these agents and I would agree that statistically – this is true.

Q. Yes, sir. Now, going back, Doctor, if you will, to the beginning of your testimony. When you gave a definition of a disease from Dorland's Dictionary, and I want to make sure that I recalled the essential part of that definition, was it not that a disease, and I am not going to read the entire definition, is a definite morbid process having a characteristic train of symptoms? A. Yes.

Q. Now, referring just to that part of the definition, what is your definition of a morbid process? A. Well, from the layman's standpoint I think morbid implies death, impending death. From a medical standpoint morbidity usually implies that the body reflects the effects of the disease in such a manner as to make the patient function poorly. If I can use as an example, morbidity in the post-operative state would be one who is running an elevation in temperature after a surgical procedure. We would say that that is a sign of morbidity.
380 But it could be the patient who is experiencing discomfort from constipation or obstipation that you cannot correct this. This creates a morbid condition in the sense that the patient is not reacting normally.

Q. All right, sir. Do you know whether or not the definition that you have just given in your best terms comports with Dorland's definition of morbidity or morbid process? A. Well, I did a little homework, but I didn't look up morbid, nor did I look up morbidity.

Q. Would you agree Dorland might very well use the definition that you earlier suggested as being a condition that by its very nature forebodes risk from a medical point of view and maybe death? A. Forebodes risk?

Q. Yes, or maybe death? A. Yes.

Q. I think you stated that in your experience the pregnant woman that you see and deliver, or of the pregnant women that you see and deliver, 10 to 15 per cent experience some complication? A. I was afraid this was going to be –

Q. I am not really testing you on that. A. I understand that. What I am trying to imply by that 10
381 to 15 per cent is that the patients that we would see from the time that we diagnose pregnancy, that they may have some complication that would alert me to the fact that if I don't take care of this I am going to get in trouble, but I don't mean to imply that 15 per cent of all the patients I deliver have complications. That is my point.

Q. I see. Well, would it be fair – A. At the time of delivery.

Q. Would it be fair of me to understand, Doctor, that of the 10 to 15 per cent who have some complications there is a far less per cent who have complications falling in the category that you later termed major complications? A. Yes.

Q. Could you give me a percentage figure of those that you have experienced with complications falling within the so-called major category? A. I would say somewhere between one and two per cent.

Q. One to two percent. Now, would you further agree with me that of that group of one or two per cent there are some who would not require hospitalization because of the so-called major complications?
382 A. Yes.

Q. Could you then break down your percentage to a percentage of those with major complications within your experience who require or required hospitalization?
A. Well, as I pointed out in my previous testimony,



when I consider a major complication that arises, most of these patients, and I would say perhaps 90 per cent of these patients would be hospitalized.

Q. So I will knock off 10 per cent of the one to two per cent who fall within the category of major complications, would that be fair? A. That is correct. In most instances they are hospitalized.

Q. Yes, sir. Well, I suppose it would be fair to say that the vast majority of the cases in this one to two per cent? A. That's right.

Q. Now, let's take the remainder of the 10 to 15 per cent, which would be 85 to 90 per cent of your patients, which I gather experience no complications – A. That is correct.

Q. – during pregnancy? A. That is correct.
383 Q. Now, would you agree with me that with respect to that group of women, their state of pregnancy, I am talking about the normal 85 to 90 per cent, that their state of pregnancy could not be characterized as a definite morbid process? A. Yes, because pregnancy itself is a physiological process.

Q. The normal pregnancy? A. We have not mentioned this, but it is a physiological process, yes.

Q. Therefore the group that you envisioned, that is the 85 to 90 per cent, absolutely normal pregnancies, suffer from no disease as defined by you earlier?
A. I would think so, yes, sir.

Q. Now, of that remaining percentage of so-called abnormal, that is the 10 to 15 per cent, are those with complications, you told me that maybe one to two per cent suffer a disability or require hospitalization. Now, would you agree that except for the one or two per cent that you have in mind as requiring hospitalization or as having a disability, would you agree with me that

the remaining 98 to 99 per cent cannot be characterized as suffering from a definite morbid process? A. I would agree that when the patient, if I can use as an
384 example, who is two months pregnant and she calls you and she says that she is having cramps and bleeding, this is a complication. Well, frequently we will see these patients in the office and institute therapy. Hopefully that will stop the bleeding, make the patient comfortable. But we are, from that time on, constantly aware that she can become morbid in the sense that the fact that she is bleeding, she bleeds excessively, it could produce morbidity.

Q. And if that occurred I assume that in all probability you would recommend hospitalization? A. That is correct.

Q. So the case that you cited to me of excessive bleeding continuing into a state or morbidity requiring hospitalization, that individual would fall in your one or two per cent category which you have given me earlier, would she not? A. Yes.

Q. Now, Doctor –

THE COURT: Mr. Battle, before you get off that, let me get these percentages correct. The 10 to 15 per cent, is it a fair characterization of your testimony, Dr. Forrest, that what you are saying is that the 10 to 15
385 per cent of your patients require special watching, is that a fair statement? Is that what you are saying? They present you with a history that alerts you to a special watching, is that fair? I want to get it straight. I am not sure what the percentages are that you are referring to.

THE WITNESS: Well, first of all I don't like percentages and that bothers me.

THE COURT: You are going to have to live with that.



THE WITNESS: I understand.

MR. BATTLE: You started it.

THE WITNESS: I understand. But I think that what I am trying to imply is that the patients that we would see either by past history or because of their inability to become pregnant, or because of the fact that they have had some little – well, for example they develop a low-grade urinary tract infection, that there are approximately 15 per cent of those patients that require specialized treatment that just don't come in and just go through the routine, if that is what –

THE COURT: It changes the word "watching" to "special treatment." Does that cover it?

THE WITNESS: Special attention.

386 THE COURT: Special attention. That is 10 to 15 per cent of your patients require special attention?

THE WITNESS: During the course of the prenatal care. Would that help? I mean would that help to explain?

THE COURT: I want your explanation. If that is what you mean.

THE WITNESS: That is what I mean.

THE COURT: Go ahead, Mr. Battle. Thank You.

BY MR. BATTLE:

Q. Doctor, it might be of some relief, I think, I have only got one other percentage that you gave to ask you about, if I have not overlooked something. I think you said too in passing, that your experience told you that from 50 to 60 per cent of the women that you see in their first pregnancies are employed. Did I correctly understand that? A. That is correct, yes, sir.

Q. Do you have a percentage figure on the percentage of employed women that you see during their second pregnancy? A. Here again it will have to be a guesstimate. I have not broken these down for statistical
387 analysis. I want you all to understand this.

Q. I do. A. This is a guesstimate.

Q. I appreciate that. A. I would say somewhere in the neighborhood of maybe 20 to 25 per cent may be, still be working with their second, third, or fourth pregnancy.

Q. So if we compare the 20 to 25 per cent of employed women when you see them during the second pregnancy with the 50 to 60 that you say are employed at the time of the first pregnancy, would it be consistent with your experience that after the first pregnancy of working women more than half do not go back to work? A. It would follow by what I have said that this is apparently what the case would be, yes.

Q. Well, I know it follows arithmetically. I just want to make sure that the arithmetic result comports with your experience. That is, that the people you see of the working force, more than half of the women do not return to work after the first pregnancy. They elect to stay at home and raise a family, isn't that true?

A. I think perhaps this is probably true.

Q. I was curious about the fact that you gave toward the end of your testimony which, as I recall it,
388 was that in England the recommended procedure was that the pill not be taken by women over 35 years of age. I don't want to ask you about that, but do you recall relating that fact to the practice in England?

A. There was a published report, I will put it this way, there was a published report where they recommended that women after the age of 35 should probably not take the pill because of the increase in incidences of thrombo-embolic disease.

Q. Are you aware also of published reports or data on the prevalency of the use of midwives and lay help



in delivering children in England and in large parts of Europe? A. Yes.

Q. And you would agree with me would you not, that there were – there is a prevalency of using midwives and lay help instead of hospitalization and the instances of complications and death do not exceed the statistics in the United States? A. I am not familiar with the statistics. I am familiar with the fact that midwives are still used.

Q. In England? A. In England and, of course, in this country it has fallen off recently to practically nil. But I am not familiar with the morbidity-mortality statistics.

Q. Well, to the extent that midwives are used, say in England, just for the sake of this discussion, no hospital care is provided, is it? A. I am not that familiar. I know that they do home deliveries. They do home deliveries, but I also believe that the midwives are operating in the hospital units per se. In other words, they are not exclusively delivering in the home.

Q. Now, Doctor, I think you testified, I want to make sure that I have it straight, that from a medical point of view in the normal or uncomplicated pregnancy the woman is able to work right up until the time of labor, physically speaking? A. Yes.

Q. And as you treat your patients you do not give any contrary recommendation, do you, in the normal situation? A. No.

Q. And I think you also testified that following delivery a six-week recuperative period was generally what you recommended, is that correct? A. Yes. And
390 here again, that is community acceptance, meaning by that, other colleagues use this. I think six weeks is what we have considered over these many years to have

the return, completely involute, and that most of the reparative healing process following delivery has taken place.

Q. Well, you have stated what I wanted to ask you about it. I didn't understand exactly how your concept of the community interest would affect this period of convalescence. Is it to say that most doctors recommend six so you go along? A. I think the verbage was very poor there, and that is what I am trying to straighten out. That I am saying from a medical standpoint, generally speaking most obstetricians have their patients return to the office for what they call their six-weeks checkup and at that time if everything has returned to normal then they are given instructions to go on further, return to their marital relations, et cetera, et cetera.

Q. And I gathered from the general thrust of your testimony that if it were not for this deep-seated practice or habit within the profession there would be many, many cases in which normal activities could be resorted to earlier than the end of the six-months–six-
391 weeks period? A. By normal activies I would assume you would imply swimming, horseback riding, golfing, playing tennis?

Q. Typing a letter, serving as a secretary?

A. Serving as a secretary?

Q. Yes, sir. A. I am sure that altogether is restricted just on the basis of this. I think we really think in terms of the fact that the body takes a period of approximately six weeks to return to its pre-pregnant state, as near as possible to the pre-pregnant state. I am sure that I have patients who do all of these things prematurely, I mean before they are seen.



Q. All right. Well, let me ask you this. Accepting the six-week period as being the correct prescription for convalescence in the normal case following delivery, if you assume no complications in the delivery, just assume as, in the layman-like way I have in mind, a normal delivery, is there any medical reason or would there be any medical reason why a woman should not return to work within the six-week period? Now, I emphasize the word "medical reason." A. I think in terms of fatigue, after a patient has been hospitalized even for a
392 simple procedure, even like an appendectomy, there is a period of time before they are completely recuperated. And I think the six weeks is a very justifiable length of time and would, as I pointed out, also except in rare instances, I would suggest that they remain home for a period of six weeks.

Q. Now, you were asked certain questions on direct examination which sought answers comparing the opportunities to malinger as a result of pregnancy with opportunities to malinger as a result of other diseases. Now, if I asked you to assume that a woman had no complications during pregnancy and a normal delivery, and then I asked you to assume that she absented herself from work for a period of 20 weeks, just assume those facts – A. After delivery?

Q. Yes. Would you agree that there was in that example a rather strong suspicion of malingering?

A. I would. Unless she had some other medical complications that would be treated by another specialist. But from the standpoint of her delivery, which was normal, I can see no reason why she would stay out for 20 weeks.

Q. Do you recall, Doctor, I wrote down as you
393 testified six examples of major, so-called major complications. Let me read what I have to make sure that I

have it correct. The six-month pregnancy. Experiencing cramping and excessive bleeding. I think that was your first one. Is there a medical term for that condition? If you don't recall one – A. What I am trying to give you, one that I think would cover it. There is some disruption of the placental-uterine attachment that would cause this in most instances. There are other times – there are other causes that may present themselves this late such as a polyp of the cervix or cancer of the cervix that was missed. But these would be the rare exception. Generally when we see a woman at six months pregnant with bleeding there has been some disruption of the placental-uterine attachment.

Q. But when you see that condition you don't describe it by the use of a medical term? A. Partial separation of the placenta.

Q. This is what you write in the record? A. Or maybe a placenta that is located down near or over the opening of the uterus, in which case we would call it a placenta previa.

394 Q. All right, sir. I think I understand you mean by the first condition or abormality or complication in the major category. I think your second one was hypertension. Do you recall that? A. That is correct.

Q. And your third was hemorrhaging, do you recall that? A. Yes, hemorrhaging.

Q. Your fourth example – A. Well, the hemorrhaging, of course, would still go back to number one, because hemorrhaging could – I mean hemorrhaging implies that there is excessive or there is excessive blood loss through the vaginal tract.

Q. All right, sir. Because you said excessive bleeding, which is the same thing as hemorrhaging? A. That is correct.



Q. You list them separately is the reason I recalled them separately. The fourth, as I wrote it down, was acute urinary tract infection. That would fall, if severe enough, into the major complication category?

A. These patients sometimes require hospitalization.

395 Q. Premature rupture of membrane? A. That is correct.

Q. And then the last was premature dilatation of the cervix, correct? A. This is sometimes referred to as the incompetent cervix.

Q. All right. But that is the group that I listed as your examples of major complications? A. Well, under the hypertension, of course, if another medical doctor were sitting here he would probably refer to the toxemias of pregnancy in that same category. I should help you there, or at least give you that toxemia pregnancy.

Q. Presence of edema? A. Edema and go on to convulsions and so forth. This is a major complication.

Q. All right, sir. Well, these are six examples that you gave under the categories, as I understand it, of major complications. Now, did you mean these examples do apply to major complications which result from pregnancy, or the presence of the fetus or – A. They

396 are complications of the pregnancy. The pregnant state having been established and the resultant changes that come about.

Q. Well, now, am I correct in understanding that a given patient may have any one of these five or six conditions and not require hospitalization? You don't suggest that all of these conditions always or invariably require hospitalization, do you? A. It is one of a degree. If, for example, if I can reverse or revert back to the hypertension, here is a woman who presents

herself at, say, six months of pregnancy and has been normal tensive, that is her pressure had been in the range of 100 to 120 over 80, and then suddenly we check her and she is 150 over 80, or something like that, but she has no urinary changes, that is no edema, she has no proteinuria or albuminuria whichever way you want to put it, we may say we better watch this. But if she continues, you will say you want to see her back in two or three days, start some medication. If it progresses or doesn't seem to be responding, then this patient should be hospitalized and studied further. Now, if you are referring to that then I would say, yes, in certain instances it may not.

Q. Well, this is what I am referring to. And I just
397 wanted to ask you one other question about the group. I think that when you testified on direct examination with respect to the cramping and hemorrhaging at the sixth-month period you said it might take several days of hospitalization, is that correct? A. Yes. Well, I was using a specific instance there. This hemorrhaging can occur at any time during the pregnancy. But I use that as an example and I don't wish to just say that six-months bleeding was the complication. I mean that that is a category of major complication, but rather hemorrhaging per se.

Q. Well, I just want to ask you a couple of questions about the condition that you had in mind when you made the statement. A. If we have a woman who say is six to seven months pregnant and she is hemorrhaging or having excessive vaginal bleeding why, yes, we would hospitalize her and try to determine is this a placenta previa or a partial separation and go about managing her and observing her during the course of that time. She may go on and progress to



complete separation with delivery of a stillborn in the
398 period of 24, or 36 hours. It is very difficult to say. Three days. Generally she will stay there until she improved

Q. I was simply asking you about what I believe was your statement that the example that you had in mind would typically take several days in the hospital. And what I wanted to asky you is that when that extreme condition occurs, if it does occur, you would add those several days to the six-week period if you were to give me the total length of time that this particular patient might be disabled with this complication? A. No, I don't think we would add it because in actuality, for example, if the pregnancy is such that we are able to stop the bleeding and we send her home on close observation and bedrest and close examinations at the office, her pregnancy very well may go right to term and she would go ahead and have a normal baby and her six-weeks recovery would be the same.

THE COURT: But you do add it, though. She is out of work during the six weeks plus the several days that you are controlling this condition, isn't that so?

MR. BATTLE: I think that is obvious.

THE WITNESS: Well, on one hand I am talking about
399 positive part of management and the other we are talking about –

THE COURT: Mr. Battle is adding them together and it does follow if you took three days to get the condition under control –

THE WITNESS: She would lose three days of work. She may lose.

THE COURT: Plus the six weeks?

THE WITNESS: Yes.

THE COURT: I understand.

BY MR. BATTLE:

Q. Yes, Sir. A. Yes, any of these complications, any number of days that the patient is in the hospital and restricted would have to be added to the six-weeks period.

Q. Yes, Sir. A. As far as the recovery period after delivery.

Q. And the patient that you have in mind when you are talking about this period of hospitalization for several days would fall within the one or two per cent category that we talked about earlier? A. That is correct.

Q. Doctor, I think you also stated that sometimes women didn't take your advice about pre-natal or post-
400 natal care because of economic pressures. Do you recall that? A. They didn't take some of my advice?

Q. Yes. Well, that is what I thought you must have meant. Now, if you advised a woman to do something that you thought was imperative, you would see to it that she did it, wouldn't you? A. To the extent of even notifying her husband or some member of her family that I could get in touch with to make sure that everyone understood what grounds we were playing with.

Q. So you wouldn't, as the attending physician, permit economic pressures to override what you –

A. Good medical judgment, no.

Q. –what you determine to be essential medical attention? A. No, sir.

Q. And I suppose this would be true of the specialty of obstetrics in general, would it not? A. I would think so. Sometimes we hate to have to put a patient in the hospital for a complication because these patients probably only have six or eight days that their



insurance companies allows them in the first place, and
401 first thing I know I have used up three or four days of their pregnancy insurance and this bothers you, but you cannot practice medicine that way. You have to do it despite the fact that it is going to be costly, and they are going to lose advantages.

Q. Yes, sir. Now, one or two questions about the process of an episiotomy. Am I pronouncing that nearly right? A. That is correct. I can't spell it yet.

Q. We only have one person in the room that needs to spell it. Now, as I understand the procedure, it merely does with a scalpel or knife what nature otherwise would do in a much more primitive way, does it not? It is an incision of the muscle and if it weren't for the incision the muscle would tear? A. Yes. The degree may vary. And the site may vary. Nature given the opportunity very well may tear out laterally where we try to place the episiotomy in the midline and release this tension. It is really a release of tension.

Q. Well, having performed the episiotomy, that by itself does not extend the mother's stay in the hospital,
402 does it? A. Not as long as – well, here again I have got to make an exception. There are degrees of episiotomy.

Q. Let's look at the normal situation. A. Normal episiotomy, not necessarily. No, not necessarily.

Q. And therefore would not extend the mother's period of disability or layoff from work in the usual case? A. No.

Q. Going back to this six-week period which I take it is generally accepted as the period of convalescence or remaining at home from work, from a medical point of view is any part of that six weeks recommended for the benefit of the child rather than, or the baby, rather

than the benefit of the mother? A. I am sure we include this in our over-all concept as far as the convalescence is concerned.

Q. The reason I was prompted to ask the question was because I think you said that in the case of a stillborn three weeks might be more realistic, and it prompted me to ask the question if the additional three weeks was mainly for the benefit of the living child or living baby. A. Now, you have to understand that if you had a term birth, that is a baby that
403 weighed seven and a half pounds, that was stillborn, I think the repair process, the healing process and everything else, is going to be exactly the same as in the normal delivery. On the other hand, if a woman comes in and she has a six-months delivery, premature, she may not have an episiotomy. The size of the uterus is much smaller and it may very well involute more rapidly. I was trying to imply that as far as the physiological response is concerned, it is probably still six weeks regardless of when the delivery took place. Certainly from the mid-trimester through the last trimester. But in many instances these girls feel well enough and are desirous of getting out of the house. They want to get back to work. And I have never based it on economc pressure. I think it has been more or less on the fact that they personally just want to return to work and get out of the house.

Q. Yes, sir. I am wondering if I heard correctly on another statement that you made according to my notes which was the medical management of a pregnancy is the same as any other disease. You don't, do you, mean to say that, or did I misunderstand you?

404 A. A medical management of a pregnancy is the same as any other disease?



Q. Yes. I think the question put to you was there any difference between the management of a pregnancy and the management of any other disease, and I think your answer was no. A. It is almost like comparing apples and doughnuts. If a woman or man comes in with a fracture of his arm there are certain practices that are carried out to make sure that this arm is set and he is followed up until the time that the cast was removed and given certain exercises and things that he can do until he is back to complete recovery. I think in terms of medical management is how we go about handling this patient. During her prepartum state, during her interpartum state, and postpartum state. And as far as management, I am talking about medical attention to the fact that given the problem of managing a patient who is pregnant I think that you – it is good medical management and I think it is the same.

Q. Well, if you are comparing a person, a woman experiencing a normal uncomplicated pregnancy with, say a man who has suffered a severe heart attack, the only
405 similarity is that both of them are seeing a doctor, isn't that right? A. That is correct.

Q. And isn't it true that except for looking out or being alert to the complications in pregnancy the normal pregnancy requires little or no medical treatment?
A. Up to what stage?

Q. Up to the stage of labor? A. Yes. I think that this could be.

Q. Your main purpose is to be on the alert for complications? A. Yes. Yes, I would accept that.

Q. Now, Doctor, I am almost to the end. You were describing complications in pregnancy and I think you have mentioned diabetes, disease of the colon, heart disease and kidney ailment. And I gather that you were

using these examples to show what might happen to pre-existing conditions because of the advent of pregnancy, were you not? A. That is correct.

Q. Would you not agree that in every example, such as diabetes, heart disease, kidney disease, colon disease, which can lead to disability because of preg-
406 nancy, follow me? A. Can lead to disability.

Q. In all cases of diabetes, heart disease, colon disease or kidney disease which could cause a pregnancy—can be brought or exaggerated to the extent of disability, those conditions, excuse me, I haven't finished the question, such conditions are diagnosable prior to pregnancy? A. Or they are diagnosed during the course of pregnancy.

Q. Let's take, for example, a pre-existing condition of heart disease. A. All right.

Q. Which is complicated or brought out because of pregnancy. I think this is an example that you had in mind. A. Which is complicated or brought out as an example?

Q. Yes. A. When you use the broad term "heart disease" there are certain types of heart disease, for example certain people who have pre-existing rheumatic fever with a history of cardiac damage, the degree of the damage, the course of the pregnancy, as a practicing physician you are alerted to the fact that you have this additional problem that could come up, not necessarily that it will come up.

407 Q. I understand. A. And many of these patients with good medical care will go sailing right through just as well as their sister who has not had this, but the fact that she has this puts an additional hazard on the management of her pregnancy.



Q. I think I understand what you are saying. I am trying to take it from the other end, which is to say you can't think of an example, can you, of a heart disease pre-existing which was so severe that it led to disability? A. Oh, yes.

Q. During pregnancy? A. Yes.

Q. Which was not diagnosable in its pre-existing condition. Am I making myself clear? A. Yes. And I can think of a case that occurred during my residency program of a young lady who came in in heart failure at about six months of pregnancy. The maximum peak usually is reached around the seventh month. And her physician or physicians who had seen her in the past did not recognize that she had heart damage. Now, she had to be managed as a cardiac patient first.

Q. But in the normal situation, the normal physician would have recognized this condition prior to pregnancy
408 is my question? A. It depends on the degree of the lesion. The lesion may become apparent as a result of the stress of pregnancy because of the increased blood volume and the stress reaches, as I say, reaches its maximum peak at approximately the seventh month.

Q. All right. We will take the example that you gave me that occurred during your residency. How long ago was that? A. 20 years.

Q. So I may assume it would be rather rare?

A. Well, you may assume that it would be very rare?

Q. Rather rare? A. We just had a case on our service that I did not manage that occurred within the last six to eight months.

Q. I realize that these conditions occur during pregnancy with respect to heart condition, diabetes, kidney disease, but what I am interested in is this question. Aren't those conditions, if they are going to disable

the patient or going to be that severe during her pregnancy, usually diagnosable prior to pregnancy? A. In most instances, but there is still this exception.

409 Q. Yes.

Well, when you diagnose them you have some warning that this can occur and you are then able to apply the right sort of prescriptions and medical treatment to manage it? A. Special assistance, yes.

Q. I am curious about the answers that you gave to questions comparing voluntary act of becoming pregnant with the voluntary act of consuming alcohol to the point of becoming an alcoholic or smoking cigarettes to the point of having lung cancer.

We can dispose of this in a minute. You don't compare pregnancy in any sense with either alcoholism or lung cancer, do you? A. No, I don't compare the two. I think one is a very, hopefully, joyous outcome and the other has nothing but dire circumstances.

THE COURT: You mean smoking will not necessarily lead to pregnancy?

THE WITNESS: That is correct.

Nor drinking.

Drinking may.

BY MR. BATTLE:

Q. So to sum it all up, Doctor, as you said earlier

410 pregnancy is a normal physiological process, is it not, and certainly can't be cmpared with alcoholism, lung cancer, or any other disease? A. Only in that they both require medical attention.

Q. They see doctors? A. They see doctors and they get treatment.

Q. Yes, sir.

I think that is all.

THE COURT: Any redirect?

Supreme Court, U. S.
FILED
NOV 24 1975
MICHAEL RODAK, JR., CLERK

**APPENDIX - VOL. II**

# Supreme Court of the United States

OCTOBER TERM, 1974

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**No. 74-1589**

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GENERAL ELECTRIC COMPANY,
*Petitioner,*

v.

MARTHA V. GILBERT,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, *et al.*,
*Respondents.*

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**No. 74-1590**

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MARTHA V. GILBERT,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,
*Petitioners,*

v.

GENERAL ELECTRIC COMPANY,
*Respondent.*

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**PETITIONS FOR CERTIORARI FILED JUNE 17, 1975**
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## REDIRECT EXAMINATION

BY MS. WEYAND:

Q. I believe you said it was statistically true that the complications arising from the pill are less in number than the women who get pregnant. You emphasized –

MR. BATTLE: Excuse me, Your Honor, I don't think that was either the answer or the question.

MS. WEYAND: All right.

MR. BATTLE: Women that get pregnant are less the number of complications.

BY MS. WEYAND:

Q. Less the number of complications of pregnancy.

You emphasized the word "statistically." Am I correct in inferring that you thought there was something else to
411 be said besides merely statistics on that subject?

A. I think that just as a matter of clarification that a complication that results from the taking of the pill and a complication that results from being pregnant are in themselves 100 percent important to that particular individual.

Statistically they compare the number of complications with dire circumstances related to the taking of the pill with those complications of pregnancy with dire circumstances. When you compare it in that light the incidence is much lower among the girls who are taking the pills, as I understand it. And this is the argument that is proposed by these people.

Q. Do you think there are substantial consequences that are not classified as dire consequences? A. I think in most instances except where there has been documented statistical or evaluation of a particular segment of people who have taken these agents, there are many of these so-called complications are missed that are not recorded and they are not reportable.

The patient who has been taking the pill and suddenly dies as a result of a thrombo-embolism, I think this is dramatic, it becomes reportable, and usually a coroner's case. And these get entered into the statistics.

412 The patient who develops positive birth control pills suppression, ovulation suppression syndrome, I don't know that we are reporting these.

There are people who are interested in them that are investigating this phenomena, these complications.

We are slowly picking up more and more of these adverse effects. And if you are interested in this subject I think you tend to read more on this subject, and I am interested in the complications. That is not to imply that we do not give the pill, and we still use it with medical indications and we offer contraceptive advice, we usually give the patient her opportunity to select what she and her husband would like to use.

Q. I take it that 100 percent of your pregnant patients have a period of hospitalization, do they not? A. We use the term pregnancy here and we keep talking about the normal pregnancy, but there are abnormal pregnancies.

Q. They all go to the hospital when they deliver, you have said? A. If we are talking about a normal I would say that 100 percent of these patients go to the hospital. Even if they delivered in a rescue squad, they still go to the delivery table and are examined and kept there for three or four days, yes.

413 Q. So when you said 90 to 95 percent of the pregnant women suffer no disease, you did not go back to your definition of disease, did you? A. No.

If I relate to discomfort aside from the normal state of well-being I probably did not relate that.

Q. 100 percent of them have suffered discomfort, did they not? A. I would say –



MR. BATTLE: I have tried not to object, but that is awfully leading.

THE COURT: She can lead him.

MR. BATTLE: It is the testimony.

THE COURT: If she can lead him he deserves it. I don't think she will lead him very far.

THE WITNESS: If you are referring to the fact that they required anesthetic for the time of the delivery to relieve the pain and discomfort, the actual delivery process and the episiotomy, or they required medication and/or anesthetic during their labor, then the answer would be yes.

MS. WEYAND: That is all the questions I have.

THE COURT: Dr. Forrest, I want to be sure I have

414 this straight. I am not sure of the materiality.

Did I understand you to say that more than 50 percent of your patients, that is of your working patients, stayed home after the first pregnancy and don't return to work?

I know you said it because I wrote it down. Did you mean that?

THE WITNESS: No – here again, Judge, I am trying to say that of the patients that I see, and incidentally I have not made a real effort to ask patients, "Do you work, not work, and so forth," the impressions that we get is through conversations with the patients when they say, "I can't get here because they don't want me to come, or I lose too much time at the office." What I am trying to say is of the patients that we see with their first pegnancy, perhaps 50 to 60 percent of these patients are working.

THE COURT: I understood that.

THE WITNESS: Now, we see other patients who come in with their second pregnancy or they are old patients who come back three or four years later. And I think

that there is – that it reduces to probably as low as 25 percent.

I am not saying that the patient that I delivered 50 percent of them never go back to work.

THE COURT: That is what I wanted to know.

415 THE WITNESS: No, because I don't know this.

THE COURT: All right.

Did the Court's questions prompt any further inquiries from counsel?

MR. BATTLE: Just in regard to those questions, Doctor.

THE COURT: It must have been more material that I had given it credit for, Mr. Battle, but you go ahead.

MR. BATTLE: In that case I have no further questions.

RECROSS EXAMINATION

BY MR. BATTLE:

Q. Seriously, you do, in discussing the pre-natal treatment and attention, typically find out whether the lady works or whether she is a housewife, or what the nature of her activities are, don't you? Isn't this part of the history that you want to have in prescribing? A. I wished I could tell you, Mr. Battle, that I inquire of that specifically. I do not.

If it comes to my attention, but I am not really hep on it. I don't go out and say, "Do you work?"

Q. Well, the thing that sort of grabs me is the fact that, as I take it, for 20 years or so, and I knew this to

416 be true before you gave the facts, you see thousands of women a year and deliver thousands of babies a year.

A. Not thousands.

Q. No? A. Not thousands a year, sir.

Q. I am sorry. Hundreds. A. I would accept hundreds.

Q. And you said on direct examination, and it wasn't particularly surprising to me, I just wanted to develop it



somewhat, that of the first pregnancy you gathered about 50 or 60 percent were working women, that is your –

A. Yes.

Q. – impression, is it not? A. Yes.

Q. And over the years of experience I take it you were using that experience, not just the last year, but over the years of experience in the state of second pregnancy you gathered by the same type of information that about 25 percent were working women.

Now, wouldn't a fair inference be that more than 50 percent of your patients do not return to work after the first child is born? A. I can't answer that because she may only have one child and return to work and I never

417 see her again.

I am comparing patients who come in for pregnancy rather than a one family – pregnant one family. If you asked me my general impression I would say that because of the nature of our practice, which many of these people who come, I say many, a considerable number of them would come to us who have problems in becoming pregnant; and I find out all of these things like do you work, where do you work, and so forth because with these people I want to know these things.

But for the average girl who drops in, or the person, I don't like to use that word "drops in," but who comes in and just going through the course of talking to her, it usually will come out in her conversation, but I don't specifically say, "Do you work?"

Q. I see.

All right. That is all.

THE COURT: Miss Weyand.

MS. WEYAND: Nothing further.

THE COURT: You may step down.

Unless I hear an objection Dr. Forrest will be excused.

Thank you, sir.

(The witness stood aside.)

* * * * *

419 Feb. 23, 1973

CITIZENS' ADVISORY COUNCIL OF
THE STATUS OF WOMEN
Room 1336, Department of Labor Building
Washington, D.C. 20210

Mrs. Catherine East has been executive secretary of the Citizens' Advisory Council on the Status of Women since its establishment on November 1, 1963, by Executive Order 11126. The primary functions of the Council, whose members are appointed by the President, is to study issues relating to status of women and to recommend needed changes to the President, Federal agencies, and other groups.

The Council has made recommendations on a variety of subjects, including most recently the Equal Rights Amendment, job-related maternity benefits, and Need For Studies of Sex Discrimination in Public Schools. Earlier recommendations to the Equal Employment Opportunity Commission on the interpretation of Title VII were adopted by the Commission and upheld by the courts.

As the chief executive officer Mrs. East has been responsible for providing staff assistance to the Council, including agenda and speakers for meetings and responsibility for preparation of staff papers and reports. For some studies she has arranged for part-time details of experts from various parts of the government. In other cases she has done the research and prepared the staff papers for the Council.

She served as technical secretary for the Federal Employment Committee of the President's Commission on the Status of Women from March 1962 until November 1963, with similar responsibilities for Federal employment only.



In the Civil Service Commission where Mrs. East was employed in public presonnel management for the preceding 23 years, she was engaged primarily in general staff work, researching various topics and preparing policy positions for the Commissioners. She drafted laws, regulations, executive orders, bill reports, testimony, and instructions to agencies to carry out Commission policies. Among the wide variety of topics on which she worked were conflict of interest laws, employment of military personnel in the Federal service, and past and future relationship of the Civil Service Commission to the President.

She played a major role in designing and implementing changes in the Federal personnel management system required by World War II and the Korean war and post-war readjustments.

She has been a speaker on legal, economic, and social status of women before such groups as the American Management Association Annual Personnel Conference, the Southern Newspaper Publishers Association Foundation Seminar for Southern journalists, Delaware Chamber of Commerce, the New York State Psychological Association Conference on Women in the Work Force, the National Conference of

420 Administrative Women in Education, the National Convention of the Intercollegiate Association of Women Students. She was an expert witness in the case of *NOW v. Pittsburgh Press* and *Cohen v. Chesterfield County School Board.*

She testified before the Select Committee of the House of Lords of the British Parliament on proposed legislation to prohibit sex discrimination in employment and education. During this trip she spoke on status of women in the U.S. at conferences at the University of London, University of South Wales, Glasgow City Council Chambers, British House of Commons, and appeared on several BBC television shows.

She testified on the Equal Rights Amendment before the Judiciary Committees of the House and Senate of the Legislature of South Dakota and before the joint House-Senate Judiciary Committee of the Legislature of Connecticut.

February 16, 1973

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421 MATERIALS ON WHICH I WILL RELY

Recommendation on Job-Related Maternity Benefits of Citizens' Advisory Council on the Status of Women.

Report of the Subcommittee on Maternity Benefits to the Interdepartmental Committee on the Status of Women, November 1969.

Contract of the Department of Labor with Labor Local 12 signed December 18, 1970.

Survey of Use of Leave for Maternity Purposes in Employment Standards Administration, Department of Labor (if completed in time).

"Childbirth and Child Rearing Leave: Job-Related Benefits," New York Law Forum, Vol. 17, No. 2, 1971.

Guidelines of States of Washington and Wisconsin.

Current Population Reports, Bureau of the Census, "Birth Expectations and Fertility: June 1972," Series P-20, No. 240, September 1972.

Personnel Management Policies and Practices, Report Bulletin 25, June 6, 1972, Prentice-Hall.

Unpublished Data from Survey of Use of Sick Leave by Federal Employees - 1961 leave year.

February 22, 1973



422 * * * * *

CATHERINE EAST was called as a witness by and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified on her oath as follows:

THE COURT: If you would move those for a moment so the marshal can put the table up.

THE WITNESS: Oh! Thank you.

DIRECT EXAMINATION

BY MS. WEYAND:

Q. I show you the vitae of curricula which has been filed.

THE COURT: Miss Weyand, stand behind the lectern, please.

The marshal will pass papers to the witness.

THE WITNESS: Yes, I did.

BY MS. WEYAND:

Q. Did you prepare that?

Are there any changes necessary to bring it up to date?

A. Well, yes, for this purpose I suppose so.

I testified before several other state legislatures on the Equal Rights Amendment, if that is significant.

THE COURT: Let me get the witness' name. I am

423 sorry. I didn't get it.

MS. WEYAND: I am sorry.

THE WITNESS: Catherine East.

THE COURT: Thank you, ma'am.

MS. WEYAND: She has filed a biographical sketch with the Court, as you may recall, and I assume the same question would apply here as to whether there is need to qualify her further.

THE COURT: In what field are you qualifying the witness?

MS. WEYAND: As an expert in the field of socio-economic effects of employment of women, the problems of women in the social and economic field.

THE COURT: Does anybody wish to examine the witness on her qualifications?

If not she is qualified.

MS. WEYAND: Thank you.

BY MS. WEYAND:

Q. What is your present position? A. I am Executive Secretary of the Citizens Advisory Council on the Status of Women.

Q. What is the Citizens Advisory Council on the Status of Women? A. It is an advisory group of 20 members
424 appointed by the President to advise the Federal Government and private groups, and anybody that wants to listen, on action that might be taken to improve the status of women.

Q. Who are its members? A. 20 private citizens appointed by the President who serve without pay and serve without term of office.

Q. How long have you held your present position? A. For 11 years.

Q. What are the duties of your position? A. My duties are to help in preparing the agenda for the Council and arranging for speakers, in preparing staff papers, doing research on the topics they are concerned with, writing the minutes, speaking as requested on the status of women to various groups and before public bodies.

Q. I believe you stated that there were some legislative bodies before whom you have testified in addition to those listed in your biographical sketch.

Would you state what those are? A. Yes. I testified before the West Virginia Legislature, a House Committee, House Judiciary Committee, and before the Illinois Senate Judiciary Committee on the Equal Rights Amendment.



Q. Have you testified before legislative bodies outside
425 the United States? A. Yes. I testified before a Select Committee of the House of Lords on legislation to prohibit discrimination because of sex in employment and education in England.

Q. When did this testimony take place? A. In November of 1972.

Q. Did the Citizens Advisory Council on the Status of Women take any position with respect to disability benefits for periods of absence from work due to childbirth and complications of pregnancy? A. Yes.

The Council was quite interested in this topic.

The Council appointed by President Johnson had taken it up in 1968. And at that point they recommended the establishment of a Federal Temporary Disability Insurance System that would provide for compensation for loss of income for all employees who lost time because of temporary disabilities, including pregnancy.

When it came up again after President Nixon had appointed the present Council members and the Council heard witnesses from an insurance company, from the Civil Service Commission from the Equal Employment Opportunity Commission, from the Office of Federal Contract Compliance,
426 and the Labor Department. I did some research for them on practices in foreign countries and a little on what was done in this country.

We found that there were a wide – I say we, I am speaking of the Council for whom I was doing the staff work– found a wide variety of practices. In the Federal Government and in the Railroad Retirement Board, we found that leave for childbirth was treated as a temporary disability and the employees used their sick leave, vacation leave, and leave without pay as necessary; and that they had reemployment rights.

We found that some other employers required women to take leave without pay or to resign when they became pregnant.

Some of them had to quit early in the pregnancy. They were not permitted to use sick leave or personal leave or vacation leave, whatever leave might be available, or didn't have temporary disability insurance coverage.

Most apparently had no reemployment rights except preference for vacancies.

We were kind of surprised; it seemed some employers almost designed their practices to force women to quit
427 work at the time they had children, and apprently some of the other practices went back to the times when pregnancy was considered obscene and when all women were expected to stay home and take care of their children.

It seemed to have been designed by upper middle-class men who, you know, were trying to get all women, or hoped or seemed to assume all women, could follow the practices of their wives.

This appearance has since been confirmed by experiences I have had.

I have spoken a great deal to businessmen, including the American Management Association Personnel Conference, and I always raised this topic when I did.

And several of the employers, these are industrial relation experts, they are not just anybody, Vice-Presidents for Industrial Relations or Personnel Directors, have asked me shouldn't women be encouraged to stay home? Why should you have policies that would permit them to come back? I told them that was none of their business whether the wife stayed home to take care of the children or not. That was between the husband and the wife.

We found that five states had temporary disability insur-
428 ance laws. New Jersey, Rhode Island, New York, California, and Hawaii.



These laws provided income replacement for covered employees while they were temporarily disabled.

At that time only New Jersey and Rhode Island covered pregnancy, and both had limitations.

Recently Hawaii has amended its law to cover periods of disability because of pregnancy. And I think to some extent because of the Council's proposal and because of the EEOC Guidelines.

And California's exclusion of pregnancy from its law has recently been declared invalid under ther 14th Amendment.

We found that four states, I guess, are or are going to have to include pregnancy.

New York also has a bill before it to include pregnancy, and the women's groups up there are working hard to get that exclusion repealed.

We found that European countries and Great Britain generally have national social security systems that provide income maintenance during temporary disabilities and include time off for childbirth and complications of pregnancy as a part of the system.

We found in looking into why this wide variety of practices and why pregnancy was excluded from benefits normally
429 provided other disabilities, that it had been justified on the basis that pregnancy is distinguishable from all other disabilities because it is voluntary. I put that in quotes. Or it is a "normal physiological condition." Since the Council membership is made up of 20 women, some of whom are of religious faiths that forbid effective birth control methods or abortion, the Council couldn't believe that the voluntary bit had been advanced very seriously, but apparently it has been.

The normal physiological condition justification was puzzling. If pregnancy is normal is non-pregnancy abnormal?

One would think that a normal physiological condition would be one that could continue for a lifetime with comfort. Constant pregnancy certainly would not be conducive to health or comfort.

In any event, the Council was concerned with employment and from the standpoint of employment absence for childbirth had all the characteristics of other temporary disability.

THE COURT: Just a moment, please, ma'am.

MR. KAMMHOLZ: Your Honor, I apologize for the interruption in the dialogue, I was waiting for the end of
430 a sentence but I had difficulty in interrupting at that point in time.

We note at counsel table that the witness appears to be reading a statement. This apparently is a prepared statement. It is not an answer to the question, and indeed –

THE COURT: I will have to ask you now to be a little bit more specific as to your objection.

MR. KAMMHOLZ: We object on the ground that the witness is not testifying but is reading a statement.

THE COURT: Well, I think the objection is well taken.

At the risk of being one of those middle-class chauvinistic males, it does appear to be argumentative.

Suppose you address questions to the witness.

You may refer to such notes as you may have.

THE WITNESS: I am sorry. I made some notes. I didn't want to forget anything.

THE COURT: I have no doubt that what you forget Miss Weyand will remind you of.

BY MS. WEYAND:

Q. What position did the Council take? A. The Council concluded that pregnancy is, that the time the childbirth, the period that a woman has to be off for
431 childbirth is a temporary disability, that it had all the characteristics of it.



That a woman is temporarily unable to work because of her physical condition. She is under the care of a doctor.

She is likely to go to the hospital. She is in need of replacement of income, as great a need as for any other disability, and possibly greater since there is going to be a new addition to the family.

So we concluded that it met all the characteristics of other temporary disabilities as far as employment is concerned.

That is what we are dealing with is employment. And that it is one and that is the way it ought to be treated.

We made that recommendations.

We also recommended that women should not be given any greater advantages for pregnancy than for any other temporary disability.

We felt this would be unfair to people, both women and men, who had other temporary disabilities.

At the time that we took this up we were considering a proposal by the Civil Service or by a committee, not by the Commission, by a committee to recommend legislation that would have given women in the Federal Government
432 a greater benefit, greater leave for pregnancy that for other temporary disabilities. We disagreed with this and recommended no greater benefits because we felt the essence of non-discrimination was to treat each person as an individual and that if you started having different treatment for pregnancy you would inevitably have some situations where a woman who was off because of childbirth would be treated better than some other employee similarly situated insofar as length of service, and so on was concerned would have another disability and we thought they were identical and should be treated that way.

Q. Did the Council issue a published statement representing its position? A. Yes, we did.

Q. What was that called and when was that issued?
A. I will look it up. I can't remember times.

Q. I will show you Plaintiffs' Exhibit 80 and ask you if that is a copy? A. Yes, Job-Related Maternity Benefits, November, 1970.

Q. Thank you.

Now, in connection with preparing this report, did you get some figures on the cost to industry of such a pro-
433 gram? A. Yes, we did. This Council is made up of good Republican women, by and large, many of them in business, and they were not wanting to do anything that was out of the question.

We had a Mr. Hunt from the Aetna Insurance Company. He was designated by top officials to come speak to us and to furnish us with data on costs of various things.

He spoke to the Council before they took a position. And as a result of this statement I prepared–

MR. KAMMHOLZ: Just a moment, Your Honor. I object. Hearsay.

THE COURT: Overruled. As a result.

THE WITNESS: As a reuslt I prepared a paper which we cleared with Mr. Hunt. I prepared a paper based on his testimony and then sent it to him at Aetna for clearing.

MR. KAMMOLZ: Note the objection, Your Honor, based on hearsay.

MS. WEYAND: We will provide the documentation.

THE COURT: Please, you must address yourselves to the bench. The objection is well taken as to the last
434 part of the answer.

MS. WEYAND: I would like to show the witness Plaintiffs' Exhibit 81, please, and ask you if that represents the figures you have obtained from Aetna with respect to the cost?



THE WITNESS: Yes, it does.
BY MS. WEYAND:

Q. Did you verify with Aetna the accuracy of the figures?

THE COURT: I am sorry. Just a moment. You said Plaintiffs' Exhibit 81?

MS. WEYAND: Yes.

THE COURT: It is described on your list of exhibits as Citizens Advisory Council on the Status of Women information from insurance industry related to coverage of childbirth. Is that what you are referring to, Miss Weyland?

THE WITNESS: Yes.

MS. WEYAND: Yes.

THE COURT: All right. I just wanted to be sure.
BY MS. WEYAND:

Q. And this was no document to which you referred when you said you had obtained information from the insurance industry included in your report, is that correct?
435 A. Yes, sir. Yes, ma'am.

Q. I would like to have marked for identification as Plaintiffs' Exhibit 121 a letter which I would like to show you. It is a letter which is from James Hunt to Mrs. Catherine East, dated June 30, 1971.

MR. KAMMHOLZ: Your Honor, may I go back to the Plaintiffs' Exhibit 81? Mr. Strauss, who had dealth at great length with counsel advises me that he had not received a copy of it, and I must confess that I have difficulty in identifying and relating this document to what has been handed the witness, which I have not seen.

THE COURT: Didn't counsel meet as required by the pre-trial order?

MS. WEYAND: Yes, And I sent him over a list of all exhibits and he marked off the ones which he said were

missing from his set and I sent them over.

I am very sorry if this didn't appear in that group.

THE COURT: I will give you an opportunity before cross-examining to look at it.

Go ahead, Miss Weyand. Let's see if we can't move
436 along now.

MS. WEYAND: Yes.

I am handling you the document marked for identification as Plaintiffs' Exhibit 121 and ask you if that is a letter you received from Mr. Hunt confirming the figures?

THE COURT: Just a moment.

THE WITNESS: Yes, it is.

MR. KAMMHOLZ: May it please the Court - -

THE COURT: All right, sir.

MR. KAMMHOLZ: Plaintiffs' exhibit list does not relate to a 121.

THE COURT: I know.

MR. KAMMHOLZ: We object.

MS. WEYAND: Mrs. East was -- did not provide this to me until today when she testified at another hearing we had a week ago, and at that time counsel, the Stromberg-Carlson case, objected because she did not have confirmation and she said I have a letter, and I will bring it down, and the first time I saw it was today, was that she got a letter from Mr. Hunt confirming the figures here.

THE COURT: I am going to sustain the objection.

But counsel for the defendent must recognize that you
437 are going to get treated the same way in the event you come across any exhibits you would like to offer.

The objection is sustained.

It was not filed pursuant to the pre-trial order.

MR. KAMMHOLZ: Your Honor, may I?

THE COURT: Change your mind, did you?

All right, sir.



MR. KAMMHOLZ: I would like the record to be clear that we object to 81 on the ground that it is hearsay. Perhaps the record already reflects.

THE COURT: Let's not go through those objections. They are all in the record.

BY MS. WEYAND:

Q. Do you have any information as to the extent to which it has been the practice of pregnant females in the past to continue working right up to delivery if their doctors advise that this was approved by them? A. Well, we have had a great deal of difficulty in finding any employers that have permitted this. Even the Federal Government that has – that does permit the use of sick leave, recommends that agencies require women to be off four weeks before and eight weeks after childbirth. And of
438 course the complaints that the EEOC gets are complaints from employers who do this.

And I have tried, I have made a number of telephone calls, and I have tried to find employers who did allow women complete freedom and to get data on it. We found a few who do.

I think – can I name them?

Q. Yes, if you will, please. A. Okay.

Xerox and IBM, Kline-French Drug Company in Philadelphia, I believe that is the name.

The Labor Department of the Federal Government.

Now, I want to make it clear, I dont' have the staff to make any kind of systematic surveys. These are things I have run across when I talk to people. The Cummings Company in Ohio and a Mount Zionist Hospital in Miami, Florida.

I checked with all of them to see if they had any data and how long women did stay off when they were given freedom to choose, and they don't.

It seems that the greater the extent to which they treat it like any other temporary disability the less accessible the data is.

I found that in the Labor Department if I want to
439 make a survey of even on administration I would have to go through every leave record for sick leave, for leave of any kind, and try to pick out those that look like they might have been long enough for a baby, and then check and see if they had and how long they were off.

And the same thing apparently was true in the other companies. I called and asked if they had data and they said they didn't and said it would be difficult to compile. So I have been unable to get any data as to how long women will stay off. I suspect it will be some time before we know.

The women have been conditioned by these requirements to think they, you know, should be off, that it is proper to be off that long, and in many cases I think there is some ridicule when they are not, even in professional circumstances.

MR. KAMMHOLZ: Your Honor, I object. This is speculative, hearsay, nonexpert testimony.

THE COURT: I think it is a little out of the witness' field of expertise.

MR. KAMMHOLZ: I move to strike.

THE COURT: The objection is well taken.

BY MS. WEYAND:

Q. When you mentioned these companies, are these
440 companies that paid sickness and accident benefits on the same basis for a disability arising from pregnancy and childbirth? A. Yes. They tell me that they are completely complying with the EEOC Guidelines, that they are treating it like any other disability and making payments and letting women decide, with their doctors' concurrence.



Q. All of these are companies that do have a payment of what we call sick pay for disabilities of all sorts including those arising from pregnancy? A. Yes. They either have sick leave or have temporary disability insurance coverage or both.

Q. And they treat –

THE COURT: Just a moment, please.

Yes?

MR. KAMMHOLZ: Your Honor, this line of interrogation has elicited hearsay answers.

THE COURT: I think I can separate it.

MR. KAMMHOLZ: I dislike being a constant objector, particularly since I am a male, but may I have a standing objection?

THE COURT: Yes. Yes, of course.

MR. KAMMHOLZ: Thank you, Your Honor.

THE COURT: I will try to separate the hearsay as
441 best I can.

BY MS. WEYAND:

Q. Are there figures available from the Federal Government with respect to the extent to which women are off and return to work? A. Yes.

Several years ago, I will give you the exact date in a minute, the Civil Service Commission made a survey of, I believe, five agencies that they considered representative on maternity leave. It is called the Report of the Subcommittee on Maternity Benefits to the Inter-departmental Committee on the Status of Women, 1969. And in there they reported on a survey they had made. Here it is. Five agencies. And one of the bits of data they collected was how long the women were off.

And they found it varid – I am sorry, it was six agencies. The shortest period of time, that average median,

the snortest median period was 11 weeks for the Labor Department. And that was about a year after the Labor Department started letting the women choose how long they would be off.

Q. What year was that? A. That the Labor Department made this change? 1968.

442 Q. These figures are '69 figures, is that correct? A. No, I am sorry. This is 1967. This was published in '69, but the survey was not. 1967 figures and the Labor Department had made the change in 1966.

Before that the Labor Department had required the women to be off six weeks before and eight weeks after childbirth.

Labor – the median there was 11 weeks.

Q. That is the Department of Labor? A. Department of Labor. State Department 11.5. Internal Revenue Service 12. Veterans Administration 14. Social Security 17.

– all these agencies who had employees doing substantially the same kind of work. The only one that had any with heavy-duty workers was the Post Office Department. (page 21) And the heavy-duty workers only took off 16 weeks in the Post Office Department (page 27) although in Social Security, which is entirely clerical, it was 17.

So my conclusion from that would be that the social climate in the agency had a great deal to do with how long the woman took off, and also the requirements she be off for a particular period of time.

443 Q. The study also shows when they came back, did they? A. This was a total of how many came back, you mean?

Q. Yes. A. Yes, it showed that 21.3 percent terminated or resigned while they were on leave. At the time this study was completed eight per cent were still on leave. 70.7 had returned.



Three per cent had resigned after return.

It is not clear any place in this study whether those resignations after return had anything to do with the pregnancy or not.

But in any event, the most conservative estimate would be that 70.7 percent had returned and eight per cent were still on leave.

Also showed that although this was the general loss rate two agencies had a loss rate of 40 per cent.

THE COURT: All right.

MR. KAMMHOLZ: Your Honor, so the record is clear, my objection stands, I take it, on the ground of hearsay on the grounds of conclusionary statements by the witness, and on account of nonresponsiveness to the questions propounded.

444 THE COURT: Well, the proper foundation has not been laid.

I think it would be, and I don't want to run the risk, but much of the evidence you are getting in is a very peculiar way to do it, different from the rules of evidence, and you run the risk.

MS. WEYAND: I thought when she was qualified as an expert it covered. I will go back.

I understood you wanted to expedite matters.

What participation did you have in investigating the facts in regard to how long women are off?

THE WITNESS: This study.

BY MS. WEYAND:

Q. As part of your present position what did your investigation reveal? A. Well, at this time that this study was done the Interdepartmental Committee on the Status of Women was also in existence and functioning. And this study was done at the request of the Interdepartmental

Committee on the Status of Women, of which I was also Executive Secretary.

Q. So you were Executive Secretary of the agency that made this study? A. Of the committee that makes it, and I also planned –

445 Q. Collecting the data? A. Not collecting the data. That was done by the agencies. The agencies under instructions from the Civil Service Commission collected the data.

Q. But you assessed the – A. It was done at the request of the Interdepartmental Committee.

Q. You have participated in requesting the various six Government agencies which you mentioned to provide the data? A. I participated in the committee. I didn't do any of the work. It is not my job to do any of the work.

Q. You supervised the people that did the work in connection with it as Executive Secretary, is that correct? A. I wouldn't call it supervising. The Executive Secretary has a kind of an anomalous position. I was in touch and I contributed and I saw to it it was done because the Interdepartment Committee wanted it done, but an Executive Secretary ordinarily doesn't supervise the group that is carrying out the instructions of a subcommittee that is carrying out instructions.

Q. For the subcommittee you were the person who executed the task of collecting the material in terms of

446 saying that it was collected and prepared, is that correct? A. If they hadn't done it I would have followed up to see that they did.

Q. You got it done, yes. And it was your job to get this? A. Yes.

Q. This material collected? A. Yes.

Q. You checked to see how accurate it was, did you? A. I had no way of checking it.



The agencies furnished this data. The Civil Service Commission asked each agency to keep a record for that period of time for each woman on maternity leave and turned it in to the Civil Service Commission.

They have a research staff, duly competent to collect data, analyze it and tabulate it.

I worked with the Civil Service Commission 20 years. So I was knowledgeable as to their competence. And I fully relied on their research department to do this.

I have no doubt the data is as accurate as the agencies furnished, and I have no reason to think the agencies would, you know, jimmy the data in any way.

Q. This was the data that was furnished by the agencies? A. Yes, furnished by the agencies and tabulated

447 and analyzed by the Civil Service Commission.

Q. And you were Executive Secretary? A. Of the Interdepartmental Committee on the Status of Women and the Chairman was one member of that, of the Civil Service Commission.

Q. And the figures you have read represent what was furnished you by the agencies? A. Official publications. Anybody can get it, a public document.

It is the only thing I know of that has any information about how long women stay off. And of course here you have to keep in mind that these agencies, except for Labor, I think require them to stay off six weeks before and eight weeks afterwards.

Q. Do these agencies provide sick leave for the time that the woman is absent? A. The Federal Government's sick leave system provides that it can be used for maternity.

Q. That is for any period that the woman is off because of pregnancy or childbirth? A. Childbirth, that's right.

Q. As part of your duties in connection with either
448 the Interdepartmental Committee or the Citizens Advisory Committee, did you make any investigation as to whether there had been any Workmen's Compensation claims attributed to pregnancy? A. I made some inquiries as to whether there was any reason to think that keeping women off until they delivered would increase the employers' risk because this is one of the things that we are concerned with.

Q. What did you – how did you do about collecting this data? A. I didn't really collect data. I called. I have no staff. I have one secretary. So a great deal of my information I have to get by calling people in the Government. I know my way around Government and I find out who to call, I call the chap in the Labor Department who is in charge of the Federal Employees Compensation Program.

THE COURT: Just a moment.

MR. KAMMHOLZ: Objection, Your Honor, as to hearsay. Move the answer be stricken.

THE COURT: Objection sustained.

BY MS. WEYAND:

Q. Do you know of any printed reports or studies which state whether or not there is a record of claims having been filed for Workmen's Compensation? A. I
449 couldn't find any, couldn't find any data at all, published data.

Oh, the Prentice-Hall survey did have a reference to it, yes. I guess they asked employers if –

Q. I show you Plaintiffs' Exhibit 78 and ask you if that is the Prentice-Hall study to which you had reference? A. Yes.

Q. Made the statement? A. This is it.

Q. And you know of no other information? A. No.



Q. You made an effort to find other information? A. That's right. This came up after we had done our study, after the Council had done its study. At the time I could find nothing at all, but this did come out later.

Q. To what extent are mothers of small children employed in industry today?

THE COURT: You mean young children, don't you?

MS. WEYAND: Yes, young children. Correction. Thank you for the correction.

THE WITNESS: It depends on the salary of the husband. The data I have here is by salary of the husband.

BY MS. WEYAND:

Q. Would you state what data you have reference to
450 now? A. Yes, This is from the U.S. Department of Labor, Bureau of Labor Statistics, summary, special Labor Force Report, October, 1972, Marital and Family Characteristics of Workers as of March, 1972.

I think maybe I have –

Q. I would like to have the witness look at Plaintiffs' Exhibit 72 and ask if that is the data to which she has reference? A. Oh, no, maybe I better use this.

I have a little later data that I have got here, but maybe since this is – was in the record we better use this.

I forgot that this has to be made available earlier. I try to get the latest thing I can before I come to testify.

MS. WEYAND: I would like to offer the up-to-date data, if I might. I am very sorry.

I make efforts when I prepare to get the data and the witness brings in some later data and it seems to me in the interest of having the record complete it should have the latest data.

THE WITNESS: It doesn't matter.

THE COURT: Just a moment, please.

451 MR. KAMMHOLZ: Your Honor, Mr. Strauss advises me that we do not have the former data, so-called Plaintiffs' Exhibit 72, and obviously we don't have the new document which I would like to see, if I may.

MS. WEYAND: He gave me a list.

THE COURT: Miss Weyand, I can't understand why counsel hasn't seen these exhibits. Now, maybe you haven't seen some of theirs, but I can't understand why they haven't seen it.

Can you explain it to me?

MS. WEYAND: I made, pardon me, I gave him a list of my exhibits very well ahead and I sent him over all of the documents. He gave me a list of the ones he didn't have and I sent those to him Friday or Saturday. And this was not on the list he gave me.

I am very sorry if he didn't have it. I made an effort. We have plenty of copies and he certainly would have had it if I had had any idea he didn't have it. I regret very much that he seems not to have had it.

THE COURT: All right.

Anything else, gentlemen?

MR. KAMMHOLZ: May Mr. Strauss respond to this? He is the one, who I noted earlier, that dealt with Miss Weyand in connection with all of the exhibits.

452 MR. STRAUSS: Your Honor, Miss Weyand is correct that I did give her a list of the documents that I was missing. This was last Saturday morning or Saturday afternoon.

Miss Weyand did send me some documents. I am sorry, sir, she did not send me all the documents that I requested.

Now, it may be that I made an error and not requested some, but we are missing quite a number of the documents which appear on her list.



You might inquire why I didn't point this out when I filed our proposed objections.

THE COURT: That was going to be the next inquiry.

MR. STRAUSS: The reason was that on the surface, sir, I thought they were so objectionable as hearsay and irrelevant that I didn't point this out.

THE COURT: Do you have a list now of the proposed exhibits that you have not had an opportunity to see?

MR. STRAUSS: I can compile it in two or three minutes, sir.

THE COURT: All right.

Suppose you do that. Suppose you do that as soon as
453 we recess tonight.

All counsel will, please, remain and use the conference room so that you may exchange exhibits, something which should have been done some time ago.

And I will have to keep the witness for cross-examination, gentlemen, until you have had an opportunity to see this. If it is tomorrow it is tomorrow.

Go ahead and let's see if we can't move along.

Use the latest information you have.

MS. WEYAND: Thank you.

Will you give your latest information, please, Mrs. East?

THE COURT: And the sources, please, ma'am.

THE WITNESS: All right.

The source is the Special Labor Force Report No. 153 of the Bureau of Labor Statistics, March 1972.

And the participation rate of mothers with children is shown by income of the husband (Table J).

When the income of the husband is under 3,000 a year, 31 – 34.1 per cent of the mothers with children under six are in the labor force.

Of the mothers with children six to 17, 51 per cent
454 are in the labor force.

If the income of the husband is $3,000 to $4,999 39 percent of the mothers with children under six are in the labor force. 53 percent of those with children six to 17.

If the husband's income is 5,000 to 6,999 37.7 per cent of the mothers with children under six are in the labor force and 57.3 per cent of those with children six to 17.

With income of the husband between 7,000 and 9,999 32.8 per cent of the women with children under six are in the labor force. If you are not looking at it maybe I ought to point out that the highest participation rate for mothers with children under six is in the 3,000 to 4,999. 39 percent there. Then it starts going down. When you get to the 7,000 to 9,999, the one I was just quoting, 32.8 per cent are in the labor force. 56.3 of those with children six to 17.

The 10,000 and over, 22.4 per cent of the mothers with children under six are in the labor force. That is the lowest percentage of any group. 45.1 of those with children six to 17.

And I think the general trend here is that the higher the income of the husband the less apt a woman is to
455 work with children under six. She is a little more likely to work if the children are six to 17.

But here again it goes down with the income of the husband. The percentage of women working goes down as the income of the husband goes up.

BY MS. WEYAND:

Q. Has there been a change or trend in recent years with respect to the employment of women with young children; A. Yes, It has been going up.

Q. Do you have figures on that? A. Yes.



In March, 1960, 18.6 per cent of women with children under six years of age were in the labor force.

In March, 1972, it was 30.1 per cent. With children under three in March, 1960, it was 15.3 percent. In March, 1972, it was 26.9 percent. For all wives in 1965 it was 34.7 per cent without regard to the age of their children and 41.5 in 1972.

So here again, the younger the children the less apt she is to work, but nevertheless the figure is going up. It has gone from 15.3 to 26.9 for the women with children under three.

The participation of younger women who are in the
456 prime childbearing years has also gone up substantially. In 1960 28.2 per cent of all wives under 35 were in the labor force. Today it is 43.4 per cent. Of those 35 or over it was 31.7 percent in 1960 and 40.4 per cent in 1972.

Now, these data came from the Monthly Labor Review for April, 1973, pages 33 and 34, "Labor Force Activity of Married Women."

Q. Do you have any reason for believing that these figures do not represent what women would do if employers would assure women the right to return to their jobs and if pressures from employers were not applied to discouraging returning to work?

MR. KAMMHOLZ: Just a moment.

If the Court please, I object.

The question assumes matters not of record, at least in two instances.

THE COURT: Overruled.

Go ahead and answer it if you can, ma'am.

THE WITNESS: Well, I think one of the reasons it has been going up is because the cultural pressures are

decreasing, and employers' pressures, I suppose, are decreasing too as the cultural pressures do and as laws give
457 women some leverage for enforcing rights. Women in the labor force have smaller families too. That is in this same article. Very interesting.

Q. The one in the Monthly Labor Review that you referred to? A. Yes.

Q. Do you have the figures on that handy there?
A. Yes.

For women not in the labor force the age 15 to 44.

THE COURT: Let me get it straight.

What are you reading from, ma'am?I really haven't got it. This official Government document?

THE WITNESS: Yes, sir. Yes, sir. I will show you. I have taken these data down, but it is from the Bureau of the Census publication, Series P-20, No. 240, "Birth Expectations and Fertility", June 1972.

THE COURT: All right.

I took these figures out because I didn't want to have to go from page to page there.

Women 15 to 44 who were not in the labor force had 1.88 children per woman.

458 For those in the labor force it was 1.25.

For women 40 to 44, which would be woman who have completed childbearing years, pretty largely, it was 3.34 for those not in the labor force and 2.74 for those in the labor force. This had been a consistent pattern over the years for labor force participation.

Women in the labor force have fewer children than those not in. There have been no studies of women that have careers that I can find. This is just the women in the labor force at any given moment.

BY MS. WEYAND:

Q. To what extent had women been permitted to



return to employment as soon after childbirth as their physicians have approved as far as you have studied industry in the past and investigated the matter? A. We could find very few employees – we could find very few employers that had permitted women to come back when they wanted to.

Q. Could you tell us of the various federal laws under which disability benefits are paid and state the extent to which, if at all, payments are made for periods of disability due to childbirth or complications of pregnancy?

459 A. Well, the Railroad Unemployment Insurance Law is a federal law and it provides payment for just like any other disability, and Federal Civil Service Law does.

The Social Security Disability Law provides for payments, that is for long-term disability, for more or less permanent disability. And it provides for payment where the women has a condition that resulted from pregnancy, a long-term disability that could come from, I guess, the kind of thing the doctor was talking about this morning, some of the more major disabilities, major complications.

Q. Have you made a study of what, if any, provisions for income maintenance is made in whole or in part in other countries with respect to absence from childbirth or complications of pregnancy? A. Well, I don't recall the study.

THE COURT: I am sorry.

Would you mind?

THE WITNESS: Sorry

I used in determining for the Council what was done in foreign countries this public Social Security program.

MR. KAMMHOLZ: May I interpose an objection, Your
460 Honor?

We object on the ground that this is irrelevant to the issues in this case.

THE COURT: Go ahead.

BY MS. WEYAND:

Q. You are referring to Plaintiffs' Exhibit 85, are you, is that correct? A. I don't know what the number is. This one. Yes.

Social Security Programs Throughout the World, 1971. It is published by the Department of Health, Education, and Welfare every year or every two years, and it has a breakdown of the various kind of social security programs in all the countries.

And most of the European countries have a social security system that includes compensation for loss of income while people are temporarily disabled, while employees are off from work, and it includes the time a woman has to be off for pregnancy.

Q. Do you know if these financing and administration of these provisins for disability from childbirth and pregnancy are financed and administered as part of the social security system for other disabilities?

461 A. In other countries it is largely a part of the federal, or the national system of social security. And that is, of course, what the Johnson Council recommended, a federal temporary disability insurance system.

Q. Covering all disabilities? A. Covering all disabilities.

Q. In private industry, and that included in that not treated differently would be disabilities from childbirth? A. That is the way they thought that maternity leave should be handled. They came to this conclusion from a study of maternity leave.

Q. Now, did the Citizens Council, the report which you have mentioned, differ from that? A. The Council didn't take a position on that.



What they recommended was within the present framework of our system, the way it is developed here, that whatever requirements, whatever provisions an employer had for other temporary disabilities should be applied to pregnancy.

Q. Took no position that they should change the social security system in this country by having a national system?

462 A. That was one of the options that was put up in the staff paper. When I do a staff paper I try to give them all the options and to go into what other groups have done in the past, and they did not adopt this option.

Q. They felt the social security system that developed here in private industry is one that should be applied equally as employers set up their own system? A. That is what the recommendation indicates.

Q. Yes.

Could you tell me what the experience has been in the states that have, New Jersey I believe for instance, has covered in its disability system, disabilities arising from pregnancy and childbirth? Are you acquainted with what the experience has been? A. Yes.

The New Jersey system provides for payments for four weeks before and four weeks after childbirth. And I have some data for New Jersey that they publish in their annual report which indicates that less than eight weeks is taken by two groups.

They have two systems for paying temporary disability insurance, not two systems but two funds from which it is paid.

Q. This is for non-pregnant cases as well as pregnant?

463 A. Generally the system provides that if a person is on the job or has been laid off less than three or four weeks he is paid out of one fund. His temporary disability

insurance payments come out of one fund. If he has been laid off more than four weeks and he is entitled – he is otherwise eligible, his temporary disability insurance payments come out of what they call unemployment fund.

And they break down the pregnancy claims in both funds. And in the fund where the women have not been off more than a couple of weeks it is a little less.

Q. Than in the unemployment fund? A. Yes. But in both cases it is less than eight weeks. And they state in their annual report that the reason most of their pregnancy claims come out of the unemployment fund, is that employers require women to take off before the four weeks, before the four-week period, so they pay most of their claims out of that fund. That information appears in the Law Review article, and I don't know which exhibit that is.

Q. Let me show you 82 and ask if that is the information?

464 A. The Law Review article that that information appears in, yes, also appears in this.

Q. Is that the one you are referring to, or another? A. No. The Law Review article, Mrs. Koontz's Law Review article.

Q. That is 83-A, then? A. That information was put in there.

Q. I show you Plaintiffs' Exhibit 83-A and ask if it appears in there? A. Yes.

Childbirth and Childrearing Leave: Job-Related Benefits, by Elizabeth Duncan Koontz.

MR. KAMMHOLZ: Move to strike, Your Honor, on the ground that that is hearsay twice removed.

MS. WEYAND: I was going into – I am sorry.

I wanted to lay a foundation.



THE COURT: You best lay your foundation first. It is not your fault, but I have been misled to some extent by just looking at the list of exhibits.

Go ahead and see what you can do with it.

BY MS. WEYAND:

Q. With respect to Plaintiffs' Exhibit 83-A, did you participate in preparing this Law Review article?

465 A. Yes. I did all the research and did the first draft.

Q. And every bit of date in there? A. Every bit of data I collected.

Q. And you drafted it? A. Yes.

Q. Drafted the article? A. Yes, I did.

Q. You did this as part of your position with the – A. Yes.

Q. – Federal Government? A. Yes. This is customary in the Federal Government. I have spent many years of my life drafting publications for other people's names.

Q. And with respect to the New Jersey data, where did you get the New Jersey data you have told us about? A. From the annual reports of the New Jersey State, whatever the name of that state organization is, that administers the temporary disability insurance system.

I called up there and they sent me all their annual reports. And what I didn't understand I called up and got explained to me.

466 Q. And then you listed in here – A. Yes.

Q. – in Plaintiffs' Exhibit 83, the sources you used – A. Oh, yes.

Q. – for the date? A. All footnoted. Shows the sources from which it came.

Q. Okay. A. A great deal of the other information that I have given is also in here.

Q. With the source data – A. Yes.

Q. – which you obtained by collecting the data?
A. Yes. That's right.

Q. Do you have data on the differences in the absentee rate in private industry between males and females?
A. Yes. I think I do. But I don't know where it is here.

The absenteeism in labor turnover publication of the Women's Bureau includes that data.

I think I see it there.

Q. This is Plaintiffs' Exhibit 66 to which you make reference, is that correct?

467 A. Yes. That's right. Facts about women absenteeism and Labor turnover.

Q. Do you have other studies besides this one on absenteeism? A. I don't think I do.

Q. That is the only one in which you are acquainted?
A. Yes.

The Public Health Service does an annual survey showing how much time men and women lose from work because of illness. And in this one it is for the calendar year '67, shows an average of 5.6 days lost by women and 5.3 days lost by men. This is based on a survey of households by the Public Health Service. They do it regularly.

Q. All right.

I believe that is all the questions I have.

THE COURT: All right.

Can you cross-examine at this time, sir? If it puts you at a disadvantage, not having seen these papers, I will let you withhold it.

MR. KAMMHOLZ: Your Honor, may I?

THE COURT: You want a brief recess?

MR. KAMMHOLZ: I was going to suggest that I begin part of my cross-examination. It would certainly shorten

468 it for a later time.



THE COURT: All right. Whatever your pleasure is.

I think maybe I haven't given any thought to the court reporter. We have kept him at it.

Would you help the witness down, please?

(The witness stood aside.)

THE COURT: The Court will stand in a brief recess.

(A recess was taken at 2:30 to reconvene at 2:45.)

(The witness resumed the stand.)

THE COURT: All right, Mr. Marshal, help the witness.

All right, sir.

MR. KAMMHOLZ: Your Honor, during the recess we engaged in colloquy with plaintiffs' counsel.

We now have a copy of Plaintiffs' 121. It is a short exhibit, a little over a page.

We have had an opportunity to examine it, and obviously it would not be particularly appropriate to stand on our objection that we did not have a opportunity to examine it.

The exhibit was not produced in time.

469 I should like therefore, to withdraw that objection, but to object to the exhibit on the ground of hearsay.

THE COURT: May I see it?

I will take that under advisement.

The objection on its face is well taken, as are many of your objections, frankly, now that I have gone into it a little more. I will let you go ahead with your examination, and then I have some questions to ask the witness, after which I will let you come back to it.

MR. KAMMHOLZ: Very well.

Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. KAMMHOLZ:

Q. Mrs. East, you testified that you have appeared before several legislative committees in connection with the Equal Rights Amendment? A. Yes, sir.

Q. Were you active in promoting adoption of the Equal Rights Amendment? A. Well, an Executive Secretary is not usually active, the Council was. Our Citizens Advisory Council at its meeting in 1970 endorsed the Equal Rights Amendment. And I had found a staff person from the Federal Government to prepare a legal memo, and it
470 was prepared.

I am personally convinced it is a desirable, very highly desirable thing for women.

Q. Are you familiar, Mrs. East, with the majority report of the Committee on the Judiciary – A. Yes, indeed.

Q. – dated March 14, 1972? A. Yes, sir. I refer to it frequently.

Q. Indeed, you have provided copies at various women's group meetings – A. Oh, yes.

Q. – have you not? A. It is an important part of the legislative history on the Equal Rights Amendment.

Q. Do you embrace the views expressed in that minority – in that majority report? A. In general. I wouldn't say I endorse all of them.

Q. But when you go before legislative bodies and committees do you draw this distinction? A. Well, if I were testifying about anything that I disagreed with I would certainly say so, but in my testimony that I have made before legislative bodies I have been testifying as to things with which I had no reservation whatever.

471 Q. But it is your testimony here that you do have reservation about some of the language of the majority report? A. Slightly.

You are getting to the maternity leave.

Q. No. You have answered my question. A. Okay. Yes, I do on that point.

Q. Any other points? A. I don't know.



I haven't read it that carefully recently.

I know that I always have had a problem with this with that report, although I think in general it is a very fine legal basis for interpreting the Equal Rights Amendment.

Q. Have you in any of your testimony before a state legislative body or before any other agency drawn a distinction as between maternity provisions of the majority report and other provisions? A. No. I have never testified on maternity leave.

Q. Have you testified on ERA? A. Yes, I mean when I was testifying on ERA I never discussed maternity leave.

Q. Now, going back to your testimony concerning the
472 Citizens Advisory Committee, did I understand you correctly to say that in 1969 or '70 recommendations were made for temporary disability insurance coverage to include maternity? A. In 1968, I believe it was.

Q. '68? A. It was the Johnson Council, the members appointed by President Johnson, who made that recommendation.

Q. Were you the Executive Secretary – A. Yes, sir.

Q. Of the group at the time? A. Yes, sir, I was.

Q. Was this proposal one to amend the Federal Social Security System? A. I don't think they wanted to amend the Social Security Act. I think they wanted a separate law that would probably be tied in to the Unemployment Insurance Acr rather than the Social Security Act. That is my recollection. I haven't read that report in some time.

Q. The scheme of the statute was to provide such coverage across the land with exceptions only as to minimal number of employees in certain establishments?

473 A. Yes, with everyone. I think that group, my recollection is, that that particular task force wanted to cover just about all employees.

Q. No matter what size the establishment? A. Well, I am not sure, sir, what size, whether they were getting into that or not. I don't think they got into that in that much detail because the primary – their primary concern, you see, was maternity leave. And they felt this was the best way to handle maternity leave was to have a general federal –

Q. To have the law amended? A. A general federal system of temporary disability insurance that covered everyone.

Q. You made reference to European systems providing payments for disabilities including maternity. Is it not a fact that each of those systems is in the nature of a social security system? A. Yes, it is.

Q. And is it not a fact also that in virtually each of those systems the benefits payable for maternity leave differ from benefits payable for disability sickness or illness? A. No. My recollection was they are substantially the same.

474 Q. Well, are they the same or substantially the same? A. Well, there are different countries involved, and I don't think any two are identical. We would have to look at a specific country before I could say, make a specific answer.

Q. But do you know as you are testifying now whether as a general proposition, and I will rephrase the question, maternity benefits are for the same duration as benefits for sickness and illness? If you don't know you may say so. A. No. I don't recall.

I reviewed this at the time I did the staff work in 1970, reviewed these foreign coutnries, and I found that they were considered under a general temporary, you know, a general system –



Q. Yes. A. – rather than private employers handling it.

Q. Turning now to the agencies of the Federal Government here. I believe you testified that generally speaking these agencies do permit maternity leave? A. Well, they are required by law to permit employees to use sick leave and annual leave for purposes of – when they are disabled because of pregnancy or childbirth.

475 Q. Are you generally familiar with the practices of the various agencies? A. Not with each individual agency. I am familiar with the Civil Service Law.

I worked for the Civil Service Commission for 25 years and I have a general familiarity with the Civil Service Law that governs all agencies. They have some latitude under the law for adopting their own practices. They don't have any latitude about whether they allow – whether they pay or whether they allow sick leave to be used for this purpose.

Q. Is it your belief that the provisions regarding maternity leave are identical with sickness and illness provisions? A. In the Federal Government?

Q. Yes. A. No. The Civil Service Commission has issued some recommended guidelines. They are not mandatory, but they are recommended.

In 1954, I think they issued them recommending that women have to take off, I think, six weeks before and eight weeks after childbirth. I believe those are the periods.

476 Also recommending that they not be permitted to use advance sick leave.

Now, the Council objected to that. We have written to the Civil Service Commission several times requesting that this be changed and requesting those guidelines be withdrawn.

Q. Have those changes been made or those guidelines – A. No, they haven't.

Q. – been withdrawn? A. No, they have a committee set up, and I have testified before the committee, and some of the women's groups' representatives have too, but they have taken no action yet.

Q. Would it be fair to say then that in your view these agencies of the Federal Government discriminate on the basis of maternity leave? A. Not all of them follow the guidelines. The Labor Department doesn't, and I think some others don't. I have not made any survey of which agencies do and which don't. As I say, they are not mandatory.

Q. The great majority of the agencies, however, do make a distinction between maternity leave and sickness and illness leave?

477 A. To the extent of requiring women to take off earlier?

Q. Right. A. I don't know. I say, I have made no survey.

Q. And you have no independent knowledge? A. I know about the Labor Department because I worked there, and I have inquired there.

Q. Do you know about HEW? A. No, sir, I do not.

Q. Defense Department? A. The Defense Department overseas teachers, I checked into that at one point when I testified down here on teachers, and the Defense Department for overseas teachers treats it exactly like any other temporary disability.

Q. Do you know about the practice at the Equal Employment Opportunity Commission? A. No, sir, I do not.

Q. The National Labor Relations Board? A. No, sir.

Q. Mrs. East, you testified on direct examination that a number of companies with respect to which you had made studies engaged in practices which in your view discriminated on the basis of sex, is that right?



478 A. You mean as far as maternity leave is concerned?

Q. Generally? A. Well, I think I am testifying about maternity leave.

Q. I am asking you about sex discrimination generally. A. I have no – I have not investigated agencies generally for sex discrimination.

Q. Agencies or companies? A. Companies. Or agencies.

Q. Did I misunderstand? A. I know what the data shows about relative earnings and this kind of thing and I, you know, have some contact with EEOC lawyers and with the lawyers in the Labor Department who are attempting to enforce the Office of Federal Contract Compliance, but I am quite sure you classify all I have to say on that basis as hearsay.

Q. Yes. I do. A. Yes.

I have some opinions about it.

Q. Well, I am delighted to know that we have some agreement on this point. A. I have spoken before a number of agencies including GE up at Crotonville.

479 Q. This is a company with pretty good employment practices, is it not? A. I have some reservations about them, particularly their maternity leave.

Q. Excluding maternity leave for the moment, it is a pretty good company in terms of nondiscrimination, isn't it? A. I don't know, sir. I don't have any data on how many women you have in top jobs. I don't see any women back here at the witness table, and I didn't see very many when I was up at Crotonville at the executive meeting.

Q. There aren't many around.

They are hard to come by. A. Well –

THE COURT: You see a picket line form around the courthouse and you wouldn't think they are so hard to come by.

MR. KAMMHOLZ: I may have the advantage, Your Honor, in being able to get out of town quickly.

THE COURT: Not if you stay close to me.

BY MR. KAMMHOLZ:

Q. Now, may I go back briefly to your position with the Citizens Advisory Council. You are Executive Secre-
480 tary? A. Yes, sir.

Q. Would you describe the duties of the Executive Secretary? A. Well, Executive Secretary does the work for the group. The Council members set the policy. They, you know, determine what they want to recommend, what subjects they want to study. I usually work closely with the Chairman in setting up an agenda for a meeting.

I may make some suggestions for topics they may take up of interest, or I think the group may be concerned with, and she may make suggestions, and we get suggestions from the members and when we do an agenda then I have to do as much research as is necessary to arrange a program that will give the members background in that area.

Q. Do you gather information for the members?

A. Yes.

Q. You do this by telephone or by letter? A. Yes. And I send out papers to them. We may collect publications of other groups, what other people have done. Anything that seems relevant to the topic we are going to take up we would send out to them in advance so they could be briefed on the topic.

Q. Do you vote as a member?

481 A. No. No, I am not a member. I am the technician who does the staff work.

I am the only full-time employee. The other members serve without pay. They come in for meetings two, three, four times a year for two days at a time.

Q. All women members? A. In this Council, they were. In the preceding Council, they were not.



Q. They serve without pay; that is not a form of discrimination by WCAW against women? A. Some think it is because all the men's advisory groups get paid and get to come in much more often and they have a lot more staff.

Q. The material that you gather, as I believe you alluded to in your direct examination; comes on the basis of phone calls, letter inquiries – A. Yes.

Q. – to other agencies of the Government? A. And reading material. I subscribe to practically all the publications of the women's movement, and there are a great many now. I read the books and I watch the newspapers.

I have quite a collection of materials. See, I have been
482 doing this for 11 years.

So I have quite a collection of materials on all subjects that are directly related to the women's movement of things I have collected, even though the Council may not be studying it at the moment or might not be any idea they would in the future.

And so I have materials on a great many topics, and bibliographies and this kind of thing that I use in planning a program.

And then you see in the Federal Government there is an expert on almost anything. And by working with the Civil Service Commission as long as I did I get a pretty good idea what each federal agency does. I was dealing with them all the time. I have a pretty good idea of where all the experts are hidden, where to call to get information and who is, you know, who is a good source.

Q. And it is this kind of contact work with the experts that describes the nature of your activity for the Council?

A. Well, I prepare staff papers frequently.

Q. From the material that you get from these places?

A. Yes, and from my personal knowledge. I have been in the Federal Government almost 35 years, 25 or it in

483 the Civil Service Commission where I was doing entirely staff work relating to legislation and to the Federal Personnel System.

MR. KAMMHOLZ: I have no further questions, Your Honor, but I should like at this time to move to strike all of the testimony of the witness on the ground that her answers on cross-examination show that her testimony is hearsay.

THE COURT: Well, I don't think that is exactly what she said.

What do you do with this information that you gather? Do you keep it as part of the records of the Council or –

THE WITNESS: Well, I keep the material, but then when we start studying a subject like maternity leave I prepare a paper based on it. The papers that have been published by the Council on maternity leave I prepare.

THE COURT: Part of the ordinary course of business of the Council?

THE WITNESS: Yes, all their publications. And I could bring in a whole stack of them. I have prepared all their publications except – in the last four years, except two that I can remember were prepared by other people.

THE COURT: All right.

484 The objection is overruled.

I guess you don't get to be an expert except from experience and reading. I can separate that.

Objection is overruled.

MR. KAMMHOLZ: May I have a moment, Your Honor? One more question?

THE COURT: Yes. Yes.

BY MR. KAMMHOLZ:

Q. Mrs. East, you are aware, are you not, that the majority report of the Committee on Equal Rights sets out that the ERA does not require that women must be treated in all respects the same as men? A. That's right.



Q. Do you agree or disagree with that statement?

A. I disagree with it insofar as it relates to maternity.

Q. You have answered my question.

The statement goes on, "Equality does not mean sameness." Do you agree or disagree with that statement of the majority report? A. I agree with that. It is an abstract statement with little meaning by itself.

Q. Now, the majority report from the Committee on the Judiciary goes on, "As a result, the original resolution

485 would not prohibit reasonable classifications based on characteristics that are unique to one's sex." Do you again disageee with the majority report of the Senate Judiciary Committee? A. I would –

Q. You may answer that yes or no, please. A. Well, I can't answer it yes or no.

THE COURT: She is entitled to give an explanation.

See if you can't answer yes or no first and then give such explanation as you want.

THE WITNESS: Well, I can answer and then give you the explanation, but I don't want to answer it without.

BY MR. KAMMHOLZ:

Q. Then you may answer and then go to your explanation. A. I would agree with it, but I would have to add some qualifications on various topics.

I think on maternity leave I would – as it relates to employment. Conceptually and in the abstract I can conceive that there might be laws that would deal with pregnancy that would be in accord with the Equal Rights Amendment. I don't know of any right now. Conceptually I

486 think there is a possibility. But when you are talking about employment and relationship of the time a woman has to be off for childbirth, I think any law that dealt with that especially, you know, would be not only in conflict with the Equal Rights Amendment, but also with the 14th Amendment and Title VII, of course.

Q. Are you a lawyer? A. No sir. I am not. I am familiar with this area of the law, though.

Q. Do you believe there are characteristics unique to a sex? A. Yes, but I don't think they make much difference about legal rights.

Q. Well, I believe Senator Javits in the Senate debate agreed with you that there are differences, and he added, "Vive la difference." A. Well, male chauvinists say that. We know where a man is when that is the way he talks.

Q. Well, if the female of the species adheres to the point of view which I gather you take to the contrary, too long, there won't be any of us around to worry or argue? A. You are misrepresenting my point of view. I have two children and I am very happy with them, and I had sick leave when I had them.

487 Q. You were Mrs. East at the time? A. I am Mrs. East, yes, sir.

Q. But you are Ms. East now? A. It doesn't matter. Whatever is comfortable for you is comfortable for me.

Q. In summary, then, it is your testimony here that you disagree with the majority of the Senate Judiciary? A. I don't disagree. I would have qualified it if I were writing that report. I would have liked to have had maybe a paragraph or two there instead of having that one little short sentence.

Q. You have answered my question. You disagree? A. Well –

THE COURT: You can give such explanation as you deem appropriate.

THE WITNESS: All right.

I don't think that – I don't consider that a serious problem in the Senate Judiciary Committee report because I think any judge who had a case before him that involved this would look at the total legislative history and total



purpose and the total situation in which, you know, it was framed.

And I don't have any doubts that most judges would
488 hold that any laws that purported to treat pregnancy different for purposes of employment and maternity leave was, you know, was not in accord with the Equal Rights Amendment. So I don't feel that is a serious problem with it, with the Judiciary Committee report.

BY MR. KAMMHOLZ:

Q. Now, you were – may I move that this be stricken from the record, the testimony of the witness which would substitute her judgment for that of the Court, the last two sentences of the last answer?

THE COURT: Do you really think it could happen?

THE WITNESS: Are you speaking to me?

THE COURT: No.

MR. KAMMHOLZ: Subject to the earlier colloquy about –

THE COURT: Well, I don't mean to be facetious, but I don't think your suggestion ought to be dignified by a ruling from the Court.

MR. KAMMHOLZ: I understand the Court's ruling. I accede to it.

THE COURT: All right.

MR. KAMMHOLZ: Now, in all candor, I don't at the moment – I am not sure that w[illegible] will have additional in-
489 terrogation.

THE COURT: Well, we will have Mrs. East available to you with reasonable notice. I would not like to confine her –

MR. KAMMHOLZ: Very well. Thank you.

THE COURT: – to the city.

Is there any further examination?

MS. WEYAND: No further examination.

THE COURT: All right.

Will you be available, Mrs. East? Had you planned –

THE WITNESS: Sir, I could – I live in Arlington. It takes me about two hours to get here. So I am not planning to be out of town.

THE COURT: Would you leave with counsel for the Plaintiff a number we can contact you at?

Subject to that you may be excused.

(The witness stood aside.)

THE COURT: Call your next witness, please.

MS. WEYAND: Mrs. Thomas, please.

*ERMA THOMAS* was called as a witness by and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MS. WEYAND:

490 Q. What is your name? A. Mrs. Erma Faye Thomas.

Q. Where do you live? A. Tyler, Texas.

THE COURT: I am sorry. I will have to ask you to keep your voice up, please, so I can hear.

BY MS. WEYAND:

Q. By whom are you employed? A. General Electric.

MR. BATTLE: Excuse me. I don't mean to interrupt, but did you get an answer to the preceding question? If so, I would like for it to be read.

THE COURT: As to where she lived?

MR. BATTLE: Yes, sir. I didn't hear the answer.

THE COURT: Tell counsel where you live.

THE WITNESS: Tyler, Texas.

THE COURT: I am sorry. I thought I understood the first time, I am positive I didn't the second time. Say it again.



THE WITNESS: Tyler, Texas.

THE COURT: Tyler, Texas.

BY MS. WEYAND:

491 Q. By whom are you employed? A. General Electric.

Q. When did you start to work for the General Electric Company? A. May 10, 1971.

Q. What plant did you start to work in? A. The Tyler plant.

Q. What classification of a job did you hold?

A. Tube fabrication.

Q. Are you still on the tube fabrication job? A. I am.

Q. You have worked continually with that job throughout your employment, is that correct? A. Yes, ma'am.

Q. Did you get pregnant during your employment with General Electric? A. Yes, I did.

Q. When did you get pregnant? A. It was the latter part of July or the earlier part of August.

Q. Of what year? A. Of '71.

Q. Did you notify General Electric that you were pregnant?

492 A. I notified them after I had been to the doctor and the doctor told me I was six weeks, and then I took this notice to the nurse of the plant.

Q. Do you know the name of the nurse to whom you took it? A. I know her first name is Sherry. I don't remember her last name.

Q. How long did you continue to work without anybody asking you to stop work? A. Well, I worked up until the day before the baby was born.

Q. All right.

I would like to have the marshal show you Plaintiffs' Exhibit 48.

I ask you if you received a copy of that notice?
A. Yes, I did.

Q. How was that notice delivered to you? A. My supervisor gave it to me.

Q. Who was your supervisor? A. Harry Poulan.

Q. And did he say anything to you when he gave it to you? A. He read through it and he told me that this date would be the last day that I would be – would
493 have to report to work.

Q. And what date was that he told you would be the last day you would have to work?

THE COURT: Is it on there, Mrs. Thomas? You may look at that.

THE WITNESS: No, it is not on here. I don't remember the date.

BY MS. WEYAND:

Q. Will you read that? It is a very poor copy, I must say.

THE COURT: You may approach the witness and point out the date you are referring to, if it is on there.

THE WITNESS: You want me to read it?

MS. WEYAND: Yes.

THE WITNESS: Just that?

"Dr. Orten advised that she may continue her regular duties until the 2/18/72."

BY MS. WEYAND:

Q. Had your doctor advised you that you had to stop work February 18, 1972? A. No, ma'am.

Q. What had your doctor told you, if anything?
A. He told me that I could work as long as I could if it
494 don't bother me, if I had no trouble or nothing.

Q. When you got this notice what did you do?
A. Well, I looked at my supervisor and I told him I hadn't seen that before and I was wondering if it was, you know, really true or not.



Q. What did he say? A. He told me that that would be my last day. And he fooled around and walked off.

Q. Did you do anything else about it? A. Well, no.

Q. Did you actually stop work on 2/18? A. Well, before that date we got this other letter from the company saying that I could work on up until my doctor said I could.

Q. Do you know how you got that letter? A. Well –

Q. Did you go to the union? A. It wasn't in a letter.

Q. Did you go to the union about the fact that you didn't want to stop work? A. Yes. I went to the union.

Q. Yes.

And then you got a letter that you didn't have to stop work, is that right?

495 A. I didn't get a letter. My supervisor told me.

Q. Your supervisor told you? A. Yes, ma'am.

Q. Now, I would like you to look at Plaintiffs' Exhibit 50.

Could you tell me who Mr. Pettey is? A. He is the President of our union.

Q. President of your union? A. Yes, ma'am.

Q. And you are the Erma F. Thomas he is talking about in there, are you? A. Yes, ma'am.

Q. And he wrote that, you went to see him before that or talked to the union about the fact that you didn't want to stop work, is that right? A. Yes, ma'am.

Q. And then after that letter was written the foreman came and told you you could work? A. Yes, ma'am.

Q. How long did you work? A. Well, I worked up until the day before the baby was born. I worked a full shift that day and had the baby the next.

496 Q. What shift do you work? A. From 7:00 to 3:30.

Q. And what day of the week was that last day you worked before your baby was born? A. It was Friday.

Q. It was a Friday.

What time did you go to the hospital? A. I don't know exactly. It was around 10:00, I guess.

Q. About 10 o'clock that night you went to the hospital? A. Yes.

Q. Yes.

Now, how long did you stay in the hospital? A. Three days.

Q. And when did you try to go back to work first after the baby was born? A. It was four weeks after.

Q. And did you talk to your doctor about whether it was all right to go back? A. Yes, ma'am. I talked to him.

Q. What did he say? A. He told me that I could go back if I wanted to, if I felt like it.

497 Q. Did he give you a certificate you should show the company? A. Yes, ma'am.

Q. And the certificate said that you were cleared by him to go back to work? A. Yes, ma'am.

Q. And what was your doctor's name? A. Dr. Orten.

Q. And did you take that certificate to the company? A. Yes, ma'am.

Q. Did they let you go back to work? A. No.

The nurse told me that she would have to check with somebody, and she called and she then came back and told me I would have to wait until I had my six-weeks check-up before I could come back to work.

Q. Did you wait until you had your six-weeks checkup? A. Yes, ma'am.

Q. Then you went back to work? A. Yes, ma'am.

Q. All right.

That is all the questions I have.



498 THE COURT: All right.

Is there any cross-examination, gentlemen?

MR. KAMMHOLZ: May we have a moment, Your Honor?

MS. WEYAND: Maybe I should show her the claim she filed. I am sorry.

Would the marshal show the exhibit, the witness Exhibit WW to the stipulation, please?

THE COURT: Well, it is not necessary. Is it just to identify it?

MS. WEYAND: Yes. I have a copy here if she would like to look at it.

THE COURT: All right.

BY MS. WEYAND:

Q. Is this the form of claim you filled out? A. Yes, ma'am.

Q. Is that your signature on the first page? A. Yes, ma'am.

Q. And on the next page, did you take this to the doctor, is that his signature? A. Yes, ma'am.

Q. And when you got this from the doctor did you file it with the company? A. Yes, ma'am.

499 Q. And I want you to look at Plaintiffs' Exhibit – well, you got a letter from the company denying your claim, did you? A. Yes.

Q. And you have never been paid? A. No, ma'am.

Q. But the company did pay your doctor and hospital bill when you had the baby? A. Yes, ma'am.

MS. WEYAND: That is all the questions I have.

THE COURT: Gentlemen, any cross-examination?

Let counsel see that, please.

MR. KAMMHOLZ: May I see this?

THE COURT: PX-WW to the stipulation, gentlemen.

Any cross-examination?

MR. KAMMHOLZ: We have no questions, Your Honor.

THE COURT: Unless I hear an objection Mrs. Thomas will be excused.

Thank you.

Call your next witness, please.

MS. WEYAND: Mrs. Furch, please.

*EMMA FURCH* was called as a witness by and on behalf of the plaintiffs and, having been first duly sworn,

500 was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MS. WEYAND:

Q. Please state your name. A. Emma May Furch.

Q. Where do you live? A. Tyler, Texas.

Q. By whom are you employed? A. The General Electric Company.

Q. When did you start work for the General Electric Company? A. October 13, 1966.

Q. What is your present job with the General Electric Company? A. Set up.

Q. Set up? A. Yes.

Q. What was your job when you were first employed? A. Tube cutting-bending.

Q. You have held various different jobs, have you, during the time? A. Yes.

Q. How many children do you have?

501 A. One.

Q. How old is this child? A. She is 15.

Q. While you were employed by General Electric did you become pregnant in 1970 or '71-'72? A. Yes.

Q. When did you become pregnant? A. '72, I believe it was.

Q. In '72.

Do you know what your expected delivery date was? A. July 6th.



Q. How long did you continue to work during your pregnancy? A. I worked up until about the fifth – about the fifth month.

THE COURT: I am sorry. Did you say February?

THE WITNESS: The fifth month.

THE COURT: To the fifth?

THE WITNESS: Yes, sir.

BY MS. WEYAND:

Q. What happened in the fifth month that you ceased work?

502 A. I started threatening a miscarriage and I had to stop.

Q. Did your doctor hospitalize you? A. At first he didn't. I left work. I worked that Wednesday.

Q. What date? Do you remember the date that you worked? A. It was possibly the 12th because I was hospitalized on the 14th.

Q. Of August? A. Which was a Friday, April.

Q. Of April? A. Yes.

Q. 12th of April? A. Yes.

Q. You were hospitalized? A. 14th of April I was hospitalized.

Q. You worked the 12th and went to the hospital the 14th? A. Yes.

Q. How long did you stay in the hospital? A. Through the 17th. I was first hospitalized on the seventh.

Q. The seventh?

503 A. Yes.

Q. And what day did you work up to before April 7? A. The fifth.

Q. You worked until April 5 and went in the hospital on April 7? A. Yes.

Q. Did you deliver while you were in the hospital? A. No. I stayed there until the 11th and the doctor thought maybe I could keep the baby, so he sent me home on complete bedrest.

Q. On the 11th? A. Yes.

Q. And you had complete bedrest? A. Yes.

Q. Did you go back to the hospital again? A. Yes. On the 14th, which was the next Friday, I started having labor pains. And then I went back to the hospital and the next day I delivered.

Q. And what did – did the baby survive? A. No.

Q. Was it stillborn? A. Yes.

504 Q. How long did you stay in the hospital? A. Until the 17th.

Q. And then you went home, did you? A. Yes.

Q. Did you go back to work? A. No.

Q. Did you got to the hospital again? A. Yes. That Wednesday I started having chest pains and I tried to contact my obstetrician and he was busy at the time. I contacted my general, you know, family physician.

He gave me an appointment for that Friday evening to come in for a check. And so I went. He checked me and found that I had pulmonary embolism, which was a blood clot in my lungs, and he hospitalized me again immediately, the same day.

Q. How long were you in the hospital that time?

A. Until the 29th.

Q. When did you return to work? A. The 6th of July, I believe it was.

Q. All right.

I would like to have the marshal show the witness Exhibit XX to the stipulation and ask her if the signature on that is her signature?

505 A. Yes, it is.

Q. And you filled out this claim form, did you?

A. Yes.

Q. And you took it to your doctor, did you? A. Yes.

Q. And will you look at the second page. Is that his signature? A. Yes, it is.



Q. And do the dates that he states there that you were disabled represent the period from the time you had your pulmonary embolism until you went back? A. Yes.

Q. And they don't cover the period that you were off for miscarriage, does it? A. No, it doesn't.

Q. And he told you it was not due to pregnancy as he states there, is that correct? A. Yes. That's right. Correct.

Q. Now, I want you to look at Exhibit YY and ask you if you received that notice from the company?

A. Yes, I did.

Q. And you have not been paid the claim? A. No.

Q. And you did file a grievance about it?

506 A. Yes.

Q. Yes.

The company did pay your hospital and doctor bills in connection with all the matters that you have mentioned?

A. They did.

Q. That is all the questions I have.

THE COURT: Any cross-examination, gentlemen?

MR. KAMMHOLZ: Your Honor, with reference to Plaintiffs' XX, the authenticity has been stipulated, I am advised by Mr. Strauss.

THE COURT: Well, the witness just testified that that was the claim tht she filed.

MR. KAMMHOLZ: I make reference particularly to the second page and the certification by the doctor.

THE COURT: Oh.

MS. WEYAND: This is part of our stipulation.

MR. KAMMHOLZ: As to authenticity, Your Honor. We object on the ground that it is hearsay as to the alleged reason for absence in that the physician's certification has not been authenticated. He is not a witness here and it is hearsay.

THE COURT: All right.

507 Overruled.

MR. KAMMHOLZ: We have no questions.

THE COURT: All right.

Unless I hear an objection the witness will be excused. Thank you.

(The witness stood aside.)

THE COURT: Call your next witness.

MS. WEYAND: Mrs. Williams, please.

*MARY WILLIAMS* was called as a witness by and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MS. WEYAND:

Q. Will you state your name, please? A. Mary Williams.

Q. Where do you live? A. Roanoke, Virginia.

THE COURT: Could you keep your voice up a little, please?

BY MS. WEYAND:

Q. By whom are you employed? A. General Electric.

Q. When did you start work for the General Electric

508 Company? A. October 26, '71 – pardon me, '70.

Q. What? A. October 26, '70.

Q. 1970.

When you went to work were you given an employee handbook? A. Yes.

Q. I would like to have the marshal show, I believe he has the original, 17-B. I don't know if she will recognize the Xerox copy of the same. A. Yes.

Q. This is the handbook. He will show you the actual handbook. A. Yes. That's right.



Q. You were given an employee handbook of that sort? A. Yes.

Q. And do you remember the circumstances in which you were given the employee handbook? A. Orientation, you were given forms.

Q. A company representative at an orientation session gave you the handbook? A. Yes.

509 Q. Did they make any explanation to you about what this handbook was to be used for? A. Yes.

Q. What did they tell you? A. It has the general rules and, well, things you would want to know about working. Just something you would relate to your job.

Q. Do you know what this handbook provided in regard to pregnancy? A. No. I didn't take interest in it because I wasn't planning to become pregnant.

Q. Did you later become pregnant? A. Yes, I did.

Q. When did you become pregnant? A. In the latter part of June, '71.

Q. How long did you work during your pregnancy the first time you went off? A. Until August – well, I was hospitalized August 4.

Q. August 4.

Did your doctor tell you why you were hospitalized? A. I was having complications.

Q. And how long did you stay in the hospital?

510 A. Five days.

Q. Did you go back to work after you got out of the hospital? A. Not immediately. I was out 11 days.

Q. Then you went back to work? A. Yes.

Q. How long did you continue to work? A. Until September 13.

Q. And on September 13 how did you happen to cease work? A. I was having more complications and I went to my gynecologist and we talked and he advised me to discontinue my work.

Q. And he advised you to cease work. And you did cease work, is that correct? A. Yes.

Q. Did he give you any other advice as to how you were to take care of yourself at the time he took you off of work? A. Well, I was to take things easy, you know, not exert myself.

Q. Did you do your housework during that period? A. No, I didn't.

Q. Did you go out of the house, in the car or to the
511 store or anything? A. No. I didn't make any trips to the grocery store.

Q. You stayed at home? A. Yes.

Q. How much time did you spend in bed? A. I was either on the bed or on the couch most of the time.

Q. Did you have a baby? A. Yes.

Q. When was the baby born? A. February 22, 1972.

Q. And what you have described about not doing housework and not going out in the car was true in the time you went off in September until the baby was born, is that correct? A. Yes.

Q. About being on the bed or couch most of the time? A. Yes.

Q. When did you go back to work? A. March 26th, I believe, or 27.

Q. When did your doctor clear you to go back to work?
512 A. It was in the fourth week after I had my baby.

Q. And you went to the doctor at that time?

A. Well, I called General Electric. They advised me if I wanted to come back to work to call my physician and get his approval. I did so and he approved and I called the personnel back and they called my foreman to see if they could use me, if it wasn't a lack of work. So I went back to work.

Q. Now, what kind of a job do you have? A. I sit and work with my hands. I assemble plastics.



Q. How large are the pieces of plastic you assemble?

A. They vary, but none of them are over –

Q. Very small? A. Very small.

Q. Light? A. Yes.

Q. This has been your job the whole time you worked at General Electric, has it? A. Yes.

Q. It was your job when you got pregnant? A. Yes.

513 Q. I would like to have you look at Plaintiffs' Exhibit TT, stipulated, and tell me whether or not that is your signature on the first page? A. Yes, it is.

Q. And would you look at the second page and tell me if that was the form which you took to your doctor, he filled out and signed? A. Yes, it is.

Q. And did you show it to the company, took it to the company then, did you? A. Yes.

Q. And did they pay the claim? A. This?

Q. Yes. A. No.

Q. They did not pay the claim.

Company did pay your hospital and doctor bill, is that correct? A. Yes.

Q. But they have never to date paid you any disability for the period you were absent? A. No.

MS. WEYAND: I believe that is all the questions I have.

514 THE COURT: Any cross-examination?

MR. KAMMHOLZ: We have several questions, Your Honor.

CROSS-EXAMINATION

BY MR. KAMMHOLZ:

Q. Mrs. Williams, while you have before you the document that is marked Exhibit TT, and calling your attention to the second page, does your doctor's signature appear, Julien H. Meyer? A. Yes.

Q. He was your doctor? A. Yes.

Q. And above his signature, a few lines above, I call your attention to the printed statement, "The patient has been continually disabled from 9/14/71 through 6/72."

Do you have an explanation as to why the 6/72 appears there?

THE COURT: I am sorry, I didn't hear you, Mrs. Williams.

THE WITNESS: I haven't answered yet.

THE COURT: Oh.

THE WITNESS: That is June. The reason that appears like that was because my due date was March 1st and he
515 was assuming that I would be out two months or eight weeks and that would bring that up to –

BY MR. KAMMHOLZ:

Q. When did you return to work? A. March. 27.

Q. When was the baby born? A. February 22nd.

Q. You indicated something about complications. What, if I may ask, were the complications in connection with the pregnancy? A. I was having cramps and bleeding.

Q. I am sorry. What was the last? A. Bleeding.

MS. WEYAND: Your Honor, this witness has expressed to me a reluctance to go into details in a public presentation. She will be very happy, if they wish, to go into details in private.

THE COURT: It may not be necessary.

MR. KAMMHOLZ: I have no further questions.

THE COURT: I didn't think so.

Any redirect?

MS. WEYAND: No.

THE COURT: Unless I hear an objection Mrs. Williams will be excused.

516 Thank you, ma'am.

Call your next witness, please.

(The witness stood aside.)

MS. WEYAND: Mrs. Hall, please.



*BARBARA HALL* was called as a witness by and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MS. WEYAND:

Q. What is your name? A. Barbara Hall.

Q. Where do you live? A. Roanoke, Virginia.

Q. By whom are you employed? A. General Electric.

Q. When did you first become employed by General Electric? A. April 4, 1966.

Q. Did you receive an employee handbook at the time you went to work? A. Yes.

Q. Did you receive another employee handbook during the time you worked there? A. Yes, ma'am.

517 Q. I would like to have you look at Plaintiffs' Exhibit 17-B and ask you if you received that handbook?

A. Yes, ma'am.

Q. Do you remember how you got that handbook?

A. They mailed it.

Q. It was mailed to you by General Electric?

A. Yes, ma'am.

Q. Yes.

Do you remember about when that was mailed to you?

A. Not really. I would say maybe around '70, but I am not sure.

Q. Some time around '70 you got that in the mail.

Did you get pregnant during the period you worked for GE? A. Yes, I did.

Q. When did you get pregnant? A. About the first of March, 1971.

Q. How long did you work during your pregnancy?

A. Up until the beginning of my sixth month.

Q. Did you discuss with your doctor how long you could work? A. Yes.

518 Q. What did your doctor tell you? A. He said as far as he was concerned as long as I felt good; left it up to me.

Q. And was there any time you didn't feel good? A. No.

Q. How did you happen to cease work at the end of your sixth month? A. I took a note to the dispensary saying when my baby was due and the nurse said this will be your last working day.

Q. Who was the nurse? A. Fern Slaughter.

Q. When did you take the note, what your due date was? A. I probably took it about when I was probably a couple of months, right after I found out I was pregnant.

Q. At that time the nurse advised you how long you could continue work, is that correct? A. Right.

Q. Do you remember the conversation you had with her? A. Well, just told her how happy I was and she said this will be your last due date – working day, rather.

Q. Did you try to file a claim covering the period you

519 were off for sickness for pregnancy? A. Yes, I think I did.

Q. Do you know whether the first claim you filed was accepted by the company, whether they took the form and let you turn in the form that you prepared? A. They sent it back saying it did not cover maternity benefits.

Q. I want you to look at Plaintiffs' Exhibit PP with the stipulation, please.

Would you tell me if that is your signature on the front page? A. Yes, it is.

Q. Would you look at the second page and tell me if that is the signature of your doctor? A. Yes, it is.



Q. Did you try to turn in a form to the company before you turned in this form? A. I am not sure.

Q. Another claim form, this is the first claim form you sent the company, was it? A. Yes, I turned in two.

Q. You turned in an earlier one. You tried to turn in another one? A. Yes. That is the one they gave back.

520 Q. That one they took? A. Right.

Q. Then you later turned in this claim form, is that correct, and got a letter from the company saying they wouldn't pay this, is that correct? A. Right.

MR. KAMMHOLZ: Your Honor –

THE COURT: It is a little leading, but it is just to save time.

MR. KAMMHOLZ: Counsel is leading.

BY MS. WEYAND:

Q. When was your baby born? A. November 21, 1971.

Q. From the time, the end of the sixth month until the baby was born were you in any way unable to work? A. No.

Q. And your doctor did not tell you you couldn't work? A. Right. He said just so I felt okay.

THE COURT: I am sorry. I can't understand you.

THE WITNESS: He said just as long as I felt okay.

521 BY MS. WEYAND:

Q. And you felt okay until your baby was born, is that correct? A. Right.

Q. Did you have any complication of any kind during your pregnancy? A. No, ma'am.

Q. Did you have any complication of any kind in connection with your childbirth? A. No.

Q. How long were you in the hospital? A. Five days.

Q. Did you try to go back to work after you got out of the hospital? A. They told me to wait until my six weeks was up, after I went to have my checkup, and call in, which I did, and they told me to return back to work in two weeks.

Q. Who told you that? A. Mrs. Neal.

Q. She is? A. She is the secretary in personnel, I think.

Q. To? A. Mr. Peterson.

Q. And he is the Director of Personnel, is that correct?

522 A. Yes, ma'am.

MS. WEYAND: That is all the questions I have.

THE COURT: Any cross?

MR. KAMMHOLZ: No questions, Your Honor.

THE COURT: Unless I hear an objection Mrs. Hall will be excused.

Thank you, ma'am.

(The witness stood aside.)

THE COURT: Call your next witness, please.

MS. WEYAND: Mrs. Wiley, please.

*DORIS WILEY* was called as a witness by and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MS. WEYAND:

Q. Will you, please, state your name? A. Doris Wiley.

Q. Where do you live? A. Roanoke, Virginia.

Q. By whom are you employed? A. General Electric.

Q. When did you first start working for General Electric?

523 A. April 15, 1966.



Q. What was your job when you started working?
A. When I started I worked in silk screen.

Q. And did you become pregnant during the time that you were working for General Electric? A. Yes.

Q. When did you become pregnant? A. October, 1970.

Q. When you went to work for General Electric did you get a copy of the employee handbook? A. Yes.

Q. Did you get another one during the time you were working for them? A. Yes. Some time later.

Q. When did you get the second one? A. I don't know.

Q. How did it come to you? A. Through the mail.

Q. Will you look at 17-B and see if that is the copy that you got through the mail? A. Yes. This looks like it.

Q. Did your doctor advise you to stop work during your pregnancy?

524 A. No.

Q. Did you discuss with him how long you could work?
A. No.

Q. When did you stop work? A. April 30, 1971.

Q. How did you happen to stop work on April 30?
A. Well, I got a notice, I went to my doctor and got the slip with my delivery date on it.

Q. Expected delivery date? A. That's right. And I took it to the dispensary to the nurse and I gave it to her.

Q. Do you remember what nurse you gave it to?
A. Mrs. Slaughter.

Q. Mrs. Slaughter? A. Yes.

Q. And you gave it to her, and what did she say?
A. She looked at the date that the baby was to be delivered, which was July 28, 1971, and then she walked to the calendar, and she was to see when six months would

be, you know, and first it would have been in the middle of the week but she let me work until the end of that week.

Q. Told you – A. To April 30. She said April 30 would be your last day.

525 Q. Your last day? A. Yes, ma'am.

Q. Did your doctor at any time before April 30 advise you to stop work at April 30? A. No.

Q. Did your doctor at any time advise you to take it easier or not engage in your usual activities? A. No.

Q. When was your baby born? A. July 26, 1971.

Q. Did you have any complications? A. No.

Q. Neither before it was born nor at the time it was born? A. No.

Q. How long were you in the hospital? A. Five days.

Q. When did you go back to work? A. September 20, 1971.

Q. Did you make an effort to be back before then? A. No. It was my understanding that you couldn't go back until your baby was eight weeks old, and when I had my six-weeks checkup I called the personnel office and told her when my baby was born and that I had my six-

526 weeks checkup. So she told me that she would call my supervisor and see when I could come back and that she would call me.

And later on that day she called me and told me to return to work September 20, which would have been eight weeks.

Q. You did go back that day? A. Yes.

Q. What kind of a job were you doing before you became pregnant? A. Well, I sit down, engraving.

Q. What? A. Engrave.

Q. Engrave.



Did this involve lifting any heavy objects? A. No.

Q. How long had you been on engraving when you became pregnant? A. I worked there six years.

Q. All the time you were there? A. Yes. That's right.

Q. I would like to have the marshal show you Plaintiffs' Exhibit XX for identification to the stipulation and ask you whether that is your signature on the first page?

527 A. Yes, it is.

Q. Will you look at the second page and tell me if that is your doctor's signature? A. Yes. This is his signature.

Q. When you got that form signed by the doctor did you file it with the company, give it to GE as your claim, did you? A. Well, when I, let's see, I left this form at the doctor's office and they mailed it in.

Q. Yes.

Now, did you hear from the company about it?

A. Yes. I received a letter at first thanking them for my claim and then another one saying that they didn't, you know, they weren't going to pay it.

Q. Couldn't pay the claim? A. That's right.

Q. Did the company pay your hospital and doctor's bill? A. Yes, they did.

MS. WEYAND: That is all the questions I have.

THE COURT: Any cross-examnation, gentlemen?

MR. KAMMHOLZ: No questions, Your Honor.

One moment.

THE COURT: All right.

528 MR. KAMMHOLZ: Your Honor, may I withdraw the "no questions," Your Honor?

THE COURT: That is all right.

CROSS-EXAMINATION

BY MR. KAMMHOLZ:

Q. Mrs. Wiley, have you had another child since the one you described in your testimony? A. No.

MR. KAMMHOLZ: No further questions.

THE COURT: Any redirect?

MS. WEYAND: No.

THE COURT: Unless I hear an objection the witness will be excused.

Thank you, ma'am.

Call your next witness.

(The witness stood aside.)

MS. WEYAND: Mr. Delano, please.

*ROBERT GORDON DELANO* was called as a witness by and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MS. WEYAND:

Q. Will you, please, state your full name?

529 A. Robert Gordon Delano.

Q. Are you an employee of the – where do you live? A. Salem, Virginia.

Q. Are you an employee of the General Electric Company? A. Yes, I am.

Q. When did you start to work for the General Electric Company? A. I started in August of 1956.

Q. Have you been continuously employed since that date? A. Yes, I have.

Q. Are you an officer of the union? A. Yes, I am.

Q. What position do you hold in the union? A. I currently hold the position of Administrative Chief Steward.

Q. What is the Local number at Salem? A. Local 161.



Q. And this is affiliated with the International Union of Electrical – A. Yes, that's right.

Q. How long have you been Administrative Chief Assistant?

530 A. My current office has been since early 1970.

Q. And what do your duties involve as Chief Administrative Steward? A. Well, my duties involve a number of things. I take care of the administrative paperwork, of the processing of grievances. I advise shop stewards on filing of grievances, the wording of grievances.

I am Chairman of the Steward Council which is made up of all the stewards in the shop, which we have about 70 of them currently.

And I take care of arbitration cases, act as counsel for the union in arbitration cases.

I negotiate with the company at the second level of the grievance procedure.

And I work or negotiate with the company on local supplements and other agreements that we may enter into locally.

Q. Did it come to your attention that some of the women were desirous of filing claims for sickness and accident benefits for periods they were disabled by pregnancy?

A. Yes, it did.

Q. When did this first come to your attention, as far as you best can recall? A. The best of my recollection it was in August of 1970, I believe it was 1971, August,

531 1971.

I had a discussion with one of our Chief Stewards, our First Chief Steward by the name of John McDaniels, and he said he heard that the company was not accepting claims. I researched some of our books and I called our office in New York, our insurance specialist in New York City, Jimmy Lawalin and advised him of the problem we were having.

And he in turn talked to our attorney in –

MR. KAMMHOLZ: I object.

THE COURT: Don't tell us any conversation, please.

THE WITNESS: All right.

BY MS. WEYAND:

Q. Did there come a time when the company did accept claims? A. Yes, there did.

Q. Were you notified by someone how you could file the claims with the company? A. Yes. I received a notification from Robert Friedman that the company would now accept these claim forms.

Q. And they did accept them? A. Yes, ma'am, they did.

Q. Do you remember when that was?

532 A. To the best of my recollection, it was a month or so, two months later probably, about two months later.

Q. And you have heard the young ladies from Salem testify, Mrs. Hall, Mrs. Wiley – A. Yes, ma'am.

Q. And those were claim forms that the company accepted? A. Yes. They accepted those claim forms, yes.

Q. Those are the first ones, as far as you know, that were filed in Salem? A. Yes. I believe there was one or – Alberta Smith, I believe, that filed one about that time.

Q. Did any of these employees file grievances when their claims were denied? A. Yes, they did.

Q. Did you process these grievances? A. Yes, I did.

Q. Would you describe what processing you engaged in?

A. Well, what we did in processing the grievances, first of all we advised the stewards through our Chief Stewards of the company that they were not paying claims.



We advised them if they knew any women that had

533 similar problems of pregnancy where the company did not, would not pay or wanted to file a claim, they should do so. If the company refused a claim then she should file a grievance. And I worked up some language and sent it out to our Chief Stewards who in turn were supposed to correspond this to our stewards to let them know how to word the grievance.

Q. And the company denied the grievances?

A. Yes, ma'am, they did.

Q. And you took those grievances to third step?

A. Yes, we did.

Q. Would you describe what is known as the third step in grievance procedure in General Electric? A. Yes. If I could – could I start at one?

Q. If you will, please. A. The first step, the procedure is that the steward, at the foreman level. The second step of the procedure is your union's officers and the company representatives, normally from employee relations at the local location.

The third step of the grievance procedure is the headquarters level of the General Electric Company and headquarters level of the union office in New York.

Q. And these grievances were proposed, Mrs. Hall, Mrs.

534 Wiley and Mrs. Williams were processed through the three steps? A. Mrs. Williams was not processed.

Q. The other two were proposed? A. Yes, they were.

Q. And there were other grievances filed by other employees through the third step? A. Yes.

Q. And you were unsuccessful? A. That's right.

Q. That is all the questions I have.

THE COURT: Any cross-examination?

MR. KAMMHOLZ: One moment, please, Your Honor. Just a few.

THE COURT: I have one.

May I? Then it may be you can follow.

When you say the company not accepting claims, you mean they wouldn't consider them, Mr. Delano?

THE WITNESS: You are taling to me?

Yes, when they tried to turn the claims in they said the girls in the office looked at it and says, "No, we do not accept claims on pregnancy. Here." Gave the claim back.

535 THE COURT: Through your good offices, or somebody's, they finally got to consider them?

THE WITNESS: Yes.

THE COURT: And rejected them?

THE WITNESS: Yes.

THE COURT: All right.

A lot of progress.

All right, sir.

CROSS-EXAMINATION

BY MR. KAMMHOLZ:

Q. Mr. Delano, since when have you been the Administrative Chief Steward? A. Well, my current office has been since 1970. Of course we are reelected every two years, you know, if the membership agrees. I held the office of Administrative Chief Steward once before, but I took a year's rest and went out of office and then came back into the office the next year.

Q. Prior to 1970 were you steward or – A. I had been – well, I had had several offices, actually been a shop steward on the floor in the area where I worked. I had also been a trustee for a short period of time.

I had then what we call just a Chief Steward.

536 This was the job the Administrative Chief Steward before, you know. And also I had been an Assistant Chief Steward before that time.



Q. About what time frame are we talking about?

A. Okay. Well, I can put this in – I would have to guess at the dates. I couldn't give you exactly.

I first became Chief Steward, I believe it was in 1965, I believe.

Before that I was an Assistant Chief Steward, 1964, I believe.

I believe it was in 1963 that I was a trustee.

And before that time I was a shop steward in the plant, just a regular shop steward.

Q. Thank you very much.

Your credentials are impressive.

You are familiar, are you not, with the General Electric insurance plan? A. Yes, I am.

Q. I am holding the booklet in my hand.

Prior to the grievances which you filed in 1971 in connection with claimed weekly disability benefits or absences due to pregnancy or childbirth, the union had not filed any such grievances; is that right? A. Not that I can recall. I don't recall those.

537 Q. Indeed the booklet to which I referred provides specifically that weekly sickness and accident insurance will not be payable for any absence due to pregnancy or resulting childbirth or to complications in connection therewith, you recall that? A. Yes.

Q. So when you did file grievances beginning in late 1971, was this predicated on your view that there was a change in the law? A. Well, it was a combination, combination of my thoughts, I guess. Just prior to that time I had received some legal documents, or what we call "Keeping up with the Law," from our legal department. And these documents I review every once in a while and one night I happened to be reading one of these documents and it come up about the case, the Cohen case,

and I was reading that and I read it and thought about it, you know, and read a number of other cases, arbitration cases and so on and so forth. Then when these questions come up about the company not accepting these claim forms I got to thinking about that and I picked up the insurance book and read what it said in there.

And I put these things together and at that point I called our people in New York.

538 Q. And thereupon you filed a grievance or some –
A. I didn't find the grievances. They were there.

Q. You processed the grievances? A. I processed the grievances, yes, sir.

Q. On the basis of what you understood to be a change in the law? A. Well, I can give you my personal opinion if that is what you want, yes.

Q. Yes.

That is all, Your Honor.

THE COURT: I can't resist it.

You are in error. It was not a change in the law.

THE WITNESS: I don't know that it was a change in the law or not.

THE COURT: I know.

THE WITNESS: It was my interpretation that there was something wrong here.

THE COURT: Thank you.

You may step down.

Call your next witness.

(The witness stood aside.)

* * * * *

544 PROCEEDINGS

(July 25, 1973) (Wednesday at 11 o'clock)

THE CLERK: Civil Action 142-72-R. Martha V. Gilbert, *et al.*, versus General Electric Company.

Continued from yesterday.



THE COURT: Good morning, Miss Weyand and gentlemen.

MS. WEYAND: Mr. DuBow is going to present the next witness.

THE COURT: Miss Weyand, you will have to stand when you address the bench, please, ma'am.

All right, Mr. DuBow.

Come around, please.

MR. DuBOW: Sherrie O'Steen.

*SHERRIE ELIZABETH O'STEEN* was called as a witness by and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MR DuBOW:

Q. Will you, please, state for the record your name?
A. Sherrie O'Steen.

Q. And your address?

545 A. 918 Clark Street, Mayfield, Kentucky.

Q. Do you have any children? A. Yes, sir.

Q. How many? A. Two.

Q. And their ages? A. Three and eight months.

Q. Were you employed by General Electric? A. Yes, sir.

Q. At what plant location? A. Portsmouth.

Q. Portsmouth, Virginia? A. Virginia.

Q. And when did you start to work with General Electric? A. June 1, '71.

Q. Okay.

What job position did you hold with General Electric?
A. Processor on an assembly line.

Q. Now, did you become pregnant during your employment with General Electric? A. Yes, sir.

Q. And what date did you leave General Electric on
546 maternity leave? A. I left October 15.
Q. What year? A. '72.
Q. Now, when did you give birth to your child?
A. November 21, '72.
Q. Were there any complications relating to your birth of your child? A. No, sir.
Q. And how long were you hospitalized? A. Five days.
Q. Did General Electric pay your hospital bills?
A. Yes, sir.
Q. Who was your doctor? A. Dr. Leonard Davis.
Q. Where is he from? A. Portsmouth.
Q. And when did your doctor advise you to return to work? A. When my child was six weeks old.
Q. And when did you return to work? A. When the child was six weeks old, the first of January.
Q. Were you told anything by the General Electric
547 Company when you went off on maternity leave regarding your return to work? A. Miss Short, the Personnel Manager, told me that I was to return to work when the child was six weeks old, and if not, to call and let them know why I could not return when he was six weeks old.
Q. Now, did you have occasion to receive an employee handbook at Portsmouth, Virginia plant? A. Yes, sir.
Q. And how did you get it? A. When I was hired.
Q. Did you read it? A. Yes, sir.
Q. I will ask the marshal to give you Stipulated Exhibit U-3, Plaintiffs' Exhibit 72-B.
THE COURT: 72-B?
MR. DuBOW: 72-B of plaintiffs' exhibits.
Excuse me, 17-B, I am sorry, 17-B, employee handbook of the Salem plant, and call your attention to page six, the second column, where it says "Maternity Absence."



Can you read that into the record, please, the first paragraph only of "Maternity Absence"?
THE WITNESS: "It is the policy of the department
548 that pregnant employees will be required to terminate active work at the end of the sixth month of pregnancy. The employee may terminate active work at any time before the end of the six months if she so elects."
BY MR. DuBOW:
Q. Now, what you have just read is the language in the Portsmouth handbook. How does that compare?
A. It is exactly the same.
Q. Okay.
Now, after you received this employee – after you received an employee handbook – you can hand that back – after you received an employee handbook did you ever have occasion to receive written information from General Electric regarding a change in that policy? A. No, sir.
Q. Did you ever have occasion to see a notice posted on any bulletin board regarding a change in that policy?
A. No, sir.
Q. Did you ever have occasion to hear an announcement by General Electric regarding a change in that policy?
A. No, sir.
549 Q. Now, what month of your pregnancy did you work through? A. I worked to my eighth month.
Q. How were you able to do this in light of this six-month policy? A. Well, my sixth month I asked my foreman if I could continue to work and he said –
Q. Who is that? A. Jim Overton was my foreman, and he said he would go ahead and let me try to work on to my eighth month.
Q. And why did you wish to work through to your eighth month? A. I needed the money at home.

Q. And what was your rate of pay immediately before you went off on maternity leave? A. I was making 2.65 an hour.

Q. How much a week? A. I was clearing $80 a week.

Q. What sources of income did you have when you first went on maternity leave in October of '72? A. I had no source of income.

Q. No source of income. What did you do while on maternity leave regarding financial assistance?

550 A. Well, in the first few months I had no income and then the first of December I filed for welfare.

Q. And when did you receive welfare assistance?

A. I received welfare in December.

Q. '72? A. Yes, sir.

Q. Now, before you received welfare assistance in December can you relate to the Court what happened to you regarding your home, electricity? A. Well –

MR. KAMMHOLZ: If the Court please, I object. This is irrelevant.

THE COURT: Well, I am inclined to agree with you. My only hesitancy in sustaining it is I have just concluded after going over your exhibits to overrule all objections to them, and many of your exhibits go to the economic effect of a change in the company's policy on the company. And while I think that may well be irrelevant when you a are talking about discrimination, if I am going to let that in I think I ought to let this in.

The objection is overruled.

BY MR. DuBOW:

Q. Before you received welfare assistance in December can you relate to the Court what happened to you regard-

551 ing your home electricity? A. Well, I had no way to pay my electricity bill during the months before I received welfare and it was cut off.



Q. And how long was it cut off? A. For about a month and a half.

Q. Now, can you relate to the Court how that electricity cutoff affected you? A. My house was totally electric. I didn't have no refrigeration, no stove to cook on, no lights in the house, and I had a small child.

Q. How did this affect you in food preparation?

A. Well, I wasn't able to keep refrigerated food. I couldn't cook.

MR. KAMMHOLZ: May it be understood that I have a continuing objection?

THE COURT: Yes.

MR. KAMMHOLZ: Thank you.

BY MR. DuBOW:

Q. Okay.

Now, before you received welfare assistance in December of '72 can you relate to the Court what happened regarding the heating of your home? A. I had oil heat and I wasn't able to buy oil for the heat.

552 Q. And how long were you without heat? A. A month and a half.

Q. From when to when? A. From November until I received my check in December.

Q. Okay.

Can you tell us what type of food you and your child were eating immediately before you went on maternity leave? A. I was eating three balanced meals a day, meat and vegetables and milk for my little girl.

Q. And what was it after you went on maternity leave?

A. Sandwich meat and water for my little girl, plus I had to go to a neighbor's for two meals a day.

Q. Two meals a day? A. A week, excuse me.

Q. And how far away was this neighbor? A. She lived almost a mile.

Q. How did you get there? A. Walked.

Q. Now, did you take any medications while you were on maternity leave? A. With everything going
553 like it was I got into a nervious state and my doctor gave me Librium, it was a nerve pill, so I could calm down.

Q. Who prescirbed it? A. Dr. Davis.

Q. And again what was the reason you took these medications? A. Because of my nerves. And at one time I had to have a shot that knocked me cold.

Q. What other medical treatment did you receive? A. I received a shot at one time that I got so bad he was afraid I was going to lose my child, and he gave me a shot to calm me down.

Q. Where did you receive this? A. At Bellevue Hospital.

MR. DUBOW: No further questions. Wait a minute.

BY MR. DUBOW:

Q. How long did you work at General Electric after you returned to work from your pregnancy, from your delivery? A. I worked four months for General Electric.

Q. And was the plant at Portsmouth unionized? A. No, sir.

554 Q. Thank you.

THE COURT: Mr. Kammholz or Mr. Strauss?

MR. KAMMHOLZ: Thank you, Your Honor,

CROSS-EXAMINATION

BY MR. KAMMHOLZ:

Q. How old are your children now? A. Three years and eight months.

Q. You are divorced? A. Yes, sir.

Q. How long have you been divorced? A. I have been divorced two weeks. A. Yes, sir.



Q. Ago? A. Yes, My divorce just went final.

Q. During the period that you have testified about on direct examination when you were without electricity, was your husband living with you? A. No, sir.

Q. Had you planned the baby? A. No, sir.

Q. The attorney on the other side showed you an exhibit marked U-2 that has on its face Salem, Virginia, does it not? A. Yes, sir.

555 Q. When did you first see that exhibit? A. Today.

Q. When you talked with the lawyers about your testimony? A. Yes, sir.

Q. You had never seen it when you worked for GE? A. Not this one. I have one similar.

Q. Where did you get that one? A. It was handed to me in court.

Q. The other one? A. Oh, they gave it to me when they hired me.

Q. Do you still have it? A. Yes, sir.

Q. Where? A. At home.

Q. You didn't bring it with you? A. No, sir.

Q. Did you talk with the lawyers on the other side about it? A. Yes, sir.

Q. Now, there is no problem in connection with your returning to work – strike that question, please. When did you return to work at GE? A. First of January.

Q. When was the baby born? A. November 21.

Q. What year? A. '72.

Q. And you worked to what date prior to the time the baby was born? A. October 15.

Q. I am sorry. A. October 15.

Q. And there was no difficulty in your continuing to work until that date, was there? A. No, sir.

Q. No further questions.

THE COURT: All right. Any redirect?

MR. DUBOW: No further questions.

THE COURT: Unless I hear objection the lady will be excused. Thank you, ma'am. You may step down. Call your next witness. (The witness stood aside.)

* * * * *

558 MR. STRAUSS: The defendant withdraws Exhibits Number 6, 9, 15, 43, 44, 45, and 46.

I would say, if I may at this time, with respect to Defendant's Exhibit Number 14, which is a deposition of a Dr. Wilbanks as to which there has been no objection, we did not file with our exhibits the physical deposition, but the deposition is on file with the clerk.

THE COURT: It is a de bene esse, is it?

MR. STRAUSS: I believe in view of the delay it is no longer a de bene esse deposition, Your Honor. It was taken about three months ago, as I recall.

I am asking that the deposition of Dr. Wilbanks be incorporated physically with our other.

THE COURT: Well, it is a little unusual, though, isn't it, to mark a deposition as an exhibit? You are entitled to read it or have the Court read it and consider it, but not as an exhibit. That is the usual procedure.

MR. STRAUSS: You would –

559 THE COURT: You want to be sure that I see it?

MR. STRAUSS: Exactly. That is all.

THE COURT: I will do that.

Now, that is 14, is that correct?

MR. STRAUSS: Yes, sir.

THE COURT: So you technically withdraw that?

MR. STRAUSS: I will be glad to.

THE COURT: Subject to what the Court has just said. All right.

So you have now 6, 9, 14, 15, 43, 44, 45, and 46, is that correct, sir?

MR. STRAUSS: Yes, sir.



THE COURT: Is there any objection?

MS. WEYAND: No objection.

THE COURT: All right.

As I have already indicated in my dialogue with Mr. Kammholz, I have gone over the objection to the defendants exhibits. I found that many of the defendant's exhibits go to the economic effect of a change of the policy that they allegedly have in effect, and I must say I have serious doubt as to, when you get around to talking about discrimination, whether dollars and cents mean anything.

Somebody will have to show me that it does before I

560 give much effect to it, which is why I permitted the defendants to put on the evidence in reference to Mrs. O'Steen.

I am going to consider all of it. As a consequence I overrule the objections made by the plaintiff to defendant's exhibits. And I have already ruled on the defendants objections to the plaintiffs' exhibits, because I think we should have a full record, but I don't want the Court's ruling to be interpreted by your side as the Court's conclusion that the matters are relevant.

I am just not going to rule on that at this stage. I don't know.

MR. BATTLE: If Your Honor please, just a small point.

I think Your Honor misspoke in the beginning of that ruling.

May I ask the reporter to read back the first sentence or two? I think it was an inadvertent statement that it was defendant's when you meant to say it was the plaintiffs'.

If you will read that back, I think we will pick it up. I may be wrong.

THE COURT: Will you, Gil?

(The reporter read the excerpt referred to.)

561 THE COURT: I meant the plaintiffs. Mr. Battle, that is a first. Anything else?

MS. WEYAND: I wanted to be certain that it was all right to brief that fully, and I will not need to make the objections when it is placed in the record, but we do urge you to disregard it when it comes to the briefing of the case.

THE COURT: Yes, indeed. If we get around to briefing.

* * * * *

CURRICULUM VITAE - ANDRE E. HELLEGERS, M.D.

562 & BORN:

563 June 5, 1926, Venlo, the Netherlands.

MARRIED:

Charlotte Frazer Lindsay Sanders, 4 children.

EDUCATION:

Stonyhurst College, England 1940-1944
Edinburgh University Medical School, 1944-1951
L.R.C.P., L.R.C.S., L.R.F.P.S., 1951
Belgian National Boards, Brussels, M.D., 1952
Diploma of Aviation Medicine, Paris University, 1953.

HOUSE STAFF:

Department of Obstetrics and Gynecology, The Johns Hopkins Hospital, 1953-1956, 1959.

FACULTY APPOINTMENTS:

Intern to Associate Professor, Johns Hopkins University 1953-67.
Josiah Macy Research Fellow in Physicology, Yale University, 1956-57.
Lecturer in Population Dynamics, Johns Hopkins University, 1966-
Professor of Obstetrics-Gynecology, Georgetown University, 1967-
Professor of Physiology-Biophysics, Georgetown University, 1969-
Director of Population Research, Georgetown University, 1971.



OTHER ACTIVITIES:

Member, Josiah Macy Foundation High Altitude Expedition, Peru, 1958.
Senior Research Scholar, The Joseph P. Kennedy, Jr. Memo Foundation, 1961-67.
Member, Research Advisory Committee, United Cerebral Pal Foundation, 1964, 1970.
Consultant, Office of the Secretary of Health, Education and Welfare, 1964-65.
Member and Deputy Secretary General, The Papal Commission on Population & Birth Control, 1964-1966.
Member, President Johnson's Committee on Population and Family Planning, 1968.
Technical consultant, Population Reference Bureau, 1970-
Member, Study Section on Human Embryology and Development, NIH, 1967-1971.
Member, National Advisory Child Health and Human Development Council, NIH, 1971-

SOCIETIES:

A.O.A.
Member, American Gynecological Society, 1971.
Honorary Fellow, South Atlantic Association of Obstetricians and Gynecologists, 1971.
Member, The Society for Gynecologic Investigation (president, 1968).
Member, The Perinatal Research Society (President, 1971).

EDITORIAL BOARDS:

Georgetown Medical Bulletin, 1963-
American Journal of Obstetrics & Gynecology, 1963-70;
European Journal of Obstetrics & Gynecology, 1971-
Gynecologic Investigations, 1971-

* * * * *

564 ANDRE E. HELLEGERS

was called as a witness by and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified on his oath as follows:

THE COURT: Doctor, I understand you just arrived. Would you like a few minutes before you testify?

THE WITNESS: No, sir. That is fine, sir.

DIRECT EXAMINATION

BY MS. WEYAND:

Q. Will you, please, state your full name for the record? A. Andre E. Hellegers, H-e-l-l-e-g-e-r-s.

565 Q. Where do you live? A. 10104 Newhall Road, Potomac, Maryland, 20854.

Q. I would like to have the marshal hand Dr. Hellegers his curriculum vitae which is on file with the Court. I have a copy if you would prefer to use the copy.

THE COURT: Yes, please.

BY MS. WEYAND:

Q. I ask you if you prepared this curriculum vitae? A. Yes, I have. I recognize it.

Q. Is there anything that needs to be added to bring it up to date? A. I am no longer on the Editorial Board of the – oh, that's right, it says 1970.

Yes, since October, 1971, I am the Director of the Joseph and Rose Kennedy for the Study of Human Reproduction at Georgetown.

Q. Would you state what your duties as Director and what the Institute is concerned with? A. Well, the Institute essentially studies the processes and the consequences of human reproduction in the biological and social and economic sense and has an ethics component

566 that deals with matters of ethics in modern biology and medicine. And my functions are to coordinate various activities.



Q. Does your practice represent a specialty within the field of obstetrics and gynecology? A. No. I am an obstetrician-gynecologist and what is sometimes called a fetal physiologist, but in terms of practice I have never done any gynecology, that is to say dealing with non-pregnant women. So it has been in obstetrics with a heavy focus on the welfare of the unborn child.

And in terms of that I do consulting work only. This is, I only see patients at the request of other doctors.

Q. Do the patients whom you see have a higher rate of complications than –

THE COURT: Let me interrupt you at this stage.

Now, you are qualifying the doctor as an expert in the field of obstetrics, is that correct?

MS. WEYAND: I also would like to qualify him as an expert in the field of social and economic consequences attendant to the medical care and socio-economic condition of the woman as doctors can see its effect on the

567 human fetus and on the mother.

THE COURT: Gentlemen, do you wish to cross-examine the doctor on his qualifications? Is there any objection to his qualifications in the field?

MR. BATTLE: We do not wish to examine him on his qualifications.

THE COURT: All right.

The doctor is qualified.

BY MS. WEYAND:

Q. Do the patients whom you see therefore represent women with a higher degree of complications and non-routine cases than the average practitioner sees?

A. I think I would go further and say that I see nothing but complications since I only consult with people that take care of the normal.

Q. Approximately what percentage of the pregnant patients do you see are employed in paid jobs outside

the home when they become pregnant? A. I am sorry. I have never asked them that.

Q. You have no idea? A. I have no idea.

Q. Have you had occasion to advise any of them on whether they should continue to be – A. Oh, yes.

568 Q. – employed? A. Yes.

Q. What kind of advice do you give them? A. A. Well, I think the advice is usually based on common sense, dependent on the job, and the usual advice is that they may continue work until you decide that they may not.

In other words, until something intervenes of which you would say given these circumstances you should work no longer.

Q. Is there to your knowledge any physiological reason which warrants a rule that at any given stage of pregnancy the pregnant woman should cease her paid job? A. Depends totally on what the paid job is. If she were to be a woman pilot I wouldn't advise her to fly in the ninth month. She would have difficulty getting herself between the steering wheel and the seat. So it is a question of common sense depending on what the job is that she has.

Q. What kind of jobs do you think of that would require a rule which fixed a given stage of pregnancy as the termination date? Can you specify the type of jobs? A. No, I couldn't specify. I would say that they would

569 be all such jobs in which girth becomes an impediment. Going up telephone poles, down manholes, driving trucks. It is a question of accommodating girth.

Q. Does the pregnancy itself unaccompanied by any complications in a normal, healthy woman require her to cease engaging in the type of activities which she is accustomed to engaging in prior to pregnancy?



A. In itself, no. Unless, I say, girth becomes an impediment and it is a question of bad fit.

Q. Is a pregnant woman more susceptible or less susceptible to sickness and disease during her pregnancy than she was when she was not pregnant? A. Well, that is a complicated question.

There is nothing in pregnancy that I know of that confers immunity against a disease.

There is in pregnancy, by virtue of the rapid weight gain, a tendency to bring out diseases which pre-existed the pregnancy, which diseases would be similarly brought out with rapid weight gain in a man, a man who rapidly became obese and who had a borderline underlying tendency towards, say, diabetes, would have that diabetes brought out by the rapid weight gain.

Whether you want to ascribe that to pregnancy or not is another matter. So I am fundamentally saying that

570 conditions of rapid weight gain, both in men and women, bring out tendencies to certain underlying diseases, such as underlying hypertension, underlying diabetes, possibly underlying thyroid disease, and so forth.

Q. How do you define disease? A. That is quite a complicated question to answer.

We need a whole set of approaches to the definition, and I don't know which of these to define by myself.

Some people would define disease or abnormalcy as a statistical deviation from an average.

Under that kind of definition, for instance, hypertension might be a disease, hypotension would be a disease; but it is a vague definition because it presumes something like normal tension, and so when you statistically deviate either towards the low or high side from that number then you might say that is abnormal, that is a disease.

A second approach would be to try to define disease

in terms of ability to function. To show some of the handicaps of going that route it might mean that somebody who had, say, a Jewish nose in Nazi Germany and was consequently unable to function in Nazi Germany
571 would have a diseased nose. That leads to certain, you know, ridiculous lengths, but there are people who talk about ability to function. A third kind of definition would have it that disease is that which, if not corrected, would continue leading to further debility and ultimately to death. I suppose that is the commonest definition.

A fourth and more modern type of definition has come through the World Health Organization's definition of health which says that it is not just an absence of disease but the presence of a total sense of physical, psychological, and social wellbeing. So that conversely, you might then define disease as the absence of a sense of total physical, psychological or social wellbeing.

But each of the definitions has advantages and drawbacks.

Q. Is sickness a medical term? A. Well, sickness, I think, is much more a lay term, It is a word used much more by the laity in terms of the way they feel like illness and sickness.

Disease would be much more the medical or technological term for the conditions that a patient might have.

Q. Is accident a medical term? A. No. These
572 are words used in the medical profession as a transference from lay terms, but it is not specifically medical or restricted to medicine.

Q. Does the medical science have a different definition for accident from the layman? A. Not that I am aware of.

May I qualify that? I mean occasionally you may talk about a certain part of the hospital being called the



accident room to which come patients other than those who have accidents in the lay sense.

So a case of acute pneumonia might be rushed by ambulance into the accident room, not the pneumonia room. But I think that is a question again of common sense use.

Q. Have you had experience with pregnant females who did not take leave prior to childbirth but continued on their job until labor began? A. Oh, yes, lots. I would say that that is probably what in my position I see the most because my office is on the third floor of Georgetown University Hospital which houses the obstetric department and the pediatric department. And if you want to see anybody who works right up to labor it is nurses in obstetrics and women – and women obstetricians and women pediatricians. So we have a fair amount of pregnant house staff working right on through to labor.

573 Q. Is there any indication that any of these women are acting contrary to the directions of the best medical advice, the nurses and the doctors that are working? A. You mean the obstetricians and pediatricians themselves? Presumably they know what they are doing. I am sure also the obstetricians that takes care of a pregnant woman pediatrician or a pregnant woman obstetrician, if he were to tell her she ought to stop working she would probably do it. And I expect that by common sense if he gave her the indication as to why she should do it she would agree to it.

You know, presumably they know themselves what obstetrics is about and what pediatrics is about.

Q. Is there anything about pregnancy which per se disables a normal, healthy woman prior to the onset of labor? A. Prior to the onset of labor?

No, unless it is miscarriage.

So there is a certain period up to 20 weeks when she could be disabled due to miscarriage.

If you pass the miscarriage stage then between that and going into labor there is nothing in pregnancy itself that disables with the exception again of the girth story,
574 if I may, you know, revert to that.

Q. Has it been your experience that patients who continue to be gainfully employed on a full-time job outside the home have a greater incidence of complications during pregnancy than women who stay home? A. No, it has not been mine, unless you want to include psychological problems, in which case I would say that the ones staying at home are probably worse off, have much more tendency to brood, get annoyed and this kind of thing, but that would be psychologically an effect.

Q. Is it today accepted medical practice that a pregnant female can continue to be employed on her usual job until the onset of labor? A. Yes. Within the limitations of the girth story that I have said. You know, if she were, I don't know, a telephone operator, secretary, yes, certainly she could continue to work on to labor. If she is a pilot, you wouldn't

Q. THat is, you would agree it is accepted medical practice in this country? A. Oh, yes.

Q. Does this represent a change in medical practice in recent years? A. Well, that depends on the word "recent" in a sense.

575 I started myself in 1951. Yes, I think there has been considerable change even since 1951 in the sense that the whole process of pregnancy used to be considered the kind of thing where you almost put a woman to bed in cotton wool and put her on a pedestal and held her hand and patted it and so on. But that has increasingly gone out the window, as have lots of attitudes towards women in general, I suppose.



So it is a hangover from former days of considering that women were hardly capable of doing anything even in a non-pregnant state.

Q. Are there certain complications or abnormalities which occur during pregnancy which may require her to cease her usual activities? A. Yes, indeed.

Q. What percentage of women have complications or abnormalities that interfere with their normal activities? A. Well, let me answer that by saying ten percent of pregnant women will miscarry. As a consequence at the time that they have their miscarriage, which is equivalent to the time of delivering a baby except that it is less than 20 weeks of age, they would be disabled in the having of the miscarriage.

576 There would be a second period of disability which would be the disability of labor and delivery itself.

Q. That would be all women, that would be all women? A. That's right, that would be all women.

There would then be a certain group of women who would be disabled by virtue of two groups of conditions.

THE COURT: I am sorry. I didn't hear that.

THE WITNESS: I am sorry. Of two groups of conditions.

The one would be that group of conditions I alluded to before where the rapid weight gain of pregnancy brought out an underlying disease which was there in the non-pregnant state, like diabetes, and that might or might not cause disability depending on how well it was under control very much in the same way as a man gaining weight rapidly might suddenly decompensate in diabetes. And it would then depend on whether he could control it or not.

Then there would be a second set of disabling conditions in pregnancy which arise purely from what I would call conditions of the fetus and placenta, which is obviously

what differentiates from the non-pregnant state.

And the two most classical ones of those would be one, the condition in which the placenta lies below the infant

577 and consequently episodes of bleeding might occur in pregnancy. And the second major one would be the one in which a part of the placenta would be detached from the lining of the uterus, so-called abruptio placentae or premature separation of the placenta.

So these would be conditions then that arise solely from the fact that one has a placenta in the uterus.

So there is the process of miscarriage, there is the process of delivery, there is the bringing out of possible underlying diseases, as in anybody who rapidly gains weight, and there are the specific peculiarities of having a placenta inside a uterus.

Q. I believe you have not mentioned the toxemias and preeclampsia? A. Yes, I do, and do not bring them out. Toxemia and preeclampsia are diseases which are defined by the occurrence of a high blood pressure, that is fundamentally what the disease is about, and the cause of the disease is really unknown so that there is still some debate as to whether in fact this is pregnancy bringing out an underlying tendency to hypertension in the first place.

So while by definition because the word "toxemis" is only used in pregnancy, therefore by definition only the

578 pregnant can have it, the signs and symptoms are all signs and symptoms of high blood pressure, which obviously the non-pregnant woman or the male can also have, and then the issue becomes whether it is something in pregnancy that brings out the underlying tendency to hypertension as would rapid weight gain of other kinds.

Q. You have also failed to mention ectopic pregnancies.



Where do those come? A. Ectopic pregnancies would obviously be disabling, they would all occur, or overwhelmingly they would occur prior to the 20th week of pregnancy and they would require surgery.

Another one that would be disabling which I forgot would be those particular kinds of pregnancies that lead to what we call a hydatidiform mole or chorio-carcinoma, those being conditions in which after the fertilized egg implants in the uterus instead of the fetus developing normally it is actually the placenta which develops by itself and forms a mole-like structure that looks like grapes, and which may turn malignant and then be called a chorio-carcinoma. So these are peculiarities of the pregnant state due to the presence of a placenta and a conceptus.

579 Q. What percent of women have these abnormalities and complications? A. I said ten percent of miscarriages, but that is, you know, usually a one or two-day affair.

In terms of the general so-called complications of pregnancies I would put it at about ten percent, but I wouldn't want to put that into a textbook. I would like to go to a textbook and figure up the numbers to give you a figure, but it would be approximately of that order.

Q. So that is ten percent in addition to the ten percent that have miscarriage, is that correct? A. That is correct.

Q. And the miscarriages you talk about, you said were predominantly the first trimester? A. Oh, overwhelmingly. By definition it would have to occur before the 20th week. Of course by obstetrical definitions we talk of premature delivery between the 28th week and 40th week, or however long you want to go.

So by definition all miscarriages would occur before the 20th week. They would overwhelmingly occur before the 10th week.

So the vast majority of miscarriages are the very early affairs.

580 Q. Are miscarriages normally attributed to a diseased condition or an abnormality in the fetus? A. The vast majority of miscarriages are due to defects in the fetus and/or placenta rather than in terms of a woman. There are some that have an underlying basis in disease of women, we think, like thyroid disease. But the mythology surrounding miscarriages is as enormous as the mythology arising over pregnancy.

Q. I believe we talked about ectopic pregnancy. Will you, please, define ectopic pregnancy? A. An ectopic pregnancy is a pregnancy which implants in a location other than the uterus. That might be a tube, ovary, it might be an abdominal pregnancy.

Q. And none of these pregnancies develop to a full-born normal child? A. The very rare abdominal pregnancy may.

Now, I suppose I ought to point out that the sum total of ectopic pregnancies is one in 200 of all pregnancies and that I have incorporated those in the ten percent as miscarriages.

Q. Does an ectopic pregnancy ever miscarry itself without surgical intervention? A. Well, the usual thing, if it isn't picked up and nothing is done, is to

581 rupture so that the tube, the Fallopian tube in which the pregnancy sits will rupture, and one of two things will happen. There will be either massive blood loss and the woman may die if surgery is not intervened with. There is the case of a silent rupture of an ectopic pregnancy in which on a subsequent occasion one may find the products in the abdomen and no one even knew she



had an ectopic pregnancy, but that would be extremely rare. Overwhelmingly it is a condition that requires urgent abdominal surgery.

Q. And if immediate obdominal surgery does not take place what is the normal result? A. Well, the result overwhelmingly would be death by exsanguination. So fundamenally a ruptured ectopic pregnancy is, in my opinion, probably the bloodiest things ouside of a rupture of an internal artery where you standardly find three or four pints of blood in the abdomen.

Q. And it is uniform practice if a doctor discovers an ectopic pregnancy to institute immediate surgical procedure? A. Absolutely. Absolutely.

Q. Does the normal birth of a full-term child always result in a period of restriction of usual physical activities? A. Yes, it usually does.

582 You mean the actual childbirth process, or do you mean the period thereafter?

Q. The whole, from the time of labor there is a period from the onset of labor to a period after delivery takes place in which a woman is restricted, is that correct? A. That is correct, yes, ma'am.

Q. How long does this period of restriction of normal activity usually last in the instance of normal childbirth? A. Well, that is subject to very much the same analysis as the restriction on activity before delivery.

The standard kind of mythical routine is to say to a woman who has just delivered to come and see you six weeks postpartum.

When one analyzes why it is that one says that, it is because one can expect that if in six weeks all is not back to normal then one is dealing with a condition which thereafter may be called abnormal.

That by no means implies that it is not until six weeks that normalcy recurs. As a matter of fact there is a great deal of evidence in the literature that women recover normal functions after childbirth earlier and earlier and in direct proportion to their socio-economic status. That is to say there have been studies done of when women
583 recover menstruation, of when women recover ovulation, and it is clear with each advancing decade this process is occurring earlier after childbirth than before in very much the same way as little girls now begin menstruating much earlier than they did in our great grandmothers' days.

Overwhelmingly this is, as I said, associated with socio-economic conditions. That is to say, the higher the socio-economic condition and the earlier little girls start menstruating the earlier women recover normalcy after childbirth, and it is suggested that they will have the menopause at a later date. So it is not at all uncommon for people to be perfectly capable of going back two weeks after childbirth.

The practice, again, is to individualize. I think probably the largest practice numerically consists in women going back to work well before two weeks after pregnancy. These are the women who have several children at home and take care of them, which is as hard a form of work as any other type of work.

So overwhelmingly what happens is that I think most husbands, you know, will grant their wives one week of no cooking, or five days of no cooking; but the speed with which women return to housework is certainly remarkable, depending on what kind of husband they have.



584 Q. Based on your experience, how many weeks after childbirth do you recommend or have you certified a patient? A. Oh, I have gone as short as two weeks where – what I have done really is to individualize it by what the need was for the woman to work.

Now, overwhelmingly I think it has been an obstetrical tendency to delay it because childbirth is about the only excuse that husbands give their wives to have a rest at all.

So the practice has been in that favor. But if there is anything at stake like job income or so forth, I have gone to two weeks.

Q. What is the average time between childbirth and the date you have recommended or certified a patient for going back? Could you state an average? A. I coundn't answer that. Overwhelmingly all of my early work was done in the setting of a university clinic and you tend to go by rote. It is like a factory in a sense. One processes things according to given rules and rule books.

And in those days it was overwhelmingly a six-weeks rule so that the six weeks postpartum rule is entrenched
585 in standard obstetrical mythology, just as anything else is. It isn't usually until one leaves one's house staff, intern, residency days and then one has to deal with individual private patients and their needs and their desires that one begins to individualize for a woman. And that is when you can go down to two weeks or three weeks or whatever seems to be appropriate to her particular life style.

Q. What to date was your intern where you had the processing on a mass basis? A. Oh, that was, let me see, 1953 to 1956 at Johns Hopkins where you had 3,000 patients per year and most of them were complicated. Of course, they were referred from all over Mary-

land, and [illegible] system like that one literally has to work on safety-first principles.

Q. Given the opportunity to follow a patient through pregnancy do the complications which sometimes occur require any different medical procedures than illnesses which occur in non-pregnant patients? A. For the group of complications which I mentioned under the heading of the pregnancy bringing out underlying diseases, like thyroid disease, hypertension, diabetes and so forth, the treatment is essentially no different than it is for
586 diabetes and so forth of the non-pregnant massive weight gainer, if you like.

The special procedures that are required all come in under those cases which are peculiar to the fetus and the placenta like ectopic pregnancy, like abruptio placentae, like placenta previa, which are diseases that have no parallel in the male.

But common ones in men and women like heart disease, diabetes, and those, when they occur in pregnancy, are treated no differently than they are in the non-pregnant.

Males require different dosage to the extent that you are dealing with a larger patient, and it may require closer following to the extent that weight is constantly changing in the woman and may not necessarily constantly change in a man.

Q. Except for the difference in location, is the surgical incision inflicted by a Caesarean operation any different from that inflicted by an appendectomy? A. Well, usually they are in different locations. The Caesarean section would be central, so the location of entering the abdomen would be different. Obviously the location is different in that once having entered the abdomen the incision for a Caesarean is into the uterus and incision for the appendectomy would be to stay well away from the uterus.



587 Q. The surgical procedures are otherwise essentially the same? A. Well, both of them are openings and closings of the abdominal cavity.

The procedure thereafter is obviously different in that one is into the uterus and the other as a rule is into the appendix. Closure would once again be the same for both entities and the recovery period would be about identical.

Q. Is the same true of surgery for an ectopic pregnancy?
A. Yes, indeed.

Q. And that again is, the location may be more different than that from a Caesarean, may it not?
A. Yes, indeed, because in the ectopic pregnancy what is done is that the tube is removed. If you want to go by sheer appearance, the tube bears much more of a resemblance to the appendix than does the uterus bear a resemblance to the appendix. But again recovery periods and so forth would not be different.

Q. How many diseases does the medical profession know which are peculiar to pregnancy and do not occur
588 in non-pregnant females or males? A. I am sorry. May I have that again?

Q. How many diseases does the medical profession know which are peculiar to pregnancy and do not occur in non-pregnant females or males? A. Well, I have to differentiate. Let me differentiate three things. Pregnant female, female, and male.

Differentiating diseases between pregnant female and non-pregnant female are only those diseases which stem from the products of conception. That is to say, from the placenta and the fetus and the mal implantation and that type of thing.

Differentiating the pregnant female and the non-pregnant female from the male would be on the female side all diseases of ovary, tube, uterus, vagina and vulva.

And separating it on the other hand would be all diseases of testicle, scrotum, vas deferens, prostate, penis; so purely diseases restricted to the reproductive organs separates non-pregnant and pregnant females from males.

What separates the pregnant female from the non-pregnant are diseases peculiar to the contents of the uterus or of the tube to include ectopic pregnancy, contents of the repreductive tract.

589 Q. Do you know the reasons upon which employers rely to support their practice of affording income maintenance during periods of sick leave? A. I am not an expert in employer motivation.

Q. I would like to have you assume the following facts.

It will be the same question I showed the gentlemen yesterday.

MR. BATTLE: I don't think it is necessary to see it again as long as the record shows that my objection is the same.

THE COURT: Yes.

BY MS. WEYAND:

Q. I am going to ask you to assume the following facts for the purpose of the next several questions.

Assume that the defendant GE provides income maintenance in the form of sickness and accident benefits for non-occupational sickness and accident absences because such payments are believed to increase production in three ways:

One, an employee who does not need to worry about a period of illness without any pay is a happier employee and therefore produces more;

590 Two, an employee afraid to go home when he or she feels below par not only produces less, but has a bad effect on the productivity of other employees; and



Three, an employee who has income maintenance is able to take proper care of himself or herself by being economically free to take off work and stay off work for as long as is necessary to get well, so he or she comes fully recovered at an earlier date, the theory being that if he or she has no income maintenance he or she will continue working when he or she should be away from work and under medical treatment. A. I didn't get that last part. I thought there was a not that slipped in.

Q. The theory being that if he or she has no income maintenance he or she will continue working when he or she should be away from work and under medical treatment.

In terms of these reasons for granting sickness and accident benefits, is there from the medical point of view any less reason to pay sickness and accident benefits for disabilities from pregnancy and childbirth than in cases of other disabilities? A. Reasons, you mean?

Q. From a medical point of view is there any less
591 reason? A. Let me put it this way. I can't see any difference between diabetes in pregnancy and diabetes in the non-pregnant state except in one state you are pregnant and the other you are not.

Q. The same way about a woman in the hospital with labor and – A. Well, labor is something that is peculiarly female. So, you know, I can't draw a male parallel to it. But heart disease, thyroid disease, diabetes, any of these conditions are no different in pregnancy than in any other case.

Q. She has a complication: Is there the same reason for her to have income maintenance as there is for someone else from a medical point of view so she doesn't continue to work when whe should be home taking care of herself? A. The complications I have already stated are complica-

tions due to rapid weight gain bringing out an underlying disease, be it hypertension, be it heart disease, be it disbates and so forth. So the net result is a disease, whatever the cause is.

Those complications which one deals with in terms of the contents of the uterus or the reproductive tract are complications of hemorrhage.

592 Now, I don't know whether you consider a lot of blood coming from the vagina differently than a lot of blood coming from the rectum. It requires different measures, but it is the same blood loss, causes the same anemia. A ruptured uterus is as disastrous, I guess, as a ruptured ulcer.

So, yes, there are anatomical differences, if you like. The net result is disability in both cases. As far as the medical outcome from that point of view you have in both cases a disabled person who requires medical intervention.

Q. And if there was need of income maintenance to get the medical intervention to take care of herself, you would see any difference medically between the disabilities from the point of view from the need of income maintenance? A. I am sorry. I don't think I get the thrust of your question.

Q. In terms of it being disabling and preventing her from working is there any, from a medical point of view, any less reason to provide her with income maintenance during the period she is disabled than there would be to provide the man who was hemorrhaging, as you say,

593 from the rectum? A. Well, you know doctors cost money. It isn't as if we treat females for free and treat males for fees. I mean, I have yet to hear anybody turn down money for medical or any other reasons.

Q. Now, have you ever considered whether or not income maintenance during the period a woman was disabled prior to delivery was important to the outcome of delivery? A. Yes. Well, that is not the question you can answer in a single given case. The only thing you can say at this point is that there is very well established evidence in obstetrics as a whole that there is a correlation between income and the outcome of pregnancy both in terms of mortality of infants, indeed mortality and morbidity of mothers, in terms of the weight of infants and presumably in terms of IQ of infants, which is heavily correlated with weight. The excellence of the outcome is a direct function of socio-economic development, socio-economic development as expressed by a whole series of parameters, income, nutrition, education, quality of medical care. And in short all those things that are associated with buying power.



Q. I would like to have the marshal hand the witness Exhibits 98, 97, 98, and 99.

Are you acquainted with these studies? A. Yes, indeed,

594 I am. Which doesn't mean I know them by heart, but I know what they are.

Q. Would you state the circumstances under which these studies were conducted and your acquaintance with the manner in which they were conducted? A. Well, these are studies that were done actually overwhelmingly by a woman called Mary Grace Kovar, but they are a part of the kind of studies that have come out of the National Center for Health Statistics which produces a lot of vital health statistics in the United States and intermittently puts out studies on cross samples of the U.S. population, and particularly has one that is called the Natality Survey Followup. And these are all studies produced by that particular branch of HEW.

Q. Turning to table 17 on Plaintiffs' Exhibit 97, page 25. A. Excuse me for a moment. 97?

Q. 97 at page 25, table 19.

Is this one of the studies to which you referred in reference to the outcome related to socio-economic conditions? A. Yes, that is correct.

595 Q. And on 18 – A. Excuse me.

Q. These tables show that in terms – A. Well, these are data correlating family income as divided by less than $3,000 per year, 3,000 to 5,000 per year and over 5,000 per year.

And it then gives the infant death rates by the income of the family, children, second, third, fourth and so forth. It shows in every instance that the higher the family income is the lower the infant death rate is for each child.

Q Will you look at table 11 on page 21?

A. Sorry. I don't have a table 11 on 21.

Q. 12, I am sorry. A. All right.

Q. Would you state for us whether there are other studies as complete as this study has been in terms of the selection on a wide basis of – A. Well, that isn't located in table 12.

Oh, you mean in general?

Q. I am having trouble finding the right table. Excuse me a minute.

It was table 17, yes, 17 on page 25. A. Yes, that is the one that shows the direct correlation between infant death rates and lack of income. So the increase in

596 death rates in proportion to lack of income.

Q. Now, you said that in addition to the death rate the weight of the infant was of relevance? A. Yes, that is correct. So that what fundamentally comes out is that the lower the income group the larger will be the incidence of infants who are born prematurely, that



is to say, born at less than 36 weeks of gestational age, and the lower the socio-economic bracket, as measured by income, the smaller the weight of the infants for a given gestational age.

Q. Will you look at table five on page 17 of Plaintiffs' Exhibit 98? A. Page which, excuse me?

Q. Page 17, table five? A. Yes.

Q. This is the table showing correlation between birth weight and income, is it not? A. That's right.

Q. And what does this show in relationship to birth weight to income? A. Well, if you look at birth weight 2,500 grams or less, which is what we call prematurity, then you find that as income goes up, namely

597 from the under 3,000 category to the 4,000 and so forth, as it goes up you will find that the fraction of premature birth decreases or conversely, as income goes down, the fraction of premature birth increases.

Q. What does the effect of premature birth have on the future welfare of the child? A. Well, again, one can't take a given case. One has to go to the general statistics as they are known, which is that there is a direct correlation between the severity of prematurity or birth weights less than 2,500 grams and subsequent intellectual performance, not just in terms of IQ, but in terms of handicapping such as cerebral palsy and so forth.

Now, in terms of handicapping conditions like cerebral palsy, then one is dealing with a very premature group, that is to say, overwhelmingly with a group of less than 1,500 grams in weight at birth.

In terms of IQ and other performance the effects are seen even between 1,500 and 2,500 grams.

So in summary, the greater the degree of prematurity the greater the chances of central nervous system damage, is really what we are talking about.

Q. Is it easier for an employee to malinger for the purpose of collecting sickness and accident benefits for a
598 disability resulting from pregnancy than from abuse for using any other disability? A. What would you call malingering?

Q. Making or faking that he had pain and complained that is not well supported in terms of fact? A. Well, as I said before, the pregnancy normally, the normal pregnancy is a physiological process. Now, if one wants at that point to claim a deviation from physiology the deviations are of two kinds. One, that I have already said, is comparable to the male gaining a lot of weight normally bringing out diabetes or thyroid disease and so forth; so it would be no easier or more difficult to malinger in terms of phony diabetes or phony thyroid or phony heart disease in pregnancy than non-pregnancy. So one is left then with malingering on the basis of things that are recognizably due to the uterine contents. You know, intrauterine, and that is easily checked.

The uterus is an awfully superficial thing, and under the skin. Access to the mouth of the uterus or the cervix is extremely easy. So it would be very difficult to fake those conditions which are peculiar to the uterus and to the uterine contents. Separation of the placenta, I don't think you could fake.

Vaginal hemorrhaging is impossible to fake because all
599 you have to do is check and see if the blood is coming or not coming.

So I don't really see where you could – where it would be easier to hide things in an organ that lies right under the skin that you can look at through a speculum then it would be in terms of, you know, whether one's liver was acting up or whether one's ulcer was acting up. It would be much more difficult to pick up whether some-



body's uterus was acting up, because the uterus is a very accessible organ.

Q. Are the majority of pregnancies in the United States planned today? A. We are getting into statistical problems.

You mean are the majority of the 3,200,000 that we have per year, or are you including all conceptions?

Q. I was asking, what was the medical profession's view of the extent to which pregnancy today is a planned event? A. I need to know your definition. Are you talking about conception or delivery?

Q. I am talking about conception. A. Oh. I would say that the majority are, if not planned, then accepted. So that at the present time I think we run
600 about 3,200,000 or so births. We probably nationwide run about a million abortions. That would be an approximate figure.

And now if you now want to split off the 3,200,000 births among those which are unwanted or unplanned, I don't think I would have any figure on those 3,200,000. That is more easily done on the basis of conception. I would say the majority are still planned.

Q. Is there available to the public today any completely effective contraceptive? A. Total abstinence.

Q. Aside from total abstinence? A. None. No.

Q. How reliable is the pill? A. Well, the reliability is something that is usually described in terms called the "use-failure rate." That is to say, the number of conceptions occurring when it is used in the way the population uses it. And for the pill by and large one ascribes a one percent use-failure rate, meaning by one percent that one would have one pregnancy in 100 years of exposure to intercourse. That is the way it is defined.

Q. And the morning-after pill? A. Well, the morn-

ing-after pill for one thing is not universally released yet, so it wouldn't even be accessible.

601 In terms of how effective it is, we really haven't had a any good studies for the simple reason that nobody has looked at what stage in the menstrual cycle people have had intercourse, in the cases in which the morning-after pill is used. So I think the morning-after pill shouldn't even be considered as an accessible method to women at the present time.

Q. The IUD? A. Depending on the type, about the lowest failure rates have been about four per 100 exposure years.

In recent studies with some newer types it has gone up to seven percent.

Q. The diaphragm? A. Well, the lowest one in the literature that I know of I think was a two percent failure rate in a high-income group in Indianapolis. The highest failures rate I think ran something like 30 to 40 in a population in Puerto Rico.

Now, the problem with all of these things, all of these figures, and I wrote a chapter on it once, the problem

602 with it is that there is a lowest failure rate ever reported and there is a highest use-failure rate ever reported. And the highest use-failure rates on almost all methods, barrier methods, diaphragm, foams, condoms, and so forth, all sit between 30 and 40 per 100 years and all come in the lower socio-economic groups. Whereas the highest effectiveness rate, the lowest failure rate overwhelmingly sits in upper socio-economic brackets, and for the diaphragm, as I recall, this is two percent in this Indianapolis study.

Q. Are there medical reasons for not taking the pill?
A. Yes, indeed, there are.

Q. What are they? A. The presence of any tumor



of the breast or uterus, even benign. Hypertension, any form of heart disease, liver disease, renal disease, disease of the circulation and cardiovascular system.

Q. Are there medical reasons for not using the IUD?
A. Well, there you get on much more controversial ground. Some would say do not use it in those who have never either had a miscarriage or a child.

Some would find previous Caesarean section to be an absolute contraindication. Some even find a fixed retro-

603 verted uterus to be a contraindiction.

These are the kind of things for which respectively you exclude people from going into that group.

When you say what are the contraindications, perhaps the proof of the pudding is in the eating of it. And there are IUD's expelled in, you know, rather large numbers, about 20 percent of all IUD's are expelled. You might question whether that was the appropriate case in which to use it.

I don't know of many people who would take an expelled IUD and reinsert it more than one other time.

Q. Are there medical reasons for not advising an abortion? A. You mean for advising not to have an abortion or not advising?

Q. If a woman has used the contraceptive and it does not be successful and she wishes to not have a baby are there medical reasons for advising her not to have a voluntary abortion? A. It depends, first of all, on how you view abortion in the first case. So that is, you know, a question of whether you count a fetus into the human race or you don't

If you count it into the human race there is excellent reasons for not advising an abortion.

604 If you count it out of the human race and see no problem with it then what you are asking for is straight-

forward contraindication to abortion. And then I think one would steer away from most people with psychiatric problems

Contrary to general belief one prefers not to do an abortion in the severely psychiatrically disturbed.

One would stay away, I think, overwhelmingly in women who have congenital heart disease which will result in spontaneous miscarriage, that will occur anyway and in which it is a much gentler process to have it occur spontaneously than surgically.

So, yes, there are contraindications.

Q. If it was decided to have an abortion, are there reasons why an abortion might lead to other complications, abortion itself have any problem? A. Yes. Any medical procedure has certain problems. In part it would – the statistics would depend on when in pregnancy it was done. The figures for the second trimester of pregnancy, that is after the 13th week, being considerably worse than the figures prior to the 13th week, and in which there is beginning to be some considerable question as to whether the first pregnancy should be aborted at all. That is to say, there is be-

605 ginning to be some considerable evidence that to terminate a first pregnancy considerably increases the chances in subsequent pregnancies of premature delivery.

So then there would be a question of while it might be desired to interrupt this pregnancy a problem might arise in the next pregnancy by virtue of having done it in this pregnancy.

I don't know if that answers the question.

Q. Is there a segment of the medical profession which refuses to perform a demand abortion? A. Well, I think probably the entire medical profession would say that it does not do abortions on demand, but an awful



lot would say that we do them on request,

And there are a whole number of people, you know, they would still insist that they voluntarily acceded to do it.

Yes, there is a large section that would do none at all. Some would do it only for lifesaving circumstances or in cases of rape.

And then a third section that picks and chooses for a variety of personal reasons.

So it is certainly not a universal phenomena in the medical profession.

Q. Are there hospitals which refuse to allow the use

606 of their facilities for abortion procedures when it is a voluntary demand abortion? A. Well, to the best of my knowledge all Roman Catholic hospitals in the United States, one-third of the private hospitals that is, and a very large numbers of Baptist hospitals. I don't know what the figures would be on that.

And then a number of hospitals in which the community has decided that it will set guidelines for who shall and who shall not be aborted.

The community in this case represented by the Board of Trustees or in the case of city hospitals by whoever the city fathers of the community happen to be.

Q. Outside of urban areas are there substantial areas in which voluntary abortions as a practical matter is not available? A. Outside of urban areas? Oh, yes. Oh, yes.

Q. Could you indicate, are you aware at all of the extent to which there are areas which – in which a demand abortion is not available? A. No. I couldn't do it on a statistical basis. I know, you do recall, that recently, not just a question of abortion, but a question of sterilization arose in Billings, Montana, in which a

particular hospital was ordered to do a tubal ligation which it did not want to perform and, as I recall it,
607 the key issue in the particular case was that it was in a woman whose abdomen was opened for a Caesarean section and consequently the sterilization was ordered in those class of cases in which it accompanied Caesarian section, otherwise the woman would have had to have both the Caesarean and then later an elective sterilization. But I think it was also distinctly said by the judge in the case that he was not judging on all cases of sterilization, let alone on abortion.

So I would think in those distinct areas in which a Catholic or Baptist hospital might be the only hospital available in a community one would have an extremely difficult time having an abortion on request.

Q. Are you acquainted with the religious convictions of various well-established religions which preclude members from the use of contraception without a serious violation of religious beliefs? A. Yes, I am acquainted.

Q. Would you state the extent of your experience with this issue? A. Well, I was Deputy Secretary of the Pope's Commission that dealt with population and birth control.

That does not denote in any sense any agreement, it just denotes a sense of being well acquainted with the
608 subject.

Q. Do religious groups regard a voluntary abortion as prohibited by their religion?

THE COURT: If it will save time, I am a Catholic.

BY MS. WEYAND:

Q. There are other groups than Catholics, are there? A. Yes.



In terms of abortion a large faction of Baptists and Orthodox Jews.

Q. Does a person who becomes pregnant voluntarily bring on herself the disabilities that may befall a pregnant woman in any different respect than the manner in which a person who drinks alcohol voluntarily brings on himself a problem of alcoholism? A. Well, I don't think that anybody engages in intercourse in order to acquire the disability, and I don't think anybody drinks alcohol in order to acquire alcoholism.

I think that they have to be unfortunate side effects of the practice that one gets into.

Q. Would you comment on the voluntariness of a
609 skiing accident as compared with the voluntariness of the woes that may befall a woman who becomes pregnant? A. I don't think anybody goes skiing to break his leg, I presume.

Q. And would you compare the voluntariness of injuries in street fights when a man gets in a fight if he gets injured, is the voluntariness different than that of a – A. I think the predictability is greater, probably.

Q. What about the injuries in drunken driving? Are they the same type of voluntariness as is involved in – A. Being hit by it or doing the driving?

Q. Doing the driving. A. I don't think anybody drinks in order to cause car crashes.

Q. Given the fact that only women become pregnant, are there other categories of employees as to whom you can predict that they may have conditions peculiar to them which may be medically disabling at some time during their employment? A. Oh, yes, lots of them.

Q. What would you mention? A. Well, a classical one would be sickle cell anemia in Negroes.

610 Hemophilia would be an obvious one as something that women would transmit out but only men would get.

Well, then, are you talking about absolutely peculiar or statistically different?

Q. Statistically different. We have got the absolutely peculiar. A. At the present time coronary heart disease would be overwhelmingly a male disease rather than a female one.

Breast cancer would be overwhelmingly female rather than male.

Prostatitis would be overwhelmingly male rather than female.

So, yes, there are differences in incidences of disease, not just by sex, which is one genetic differentiator between human beings and a rather obvious one, race, which is a genetically easily picked up difference between human beings, and then for a set of other conditions like hemophilia and so forth you would have to go much more sophisticated type of selection of populations that would be at higher risk.

You could do it for non-genetic conditions, that is to say, in cases of predictability of diabetes, one could
611 screen on the basis of glucose tolerance tests, which would be two or three-hour procedures in which by administering a certain amount of glucose you could find out how well the person was capable of metabolizing the glucose and you would subsequently be able to foretell that this category of people with poor outcomes of tolerance tests would be prone to diabetes.

So this is in a sense dependent on the degree of screening that one does.

Q. I take it that only members of the Negro race can get sickle cell anemia, is that correct? A. Yes, the trait is carried, but one rarely sees it, along the



Mediterranean in some people, but for the United States it would be overwhelmingly, as a matter of fact, solely Negroes.

Q. So if an employer refused to pay sickness and accident benefits for sickle cell anemia he would be discriminating against the black race, would he not? A. Well, I don't want to use the word "discrimination." He would be dealing with an entity which could only apply to Negroes.

Q. And he would be dealing on a basis that was not scientifically different from other diseases that other
612 people got, is that right? A. That is correct. Whenever there is a genetic predisposition to any disease, be it sickle cell anemia, be it diabetes, hemophilia, Tay-Sachs disease or what have you, the only way one can pick it up is by a genetic screening. And of course screening by means of the eye – it can be done in screening Negroes from whites or women from men or, you know, that is the simplest genetic test that you can apply in a sense. Doesn't need very sophisticated equipment.

Q. Can you give any plausible scientific reason why health problems peculiar to women should be viewed differently for purposes of incidence in employment from the health problems peculiar to other categories of employees? A. I don't think I caught that question.

Q. Can you give any plausible scientific reason why the health problems peculiar to women or peculiar to blacks should be treated differently for purposes of incidents of employment than the health problems of other employees? A. Well, there is no medical reason for a difference.

I can't comment on why it is done because I am not an industrialist or anything like that.

Medically it makes no difference whether you bleed one way or bleed the other way, you have got to stop
613 the bleeding.

Q. Whether you are disabled by one condition or the other from a medical point of view.

What are the social consequences of a policy of depriving pregnant women of the opportunity, income-producing activity, without substituting financial compensation in the way of income maintenance during the period preceding childbirth? A. Well, I don't know. I can't give a blanket social consequence answer.

The pertinent obstetrical problem that one sees again and again is the correlation between low income or absence of income and low birth weight of children, prematurity, and all the problems that arise as a result of that, namely defective development of central nervous system. That would be medical.

That is medically a consequence.

I don't know whether you mean by that that it is socially a consequence. It then becomes socially a consequence in terms of the upkeep of facilities for cerebral palsy, for mental retardation, and this kind of thing.

Q. What is the relationship from a medical point of view in terms, say malnutrition is the lack of medical–
614 what – why does low economic condition bring about the results that you suggested? From a medical point of view what do you attribute it to? A. There is one obvious one that I think is not the main one, and that is the inability to pay for medical care. That would be one.

Then a consequence is not adequate and early enough a way of picking up those conditions for which one should in fact be hospitalized and undergo some therapy. That is not the only problem.

I think the second problem is very highly a nutritional



one, overwhelmingly a question of protein nutrition.

That is the one in which then the production of the small child or a smaller-than-normal child is an indicator of the state in which the woman is at that point nutritionally.

So that there are excellent data, people of very high socio-economic brackets suffering severe malnutrition as existed notably in Holland in the later autumn through the winter of the year 1944 when the diet in Holland suddenly plunged down severly because, you may remember, the American-British armies didn't manage to get across the line during that winter and Holland was isolated and it was very clearly evident in increased infant
615 mortality, in marked decrease in birth weight, in marked decrease in birth weight per given age, in marked increase in prematurity. Not because the housing was bad, because they were living in the same housing as they did before the troops arrived. The one variant was malnutrition.

In how far the animal data that exist are worth even comparing is unknown, but certainly in these cases severe loss of weight of newborn animals occurs, and excellent evidence exists they can't fight their way out of a maze or their way through a maze.

So in summary, the economic effect that I would think would be the most deleterious, inability to get medical care or equivalent medical care, and secondly, lack of income producing, lack of adequate nutrition as particularly expressed in proteins which are usually the first thing to go in budgetary difficulties, you know, meat prices and so forth.

Q. Thank you. I believe that is all the questions. Thank you very much.

THE COURT: Help the witness down. We will take

a luncheon recess.

616 (The witness stood aside.)

THE COURT: We will recess until 1:45.

(A recess was taken at 12:40 to reconvene at 1:45.)

(The witness resumed the stand.)

CROSS-EXAMINATION

BY MR. BATTLE:

Q. Doctor, I hope that all these years I haven't been laboring under the misimpression that birth is a blessed event. You agree that it is, isn't it, in most instances? A. In most instances, yes.

Q. Now, you recall, do you not, giving testimony before the New York State Division of Human Rights in the Stromberg-Carlson case? A. In Rochester?

Q. Yes. A. Yes

Q. Now, do you recll that in that case you testified that in applying your definition of disease, sickness, and illness, that pregnancy per se was none of those? A. Yes. That is correct. I seem to recall saying that I thought it would be strange if the human race survived on

617 the basis of a disease.

Q. Yes. A. That's right.

Q. So I may assume as we proceed that that remains your opinion, which is – A. Yes, indeed.

Q. – that pregnancy is not a disease? A. That is correct.

Q. Nor is it an illness, nor a sickness? A. Yes.

Well, illness and sickness, I think I have said throughout is something that the patient perceives, so, you know, a patient may still feel sick in the absence of a disease even –

Q. Yes. A. I think I said I tend to think of the words, "I feel ill" and "I feel sick," as being perceptions



of the person whereas a disease is something that is diagnosable by a physician as being abnormal.

THE COURT: You mean is subjective and one is objective?

THE WITNESS: That is precisely right. I would use the work, Your Honor, of disease as being objectively

618 noticeable and illness and sickness as subjectively a perception of the individual.

BY MR. BATTLE:

Q. Now, Doctor, I was curious about one other thing that you said. I had understood all along this to be the case, that in your experience most working women who were pregnant were able to work right up until the time of the delivery. Do you recall that? A. Yes, I said that I would so advise them unless I saw a contraindication which might be a girth contraindication in the case of climbing a telephone pole, or the appearence within this normal process of a sudden disability, bleeding, or some other such thing.

Q. I think you put it unless there were problems of fit, so to speak, problems of girth? A. That's right.

Q. Then you would recommend continuation of working up until labor or just before delivery? A. Yes.

May I put it perhaps in the way I can say it best which is I see no contraindication to working unless a medical contraindication other than simple, straightforward pregnancy suddenly appears.

Q. Well, I thought one of the impressive things that

619 you said was that you had personally observed this taking place among staff members of the hospital who were– A. That's right.

Q. – knowledgeable in this field and so forth? A. Right.

Q. And I assumed, and I want to be sure that this is correct, that you have also observed it fairly consistently in your own practice? A. Yes. You mean women continuing to work?

Q. Yes. A. Yes, indeed.

Q. Your patients who want to work and you encourage them to work up until – A. I might say my wife, who was a nurse, worked right through.

Q. Yes. Well, now, I want to be sure that we are straight on this.

Your wife would be in a category, female staff members of a hospital would be in that category, and patients that you see would be in that category? A. That's right.

Q. And would that be true right along until recent
620 dates to the present time, would this impression that you have still exist? A. Yes. My impression –

Q. That women that you have still exist? A. Yes. My impression –

Q. That women that you see – A. That women increasingly work in pregnancy that doctors increasingly allow women to work in pregnancy rather than saying by some arbitrary calendar date you must stop.

Q. Yes. Dealing with this group which you have defined, and that section of it which would include your patients, how many would you say, how many women would fall in the category of your patients since, say, the first of the year?

Just roughly. I certainly don't want to hold you to it. A. Since, say, the first of this year?

Q. Yes, sir. A. Oh, I though I stated that at the present time I see only complicated cases.

Q. Oh. A. I thought I made that clear very early in the testimony that my present obstetrical practice consists not of a primary practice but of other physicians



bringing me in as a consultant to complicated cases so that what I am seeing at the present time are the com-
621 plicated cases.

Q. So you would make a distinction between the patients that you now see – A. Oh, yes, and those –

Q. And the patients that you referred to in the category – A. Yes, I am afraid that is the fate of every professor, you increasingly get the abnormal people thrown at you.

Q. Dealing with the patients that you now see on a consultant basis -- A. Yes.

Q. – approximately how many have you seen since the first of the year? A. Let's see. Where are we now?

Q. This is July, mid-July. A. Oh, something like 40, I would think, in pregnancy.

Now, I do see non-pregnant contraception problems, abortion.

You mean of pregnant ones?

Q. Pregnant ones. A. No more than 40.

Q. 40.

622 Would it be less than that? A. Likely. I haven't counted it.

Q. I am not holding you to be exact. A. To give you a description of what happens, somebody walks in my office and says, "I have got a problem on the floor, will you, please, come and consult and advise on it?"

Q. Have you been required to deliver with respect to any of these patients with complications? A. No.

Usually – what usually happens is I decide whether we have to have a Caesarean and somebody else does it.

Q. You advise what is to be done and somebody else does it? A. Yes, sir.

Q. Doctor, going back to the classification question of

pregnancy against disease and illnesses. I think you also agreed with the questioning of your attorney in the Stromberg-Carlson case that pregnancy was a normal physiological function? A. That is correct.

Q. You have testified, as I understand it, that aside from the ten percent of miscarriages among pregnant
623 women there is an additional approximate ten percent of pregnant women who experience some type of abnormality, is that correct? A. Yes, sir.

Q. Now, let's deal with the miscarriages separately.

That ten per cent category, would I be correct in assuming that the vast majority of the miscarriages occur during the first three months, approximately? A. Yes, indeed.

Q. And would I be correct in assuming that of that group the vast majority do not require hospitalization, or would that be too broad a statement? A. We get into difficult statistics, but let me put it this way. If they require hospitalization it is by and large in and out the same day.

In the vast majority of people – well, I shouldn't say the vast majority because I may have to define vast.

Q. I think we know what you mean. A. Overwhelmingly women will miscarry at home, you have some cramping, a little bit of bleeding, go to the bathroom, say I passed some tissue, which is frequently the fetus, then
624 continue bleeding and they call their obstetrician and say something has happened and he, for the sake of convenience, or not, will say, "I will meet you on the delivery floor of the hospital." He arrives at the hospital, examines her. If he feels that any part of the placenta or afterbirth is still retained he is likely to give her some shots to try to make her expel it or take her into the emergency operating room and do a curettage. And it is sort of an in and out phenomenon within one day, by and large, particularly a very early miscarriage.



Q. Do you have an approximate percentage of miscarriages that occur during the first three months of pregnancy? We have talked about it being the vast majority. I want to see if you can pin it more precisely. A. Certainly. I would say certainly – well, certainly 90 per cent of spontaneous miscarriages which occur occur prior to the thirteenth week.

Q. What you previously described is the typical way that this group of miscarriages occur and the typical type of treatment, in and out of the hospital? A. That's right. That's right.

Q. Now, let's go now to the remaining ten per cent of pregnant women who suffer statistically some type of abnormality.

625 Now, am I correct in assuming that in that ten per cent statistic there are those women who suffer abnormalities that do not result in disability or hospitalization? A. Yes, there are some of those.

Q. I think you so testified in the Stromberg-Carlson case? A. Yes, indeed.

Q. Does anyone know what part of the ten per cent fall in the category of so being so slight in terms of abnormalities as not to require hospitalization or resulting disability? A. I think at the time Mr. Battle, that I said that I didn't know. I could, you know, I am sure I could spend a week on it and figure it out from various books.

I think I also said that those figures were more likely to be contained in general health insurance sources than among the obstetrical profession. That is to say, the average time of hospitalization per woman would be more likely known by Blue Cross and Blue Shield than they would be by a professional obstetrician.

Q. Would you have a feel for it that you could ex-

press in approximate terms?

If you don't –

626 A. If I did it would be a guess and wouldn't be academically worth anything.

Q. All right, sir.

Well, now, of the ten per cent, which includes these that we have discussed at least to some extent, and I suppose you would agree it would be to a significant extent at least, these that don't require hospitalization or no disability, do you have trouble with my word "significant"? A. No. I just sit here frustrated thinking that one run-through of the IBM cards on a service could tell us because it seems to me what you are asking here is what fraction of all patients that first enter into an obstetrical service in the out-patient department are actually hospitalized prior to being hospitalized for labor and delivery.

Q. That is the reverse of my question. A. Yes.

Of that I would have to say that the 14 years that I spent at John Hopkins would not give a good run of the cards because it is overwhelmingly a hospital that wouldn't even deliver normally pregnant women and selects for pathology.

So I am trying to think of where would one find the statistics of what fraction of women walking into a pre-

627 natal clinic in the United States gets hospitalized.

I have a wild guess and say five per cent maybe or, you know, that may be high.

Q. Well, recognizing it as a wild guess, your feel is that of the ten per cent that we are talking about there are about five per cent that don't need to be hospitalized? A. Yes, I would think so.

Q. On the disabilities, and I am holding you to that only as a guesstimate. A. Let met give you an



example maybe: Placenta previa, the placenta lying under the baby and causing bleeding, is the kind of a situation in which a woman bleeds, calls her obstetrician who may bring her to the delivery room, do an examination under sterile conditions, and will say if the cervix, the mouth of the uterus, is closed, you can go home again.

I would not count that as a hospitalization. That is rather like having a visit to a doctor's office, in a sense.

So if one talks about true hospitalization, yes, I guess probably less than five percent, but I can't – I say that with due circumspection.

628. Q. I think I fully understand that.

I just wanted your experience as a matter of how you felt about it more than how you would pin it down. A. Right.

Q. Now, Doctor, of those who – oh, we will put it this way. I think that in this group also you made the division between the women in a pregnant state who suffer from an increase or bringing out, I think as you stated, of a pre-existing disease, that is group one, basically, I think; and the other group are those who suffered from some disease because of the presence of the fetus and placenta, is that correct? A. Yes, sir.

Q. Now, directing your attention to the first group, that concerned pre-existing disease, is it your medical opinion that in those cases the thing that arouses the pre-existing disease to a point where it becomes troublesome, is the gaining of weight rapidly? A. Yes. Yes. I think it is overwhelmingly the rapid gain of weight, very much like you see an occasional male who suddenly becomes obese and demonstrates his diabetes or his heart disease.

Now, I should perhaps add one other classification. That might be, and I don't know whether it would oper-

629 ate directly or indirectly, but let me get back to that, it would be the condition, the condition of an increased flooding with hormones that occurs in pregnancy.

Now, when I say direct versus indirect, that may be that the rapid weight gain operates through a hormone influence. But certainly that same bringing out of a disease that is underlying, we see in patients who go on the pill occasionally.

That is to say occasionally you see patients who go on the pill in order to prevent pregnancy who while they are on the pill develop problems of weight gain, problems of thyroid, problems of high blood pressure, and so forth.

Those are then considered to be contra-indictions to the use of the pill or side effects of the use of the pill.

So I wouldn't want to say that that weight gain cannot act indirectly through hormones as hormones may act.

Q. I see. All right. A. It may, as a matter of fact, be that in the rapid weight gain of the male the hormone may be the problem, you know, that triggers off the other phenomena.

Q. Yes, sir.

Well, now, may we go back to the category of aggra-
630 vation or bringing out of the pre-existing diseases? And I want to just ask you something about the ones that – diseases that typically appear in this category.

And I think you mentioned on direct examination diabetes? A. Yes.

Q. I think you mentioned hypertension and thyroid? A. Yes.

Q. Heart disease? A. Yes.

Q. Would you also include kidney disease, disease of the colon? A. I haven't ever been able to ascribe



colon disease to weight gain unless it be enormous constipation.

I think by and large diseases of the gastro-intestinal tract in as far as they exist in pregnancy have been ascrimed more to the harmone effect than to the weight gain effect.

Diseases of the kidney I have not been able to ascribe that way either.

If there is a disease of the kidney it is usually secondary to a cardiovascular problem.

Q. The reason I asked the question, the doctor who testified yesterday for the plaintiff included those two
631 diseases and I was curious to know whether or not–

A. Due to weight gain?

Q. No. A. As being brought out by pregnancy?

Q. Yes, sir.

As being typical of the class that could be brought out by pregnancy. A. Yes. I might quibble with him on the renal disease. I don't know what renal diseases he refers to. I suppose what he means is actually urinary tract infections which are more frequent in pregnancy.

I think by and large the urinary tract infections have been ascribed much more to the hormones of pregnancy, particularly to progesterone.

Q. If I may interrupt, he said kidney disease without qualification. I don't want to burden it. A. There are certainly a class of kidney diseases which are brought out in pregnancies. The common one of which would be urinary tract infection.

Q. Yes. A. In which, to the best of my knowledge, rapid weight gain in males is associated with it as well, but I wouldn't want to say it was the rapid weight gain that did it.

632 Q. Let me make sure I understand what you mean.

By the rapid weight gain with respect to these pre-existing diseases, and let me put it this way:

Assume that a woman in her eighth month of pregnancy develops from a pre-existing condition, a weight trouble, put it that way, diabetic state that requires medical attention, insulin or a changing of diet, and in the course of the pregnancy she gained 22 pounds.

Would it be your conclusion that if the same woman at the same time in her lifetime with the same pre-existing condition had simply gained 22 pounds in an eight-month period her diabetic condition would have been the same? A. Yes.

Q. Now, Doctor, I don't want to pin you to specifics again, but here also I think it is important that we have your professional guesstimate on this.

Of all these conditions that you think of as pre-existing diseases which can be aggravated or brought out through pregnancy that fall in the ten percent which includes both the disabling and the non-disabling, what percentage would these diseases occupy within that ten per cent, roughly? A. You mean the diseases and conversely asked that are not due to the contents of the uterus?

633 Q. Yes. A. I wish I could say, I wish I could give you an answer.

Let me start off and say –

Q. Here again I won't claim to hold you precisely to it. A. Well, ectopic pregnancy would account for one in 200. So that would be half a per cent there.

Placenta previs would account for two per cent nearly, so that would be.

Hydatidiform mole, carcinoma, we are talking about decimal points it is so rare.

So the remaining one, that one would think of would



of would be separation of the placenta, that is to say, an abruption of the placenta.

And there overwhelmingly it would occur in people who already had hypertension prior to pregnancy.

And I would give as a rough figure five per cent as due to the uterus, to the contents of the uterus, malimplantation, bleeding, that kind of thing, and five per cent to –

Q. To the other? A. – to the other.

634 Q. Yes. All right. A. But I hope that this does not get sent in and presented to my students lest they go back to the textbooks and say –

Q. It won't from me, I will assure you.

I am sure it won't be. I know what you mean by giving it that qualification.

So that by your process you divided about equally between the two categories? A. I would think so.

Q. Approximately.

Now, moving then to the five per cent that arises because of the presence of the fetus placenta, would it be fair to say that at least half of those do not produce a disability? A. Do not produce a disability for which hospitalization is necessary.

Q. All right. I am willing for you to add that. A. You would still to the overwhelming majority of these women say, "Stay home in bed."

Q. Yes.

Let's include your additional qualification. A. Yes.

Q. Would you agree that that at least a half of those

635 do not produce disability requiring hospitalization?

A. I would think so.

Q. So we might be down to two and a half per cent or less of the placenta and fetus-presented cause? A. Requiring hospitalization.

Q. Yes, sir.

Now, then, Doctor, going to another part of your testimony dealing with the typical period of time that women are advised to stay home out of work following delivery. I think you said that the standard medical routine is six weeks and that you as a specialist in the field considered that from a medical point of view maybe half that much time was required in the normal case? A. I tried to state that the reason for saying come back and see me in six weeks is a convenience rule for the physician because if after six weeks things are still not back in place he would tend to do something about it.

That would not at all mean that he is thereby predicting that things won't be back in place in two weeks. It is for his convenience so that he doesn't have to see people again and again and again until things are back in place.

It is much easier to say come back and see me in six weeks, and if by six weeks things are still not in order
636 then we will start talking turkey.

Q. Yes.

Now, if because of this prevalent view or standard mythology within the profession persists and it happens that working women are paid disability benefits for six weeks following delivery, you would agree that they are paid for a longer period of time than is medically required in the usual case, would you not? A. Oh, yes. I would say a flat rule that says six weeks of benefits must be paid postpartum is not based in the individual case on a medical requirement.

Q. Yes, sir.

Would you also agree if a physician universally prescribes the six weeks layoff to all of his patients those who are in the work force are paid the benefits longer than



medically required? A. That's right. Many of them are.

Q. Yes, sir. A. Yes, sir.

Q. You were asked several questions about the Caesarean operation and just in passing I would like to touch on one thing that seems to me to be important. I think you were asked – well, is the incision similar to an appen-
637 dectomy, and I think you said except for location it is. But when you compare Caesarean and a successful Caesarean with a successful appendectomy, isn't the great and important difference that in the appendectomy you remove a diseased organ or a malfunctioning organ whereas in the Caesarean operation you give birth to a living being? Wouldn't you say that is the big difference? A. Well, yes and no. That is a very tough one. First of all, an awful lot of appendectomies are removed that are never diseased. So let's start with that.

Whenever we are in somebody's abdomen we remove the appendix whether they are diseased or not. Just simply so you –

Q. It is a useless organ? A. So you won't have to have a second operation later. You might as well get twice the goods for your money, I suppose.

The second thing that begs the question, which is when you say when you enter the uterus for a Caesarean section you are not doing it because of a disease.

Q. What is that? A. That is not factually true.

638 Q. You are doing it to deliver – you are doing it in order to be as certain as possible of delivering a living being, are you not? A. Yes, indeed, but that does not say that the uterus is not diseased, let me put it this way.

If a woman is in labor for 36 hours and goes into what we call disfunctional labor and is unable to produce a

normal-size fetus through a birth passage then the question becomes can you now say that you have a normal uterus.

Q. Yes, sir. A. You see, that gets us into that whole thing of when do you pronounce something diseased. All I can say is she is awfully disabled.

Q. Would you agree with my hpothesis that I have given as it may be applicable to the normal situation or to the typical situation comparing appendicitis operation with a Caesarean? A. Well, I don't know what your comparison is, that the appendix is diseased and the uterus is not? I would say statistically in the United States more appendices are removed while not diseased than Caesarean sections are done with the uterus normal.

THE COURT: Would you like to try for gallstones?

MR. BATTLE: I thought that would be an easy one

639 to answer, but apparently it isn't.

THE WITNESS: Do you understand what my problem is?

BY MR. BATTLE:

Q. Yes, sir, I do understand. A. We do a routine appendectomy. We do not do routine Caesarean sections.

Q. I understand.

Now, Doctor, you have in front of you the various exhibits in the form of those pink books, do you not?

A. Yes.

Q. Tables prepared by HEW, I believe.

And you were asked certain questions about Plaintiffs' Exhibit 97, which gave certain statistics on death rates of infants with respects to parents' income.

I don't seem to have a copy in front of me, but my memory tells me that table 17 was used on page 25.

A. That's right.

Q. Do you recall giving testimony about table 17 on page 25? A. Yes, indeed.



Q. Now, am I correct in interpreting that table to show with respect to birth and death colums applicable

640 to parents' income of less than 3,000, between 5,000 and over 5,000 would you agree with me that from the point of view of statistical information these figures are valueless in considering, one if one wanted to consider, death rates of infants born to women who work in industry where minimum annual salaries were in excess of $5,000. There is no column for that figure, is there, to compare upward? A. You mean five to six to seven to eight and so forth?

Q. Yes. A. No, it is not on this table, no.

Q. Now, in your entire practice, Doctor, have you ever experienced a case where death to the newborn resulted solely because the mother was not receiving disability benefits from her employer? A. Oh, that would be a question that would be totally impossible to answer.

Q. Well, do you recall any case? A. I beg your pardon.

Q. Do you recall any case where such occurred?

A. No one could.

Q. No one could? A. No one could, no.

641 You know, you would have to have a whole series of cases in which in one – one on day somebody's pay was cut off and the next day a dead baby dopped out. If things were that simple the old problem of illegal abortion would be solved. Women would forego their pay for three days and drop the baby out.

Q. Can you think of any case, and I am not being facetious, I think it is important, can you tell of any case or have you experienced any case where the mother suffered disabling complications during delivery or during pregnancy solely because she was not provided disability benefits by her employer? A. I couldn't begin to

answer that. That is why I said this morning I think in my testimony that these are data which are based on, you know, large-scale numbers. The simplest answer I could possibly give you is tht if the death rate, the infant death rate in this table is 22 per thousand live births with an income of less than 3,000, then quite obviously 978 per thousand did not have a dead baby.

Q. Obviously. A. So you know, at that point you cannot expect me as a physician to say that when somebody cut off the money the baby drops out dead. This is not the way it can be done.

642 Q. Now, just in passing, again you were asked certain questions about an opportunity to malinger during pregnancy as compared with an opportunity to malinger during other disorders, and you said that the complications of pregnancy could be observed, and I think you must have been referring to those complications that fall in the category of being related to the presence of the fetus or placenta? A. That's right. I said that the other complications, namely those that are akin to diseases in males, like diabetes and so forth and so on, fall into the same category. And what one sees that is peculiar to pregnancy is the uterine contents, and those are very close to the surface, readily accessible.

Q. What crossed my mind was this situation of a woman, say, during the seventh month of pregnancy coming to you as her attending physician and saying, "Doctor, I am suffering terrible backache, I just can't go to work," or, "I am awfully dizzy every morning and don't feel like working." There is no objective test that you can apply to that situation, is there? A. Oh, no. No more so than in a man.

Q. And it can be honest or it can be faked?
A. That is correct, yes, sir.



643 Q. Now, I was interested in one or two things that you said about contraception, and I think I will only deal with, for the sake of brevity, with the pill. And I

And I think before you gave your description of the use-failure rate of the pill, and its possible side effects, you said that there was no completely reliable method of contraception.

Now when you made that statement did you have in mind that for a method of contraception to be completely reliable, as you used the term, it had to reduce the chances of pregnancy to exactly zero? A. That is correct. That was the way I was using it this morning.

Q. Yes. I thought you were? A. Yes, sir.

Q. Well, now, don't you agree that statistics show that proper use of the pill, and I use it in its broad sense, reduces the chances of pregnancy to practically zero? A. Yes. I thought I gave the figure of one pregnancy per 100 exposure years this morning.

Q. You did give that, but I was mystified by that and didn't understand it. Maybe you can explain it.

You say one pregnancy in 100 exposure years.
A. Yes. It would mean –

644 Q. What do you mean by 100 exposure years? Does that assume constant intercourse? A. The way it could be calculated would be the following.

If you had 100 women, fertile –

Q. I beg your pardon? A. Fertile.

Q. Yes. A. Exposed to intercourse for one year, yes, exposed to intercourse for one year, one of them would become pregnant.

Q. Well, statistically, and I may be missing the point, that would seem to be far less than one percent as the term is usually used. A. Well, you see, you can't use one percent will become pregnant because it depends on

how many of them have intercourse, and that is why we use the term per 100 exposure years.

You could put it per one year of exposure, also, if you prefer to put it that way, just shift the decimal point. But the standard way of doing it in the contraceptive literature is to describe it per 100 years of exposure to intercourse.

645 Q. So that assumes 100 women having normal intercourse for a year? A. That is correct. And one becoming pregnant.

Q. And one would become pregnant? A. That's right.

Q. Now, would you agree that, excuse me, did you want to say someting? A. Yes.

Q. I think I am straight. A. You understand that that is – that that is as long as they are on the pill?

Q. Oh, yes. Yes, I understand. A. Okay. Because you know after –

Q. That is what I meant by proper use of the pill.
A. Yes. But the different problems, which is in the United States, people don't stay on the pill for 100 years, obviously, you know. Half come off within three years.

Q. Yes. All right.

Now, you also gave some testimony on certain side effects, use of the pill? A. Yes, sir.

Q. The doctor who was on the stand yesterday for
646 the plaintiff had this to say, and I want to see if you agree with it, that statistically the use of the pill produced fewer complications than did pregnancies.

Would you agree with this, or am I being too general?
A. No, I don't agree with it at all.

Q. You do not? A. No. I think that is a statement that is generally made.



Q. You do agree? A. I recognize the statement as universally made. The universal statement is use of the pill is safer than childbirth.

Q. Before you go into your explanation, which I will permit, I mean I will ask you the question so you can do it, but to stop right there, you do agree that among experts in the field there is this opinion?
A. Yes. Depends on – now, you asked me to define the word "expert," and that becomes very difficult.

Q. I will withdraw that. A. Let me –

Q. Within the field of obstetrics the opinion prevails?
647 A. Yes, I think if you were going to go to a standard obstetrician he would say it is safer on the pill than to have childbirth.

Q. Oh, yes.

Now, you disagree? A. I disagree with it for the following reasons, which is that before you are allowed to go on the pill you have to have a physical examination. If you have cancer, liver disease, high blood pressure, heart disease, a whole slew of diseases, you are not allowed to play on the pill team, see?

Q. Yes. A. So you have to play on the non-pill team,

Q. Yes. A. So only well people play on the pill team. The sickies play on the other team. And then you wind up with statistics that show the wellies do better than the sickies.

Q. I see. A. But the answer is inbuilt into the way we put people on the pill. So while it is true that those who take the pill do better than those who have childbirth, the statement is true, it gives a false impression because we have pre-screened them and allowed only the healthy ones to play on the pill team.

Q. I see. A. So the statement is both true and meaningless, if I can put it that way.

Q. But you do agree that with all due regard for the validity of your opinion it represents something of a minority point of view within the profession? A. No, I don't think so.

I agree with the statement that those who are on the pill will have fewer deaths than those who have childbirth. All I am saying is that it is a meaningless question because we have screened them so that the healthy ones go on the pill and the sick ones do not go on the pill.

You know, it is like saying –

Q. Do you have a percentage figure of those who get screened out during this examination as being unable to take the pill for medical reasons? It is a very small percentage, isn't it? A. No, I don't think that there are any statistics that I know of except to say that with almost anything you can die from you are not allowed to go on the pill. And as a consequence they do infinitely better.

Q. And there are a lot of those same things which would indicate that the woman should not get pregnant either? A. Oh, that is correct. That is correct.

649 That is where the problem arises. Precisely.

MR. BATTLE: May I have just a moment?

THE COURT: Yes, sir.

Any further examination?

MR. BATTLE: Yes. Thank you, sir.

MS. WEYAND: Yes.

MR. BATTLE: I will be very brief.

THE COURT: Let Mr. Battle finish.

BY MR. BATTLE:

Q. Dr. Hellegers, among the group of women who should not take the pill for medical reasons that may



lead to dire consequences, I assume that that is a very small group percentage-wise? A. People that cannot go on the pill?

Q. Yes. A. Well, I don't know if the data to start off with – I do not have the fact that in the United States so-called halflife of the pill, and I will explain what I mean by the halflife of the pill is like two and a half years.

Q. I have a very simple question that has nothing to do with that, is that people that cannot take it or tolerate it for medical reasons fall into a small percentage. If you

650 don't know the answer I can't insist. A. I can give the answer in a sense which is that 50 percent, which is why one talks about a halflife, 50 percent of American women who start on the pill come off it in a three-year period because for some reason or other they perceive they cannot tolerate it.

Now, I would not want to say that all of that is objectively and medically they cannot tolerate it, but the combination between objective and subjective intolerance makes for the fact that in the United States half the women who start on the pill come off it within three years.

Q. Do those who change their minds and want to plan a family play in the group that come off? A. No.

Q. Are you sure? A. I think so.

Q. Are you sure? A. Well, since I am under oath my perception is that they are not.

Q. But you are not sure? A. I am not absolutely sure, no. But it is, let me tell you why I think I am sure, which is that the average American family size is two children at the present time. Average fertility span is about 20 years at least. And you continue to produce halflives of three years by two pregnancies and you still

come off the pill. Do you follow me?

651 Q. Well, it doesn't matter. A. If you rotated half the Americans off every three years it would be extremely difficult to see that was in terms of planned pregnancies.

Q. Well, I am really concerned with those who fell in the category that you mentioned the first time as being those that it is dangerous for them to take?

A. Yes, you mean never starting into it?

Q. Yes. A. Where the doctor wouldn't even let them in?

Q. Yes. You mentioned an examination which would show? A. Yes.

Q. There are a group who should not ever start it?

A. No. I don't have the figure on that.

Q. But isn't it true that of that group, there are accepted methods of contraception that can be used by most of the people who fall within the group that cannot pass the examination to be? A Overwhelmingly the next most acceptable would be the IUD in terms of effectiveness in birth preventing, and that would be, you would fall into a failure rate of two per 100 exposure years as failure rate on some IUD and up to seven.

652 Q. And then there are other acceptable methods?

A. Yes, diaphragms.

Q. Now, one further question, Doctor, and I will conclude.

Is it not true that in England and certain other European countries the practice of delivering by lay personnel and midwives is prevalent or much more prevalent than in the United States? A. Yes.

Now, I have difficulties with your describing midwives as lay people.



Q. I didn't mean to describe them as lay people. I said lay people and midwives. A. Yes. I don't know about layman. I would imagine delivery in Britain, Holland, and Western Europe by laymen is less than it is in the United States.

Q. How about midwives? A. By midwives much more common.

Q. Much more common? A. Yes, indeed.

Q. And the statistics of freedom from complications, death and so forth are just as favorable there as they are

653 here, are they not? A. Oh, yes. That is built into it. That is to say if any complications arises the midwives are forced to release the patient to a physician.

Q. Yes. A. That's right.

Q. And would she normally perform the delivery at home, the midwife? A. Well, less and less so.

Q. I am speaking now of Europe, Western Europe and England? A. Yes, less and less, though it is increasingly hospitalized, I think the last bastion of home delivery is my own place, I came from Holland, and that has changed from 70 percent home to 70 percent hospital in the past 15 years.

Q. When it was 70 percent home? A. Yes.

Q. The figures on complications and death and so forth compared favorably with comparable figures in this country, did they not? A. I would say their figures have always been better than in this country.

Q. That's right. A. In general that is correct.

654 Q. Thank you, sir.

That is all.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MS. WEYAND:

Q. Would you suggest why the figures were better than the United States during the period? A. Oh, yes, for a very simple reason. If you develop a complication at home in Holland they can get you to a hospital faster than, you know, in the United States.

As a matter of fact I used to live across the border in Belgium and deliver babies in Holland. And it took me less time, and my patient less time, to get from my home in Holland to the hospital in – my home in Belgium to the hospital and to the delivery room than it took me to get from the intern quarters to the delivery room at Johns Hopkins. I mean there is a hospital – there is a hospital every three miles and no city congestion.

But I wouldn't like to try it in Rotterdam or Central Rotterdam. That is where one no longer delivers at home. So it is a question of access to emergency facilities which are infinitely better in Europe than they are here.

655 Q. So the statistics and your experience, the medical experience shows that child labor and childbirth is not such a normal phenomena that a woman can go through it by herself unaided by medical assistance, is that correct?

A. Are you including midwives as medical assistance?

Q. Yes. A. Because I do.

Q. Yes. A. Yes, that is correct.

Q. Would you describe the type of training mid-wives have, what kind of medical assistance? A. Yes. It varies from country to country. In Holland it is a question of having, first of all, nursing degrees and then going to one of the Royal Schools of Midwifery and having two to three years further training which is –



that is more obstetrical training than 90 percent of the American medical profession.

I mean barring specialists, obstetricians and gynecologists. If you are delivered by a midwife in Holland you have much better an obstetrician than if you are delivered by a regular M.D., American surgeon.

Q. Are you acquainted with the roving hospitals in England that are available to the midwife on wheels when she is delivering? Have you been acquainted with that?

656 A. No. That is past my day. I left there in '52.

Q. I believe Dr. Donovan and the record in the Stromberg-Carlson case referred to the roving hospitals were available to midwives a few blocks away or right there when they were delivering if they were delivered at home instead of the hospital?

MR. BATTLE: I move that that testimony be stricken, Your Honor.

THE COURT: I think it was just gratuitous.

MS. WEYAND: He is going to be here, I understand, and I will ask. He is going to be their chief witness.

Certainly did not mean it to be testimony. We will waive it so being relied on unless it is put in in another fashion, of course.

MS. WEYAND:

Q. Would you describe the changes and effects on a woman's body of labor and childbirth which require medical assistance? A. Well, in itself labor does not require medical assistance. It requires medical presence in case something goes wrong. So that one can intervene.

657 For the rest there is really nothing that the doctor does in labor except hold hands and rub backs and encourage, you know.

In terms of delivery the main function is one to guide the head of the baby over the perineum or if necessary

do an episiotomy, which is sort of an American practice.

And then in general to prevent the baby from being expelled too fast is the major function. And that would be the normal function in childbirth.

Now, once again, there is a presence required for the possibility that certain things happen, such as rupturing of the membranes with the cord coming out and then the baby occluding the cord and the baby dying as a result of that. So overwhelmingly I would say that the medical presence is there as a preventer of complications rather than as a primary requirement without which the human race would die out. And quite obviously in Africa there is a population explosion and I am sure obstetricians are not there.

Q. Is a woman disabled throughout labor from performing any other type, any usual normal functions, housework or – A. Short of knitting, yes.

658 Q. The force of nature takes over and she is completely disabled? A. At some point in labor certainly.

Q. And through a substantial part of labor, dependent on – A. Yes. Oh, yes.

Q. Yes, she needs someone, must have someone with her to be safe? A. Yes, from the preventive point of view I think women ought to have obstetricians there from the beginning of pregnancy, but this is always a sort of preventive basis as picker-upper, and since that incidence of complication gets larger as one sits actually in the birth process that requires that medical aid be there all the time.

Q. To what extent in the United States are episiotomies performed in deliveries? A. Oh, in the United States it is, I would say, routine, or close to routine.



Q. So that it is routine for a woman to have a surgical incision and require stitches incident of childbirth?
A. In the United States.

Q. And that surgical incision in the United States is only made by medically licensed physicians, is that correct?

659 A. Yes, except for the few, except for the few nurse midwives that do exist in the United States.

Q. They are quite rare in the United States?
A. Very rare. Only some hospitals.

Q. And the type of stitches and surgery is the type of a medical incision that is used in other surgery, is that correct? A. Well, yes, it opens skin, bleeding occurs, and the wounds must be resutured. Of course it is in another location.

Q. Cuts through muscle tissue, the point of it is to cut through muscle tissue? A. Yes.

Q. And the muscle must be repaired so the muscle can function? A. Yes.

Q. And if a woman has either a tear or episiotomy without adequate repair she has a problem the rest of her life, does she not? May have? A. May have.

Q. Yes. What type of problem does she have if

660 there is not proper repair? A. Well, you know, the most severe form might be formation of a fissure which would be an opening or tract between the vagina and the perineum, and a lesser – a relaxation of perineum, possibly loss of sphincter control in the rectum, or worse – well, not worse but alternatively, uneven healing of the two edges of the wound so that one is constantly sitting on a knob with the pain and discomfort of constantly sitting on a knob.

Q. Could you say that the woman would be in a diseased condition if the repair was not made of an episiotomy or a tear of muscle during childbirth?

A. Well, it would be diagnosable and she would have complaints so she would feel ill, sick, discomfort or anything like that and a physician examining her would be able to find the cause of her discomfort. So to that extent it is a disease.

Q. Women feel sick and discomfort throughout labor and childbirth, do they not? A. Yes, indeed, they do.

Q. Uniformly? A. Again you asked me for 100 percent figures which I don't like. I have seen women deliver a baby that didn't know they were pregnant, so I don't like the 100 percent figure, but, yes.

661 Q. With rare exceptions? A. As a class, yes.

Q. Not what you would regard as sick during the period or point of view of being in discomfort, needing – attention during the time of labor and childbirth?

A. That's right.

Q. If a company requires a woman's physician to certify as soon as the woman is able to return to work because the company does not feel it should be obliged to pay sickness and accident benefits when she is not disabled, do you have any reason to think that physicians would not honestly comply with the certificate?

A. Oh, I would say one or two good lawsuits would straighten that out.

Q. What kind of lawsuits would the physician be subject to in your opinion? A. I presume for falsifying records or something of that order.

THE COURT: It would be a violation of the ethics of the profession, wouldn't it, Doctor?

THE WITNESS: Yes, Judge, but I have known people to behave unethically whereas a good lawsuit –

THE COURT: Doesn't the medical profession do something about it?



662 THE WITNESS: It might well do. I was simply suggesting I am more impressed by the force of the pocketbook than I am frequently by the force of ethics.

BY MS. WEYAND:

Q. Does the medical profession use policies of convenience in examining patients after a certain period to determine their recovery conditions in areas besides childbirth? A. You know, I have difficulty answering that because I haven't even been in a branch of medicine outside of obstetrics.

Q. They don't have rules of thumb on how soon you come back for work after an appendectomy? A. No, I would suppose the possible equivalent might be in the orthopedic and fracture area in which time periods are set that say something like you have to have this cast on eight weeks when it probably doesn't mean that after seven weeks it wouldn't be possible to have the cast off, but the standard practice would be to say eight weeks. And if by then it isn't healed we have got to do something.

Q. Are the tables which we dealt with respecting infant mortality and infant weight having to do with women and families earning more than $5,000 a year relevant when a woman loses her income by going on leave without pay? A. Well, these tables are family income, so it would depend completely on whether her husband had income or not, I presume.

663

Q. So if she would be dependent on her wages, or the family was, and she lost them then it would be relevant even though the wages when she was working might be over the amounts that Mr. Battle suggested?

A. I don't think I got the thrust of your question.

Q. He suggested to you that the tables were not relevant because they dealt with women – with families who had incomes lower than the ones that General

Electric employees have, and he suggested therefore they would not be relevant. I was going to suggest if the woman ceased having her income the fact that when she worked she had a $5,000 a year didn't mean that when she lost the income, the facts there shown, about the facts of immaturity and weight would not be applicable, these are relevant because she so happens – when she loses income the fact she had a $5,000 income before she lost it doesn't mean she would keep it from being relevant when she lost it? A. I think the three problems are mixed up.

664 One, is these tables go to $5,000. These tables do not show whether at 6,000, 7,000, and 8,000 the figures might still look better than at 5,000. That is number one.

There are no data on that in these tables.

The second thing is these tables deal with family income, so if women were to lose their income they might still not fall within the purview of these tables, depending on whether their fathers, their mothers, husbands, whatever provided the income.

If the sole source of income was what they got and they then fell within these particular tables then presumably they would be subject to this general risk.

Q. And the tables would be indicative of the effect of loss of income? A. Right.

Q. In respect to it? A. If they were to go from $7,000 to zero they would fall into the group of less than $3,000 in this table.

Q. And the experience in Holland showed this effect could have sudden – A. Well, I am sorry, in Holland the story was not an income story.

Q. It was –



A. People had their income but couldn't buy any food
665 with the income. That is why I was saying that probably income acts through nutrition.

Q. These were women who had had nutrition up until – A. That's right.

Q. Cutting off and immediately the cutting off of nutrition showed up immediately? A. That's right.

Q. In the infant mortality? A. And in infant weight.

Q. So it shows since you have had a $5,000 income for maybe five years of working with GE it doesn't mean that when you were cut off without pay that it didn't have an effect on the outcome in the child?

A. Particularly if it would affect nutrition is what I am trying to bring out in the story, not a deprivation of income. It was a deprivation of food regardless of income.

I am simply suggesting that income might act through food deprivation if there was no income and consequently not first-rate protein.

Q. You assumed that was one of the major elements reflected in the tables we referred to? A. Yes. I think I testified this morning that the two main things that would worry me is the quality of nutrition, particu-
666 larly protein, and secondly accessibility to medical care in the absence of income.

Q. Are there certain neurological and internal medical complaints which would be easier to malinger with respect to than pregnancy? A. I wouldn't say easier because, you see, everything that a man can malinger on a woman can malinger on except such things as prostatitis, testicular diseases, and organs specific to men.

By the same token women can only malinger differentially than man by that which is peculiar to women.

All I was trying to say is that malingering on the basis

of pregnancy as it affects the uterus and its contents is extremely easily picked up because you have access to the organ in that it is so superficial and you have access to find out if there is any bleeding. I don't quite know what it is one would malinger about, but that doesn't mean that a woman couldn't malinger as well on double vision as a man could.

Q. I believe that is all. A. All right.

THE COURT: Any recross?

MR. BATTLE: Very briefly.

667 RECROSS EXAMINATION

BY MR. BATTLE:

Q. Doctor, I want to ask you just one or two questions about this question of unethical conduct.

You don't mean to infer that if a doctor specializing in obstetrics invariably certified that his patients should stay out of work for six weeks after delivery that that doctor is engaging in any unethical conduct, do you? A. Oh, no. I am not suggesting that.

Q. I didn't think you were. A. I am not suggesting that at the present time, I would say that it would become unethical to do so if somebody else stood to lose by it. Then I think it would become unethical.

Q. But this opinion which you do not share, that you call a myth, prevails in the profession today, does it not, that it is better for the woman or customarily recommends that the woman stay out of work six months, in doing that they do not engage in any unethical conduct as a man? A. No. No.

Q. This is all. A. For one reason. I mean for one thing, I don't think you could ever engage in unethi-

668 cal conduct if you were – well, that is saying a little bit far – but it would not be unethical to give your best



medical opinion on a certain thing if that is what you were asked to do.

Q. Yes, sir.

Of course bear in mind my example relates to a doctor who today – A. Yes, sir.

Q. – in recognition of what you call the myth – A. Yes.

Q. – invariably prescribes, that is in all instances – A. Yes, sir.

Q. – that the patient stay out of work for at least six weeks? A. Mr. Battle –

Q. Nothing unethical about that, is there? A. I never met such a physician.

Q. I didn't think you did, but the record may have indicated a question that was asked you that you might have thought it was unethical and I wanted to straighten it out. A. Perhaps I gave an answer that isn't clearly understood.

669 It is my opinion that if a woman came in to a physician three weeks after childbirth and said if I can plead this case in court tomorrow, and I am a lawyer, I stand to get a fee of $50,000, and said to her obstetrician, "Do you think it is all right for me to go and plead the case in court tomorrow because I stand to get a $50,000 fee," I assure you that the vast majority of American obstetricians would say, "You go right ahead and plead that case, and I hope you win it." That does not at all mean that such a person might not have the six weeks as part of the mythology routine. And I was trying to say whether he would change his routine would depend on what the financial and pocketbook issues might become to him, the patient, and society as a whole. That is all.

MR. BATTLE: Thank you.

THE COURT: All right.

670

# BRIEF RESUME

## PAUL H. JACKSON

Born: Cleveland, Ohio, October 12, 1923.

Schools: Public Schools - Cleveland, Ohio (Chesterfield Elementary, Patrick Henry Jr. High, Glenville High, graduated 1941).

- University of Chicago, B.S. 1948, M.S. 1949 - Major in Mathematics
- Rennselaer Polytechnic Institute, Management Development 1962 (6 mos.)

Military Service: Drafted January, 1943, U.S. Army; served in European Theater as Staff Sergeant, Army Comm. Service (Signal Corps) November, 1943 - January, 1946. Honorable discharge January, 1946.

Employment History: Joined Aetna Life Insurance Co., June, 1949 as Actuarial Trainee. Fellow, Society of Actuaries (by exam) 1952. Appointed Assistant Actuary 1953, Associate Actuary 1957, Assistant Vice-President 1964. Responsible for all aspects of Group Paid-up and Permanent Life Insurance, Long Term Disability, Group Accident Plans, Large Amount Pool.

Joined The Wyatt Company in November, 1964. Client responsibilities include: General Motors Hourly-Rate and Salaried Employes Retirement Plans, both U.S. and Canada; IBM Retirement Plan; Penn Central Plan for Supplemental Pensions; IBEW Members' Pension Plan; National Electrical Contractors Association



Multi-Employer Pension Plan; Riggs National Bank; Landmark Communications. Special assignments - Report to House Armed Services Committee; Southern Railroad Study of Railroad Retirement System; Various Group Insurance Studies (National Dairy, Carlisle & Jacquelin, Landmark Communications, etc.); Civil Service Commission-Blue Cross Study; Dept. of Defense-Review of Industrial Pension System.

Family: Married to Martha Virginia Garrett of Des Moines, Iowa, June 24, 1949. Three children.

Residence: 8012 Greentree Road, Bethesda, Maryland.

Clubs: Hartford Golf Club, 1957-64; Congressional Country Club, 1967 to date; Cosmos Club, 1971 to date.

Actuarial Memberships: Fellow, Society of Actuaries; Fellow, Conference of Actuaries in Public Practice; Member, American Academy of Actuaries; Fellow, Canadian Institute of Actuaries; Member, International Congress of Actuaries (and ASTIN); Associate, Institute of Actuaries (Great Britain); Member, International Association of Consulting Actuaries.

Publications: See attached.

Personal References: Henry S. Beers, Chairman, North American Reassurance James A. Hamilton, Retired Chairman, The Wyatt Company Thomas A. Murphy, Vice Chairman, General Motors Corporation Preston Martin, Chairman, Federal Home Loan Bank Board Albert L. Williams, Chairman of the Finance Committee, IBM Joseph D. Keenan, International Secretary, IBEW

If there is no further examination help the Doctor down down, please.

You may be excused, sir. Thank you.

(The witness stood aside.)

THE COURT: Call your next witness, please.

MS. WEYAND: That completes the plaintiffs' presentation of the plaintiffs' case.

THE COURT: All right.

* * * * *

671 THE COURT: All right, gentlemen, plaintiff rested.

Any motions?

If not, please, call your first witness.

MR. KAMMHOLZ: I call Mr. Jackson, please.

*PAUL H. JACKSON* was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. KAMMHOLZ:

Q. Will you, please, state your name and residence address? A. Paul H. Jackson, 8012 Greentree Road, Bethesda, Maryland.

Q. And what is your profession, Mr. Jackson?

A. I am an actuary.

Q. What is an actuary? A. An actuary is a mathematician who makes use of statistical tables and probabilities relating to mortality and morbidity in the financial management of a risk enterprise such as a life insurance company or pension fund.

Q. Are you a Fellow in the Society of Actuaries?

672 A. Yes.



Q. What are the requirements for admission to the Society of Actuaries? A. There are a series of written examinations, ten in number at this point, required for membership.

Q. And when were you admitted to the Society?

A. 1952.

Q. With what firm are you persently associated?

A. The Wyatt Company.

Q. What is the nature of the Wyatt Company's business? A. Wyatt Company is a firm of employee benefit consultants and consulting actuaries.

Q. And where are its offices located? A. Well, I am employed in the Washington office at 1629 K Street, N.W.

Q. Does the company have other locations?

A. 14 or 15 other offices, yes, around the country in major cities.

New York, Chicago, Philadelphia, Dallas, Los Angeles, San Francisco and so on.

Q. All right.

Would you have the reporter mark this as Defendant's

673 Exhibit for Identification?

THE COURT: While the reporter is doing that, does anybody wish to cross-examine Mr. Jackson on his qualifications? If not, I declare him to be an expert in the field.

MR. KAMMHOLZ: Thank you, Your Honor.

We then offer in evidence – perhaps I should have the witness look at it.

Does the four-page document which I have handed you, Mr. Jackson, represent your curriculum vitae?

THE WITNESS: Yes, sir.

MR. KAMMHOLZ: Is it up to date and accurate?

THE WITNESS: Yes

MR. KAMMHOLZ: We then offer in evidence Defendant's Exhibit 52 for Identification.

THE COURT: All right.

If there is no objection it may be filed.

BY MR. KAMMHOLZ:

Q. In your professional capacity, Mr. Jackson, have you worked in the area of disability insurance coverage? A. Yes, I have.

Q. To what extent? A. In 1956 when I was employed at the Aetna Life Insurance Company, I was assigned the responsibility for developing the long-term disability insurance product which they were producing. And I was responsible for that until 1964 when I left to join the Wyatt Company.

Since then I have worked with disability coverages with
674 various clients and with some insurance companies.

Q. What elements are required for the satisfactory operation of an insurance program? A. Well, generally you need a defined event, a clear-cut hazard that is capricious in its impact beyond the control of the insured and one which involves a financial loss so that there would be an insurable interest.

Q. Will you give us an example, please? A. Life insurance is perhaps the best example.

Q. Does disability insurance also meet the requirements which you have enumerated for the satisfactory operation of a program? A. It meets them, but to a far lesser degree.

Q. And why is that so? A. Well, the death is a clear-cut event while disability is not so much a physical state of health but one which must be defined, such as restricted activity, or home or bed confinement, partial or total, permanent or temporary, and the like.



675 Q. So is it fair to say that disability commencement and termination are rather susceptible to exact and absolute determination? A. They are much vaguer in their certainty, the termination of most disabilities, the termination by recovery would be one of those vague areas.

Q. From the insurance point of view what problems, if any, are presented as a result of these considerations? A. Well, it means that the coverage is subject to claim abuse and malingering, which have been pointed out in actuary literature.

Q. What do you mean by claim abuse? A. Well, the application for disability benefits when the individual is not actually disabled, backache, feigned disability, mental illness, migraine headaches, various other contentions.

Q. You referred to malingering. Would you tell us more about it? A. Malingering is the term the insurers use to describe a situation where an individual continues in a disability and collecting benefits longer than would be justified by purely medical matters and requirements.

Q. Would this cover a longer claim in the first place
676 as well as at the end? A. In a situation such as pregnancy it could, yes.

Q. Do you have an opinion as to which of these two problems leads to the greatest abuse of disability income insurance? A. Both are extremely important. Malingering has been pointed out in the literature as being perhaps more important than the claim abuse, but it would depend on the period of time, I am sure.

Q. What, if any, effect, Mr. Jackson, have these problems had on the writing of individual disability income insurance? A. Well, disability insurance because of the vagueness of the definition of disability was origi-

nally instituted as an accident coverage. Sickness coverage was added, but the benefits are usually sharply limited, both in amount and duration. Waiting periods are used to exclude short-term sicknesses and the like.

Q. In your professional experience have you ever seen an individual, an individual policy covering pregnancy? A. I never have. Disability income, no.

Q. Are the problems to which you alluded, I will ask you now, have they had an effect on the writing of group disability income insurance? A. Yes. The
677 group insurers have had to concern themselves with the impact on benefit payments resulting from claim abuse, from malingering.

Q. For what periods of time do group policies covering sickness and accident, for what periods of time are they ordinarily written? A. Well, a group policy would typically be limited in benefit period to 13 weeks or 26 weeks with a few providing benefits for as long as 52 weeks.

Q. Percentage-wise do you know what current coverage in effect in this country breaks into in terms of 13 and 26 and 52? A. Roughly 45 percent of the plans provide 13 weeks of benefit, 50 percent 26 weeks and five percent would provide 52 weeks of coverage.

Q. Do such group policies ever include coverage for maternity? A. Yes, but the maternity coverage is usually expressed as a separate, a different form of benefit, sort of an add-on severance pay provision, separate and apart from the sickness and accident.

Q. Can you tell us approximately what percent of group contracts currently in effect to provide such add-on maternity benefits?



678 A. I have estimated that approximately 40 percent of of the existing short-term sickness and accident policies provide the maternity benefit.

Q. And when you refer to short-term sickness, sickness and accident benefit policies, are you referring to the 13, 26, 52 category – Yes.

Q. – that you described earlier? A. In distinction to the long-term disability policies which might pay for life or to age 65.

Q. Under the group disability insurance plan that includes maternity coverage, are maternity claims treated any differently than claims that are based on sickness? A. Yes. Almost always the benefit period has been limited to six weeks and it is customary to pay the full six-weeks benefit at the time of departure rather than applying a waiting period or even making sure that the individual is out as long as six weeks.

There are many situations where the benefit might be paid and as a result of an accident or miscarriage or something the woman might come back to work two or three weeks later and the full six-weeks benefit would have been
679 paid.

Q. And is it because of this method of payment that you earlier referred to this kind of maternity coverage as a form of severance pay? Yes. It is usually considered to be such and benefit design.

Q. On the basis of your professional experience, Mr. Jackson, would there be any difficulty in designing a disability income insurance plan which includes maternity benefits on the same basis as sickness or accident benefits? A. There would be a great deal of difficulty,

679 and certainly the existence of that coverage would have to be taken into account in designing the various controls that might be required to keep the benefit payments in line and to hold down claim abuse and malingering to a reasonable level.

Q. Let me return to the matter of control in a little bit; and let me first ask you, when did insurance companies begin to write disability insurance coverage in this country? A. Well, the first policies covering accident only benefits were issued in the 1870's and '80's. It was in the early 1900's when sickness was first included.

680 And the vast – the period of time in which there was the greatest activity was started around 1920, in the 1920's.

Q. And can you tell us about the experience of insurance companies since then on the subject of disability insurance coverage? A. Well, the insurance companies underwrote a great deal of coverage during the 1920's. It was quite a popular form. It appeared to meet a social need. It was easily sold.

In the 1930's with the Depression the financial experience was catastrophic. The insurance industry lost hundreds of millions of dollars on the coverage. Several companies were pushed into technical insolvency as a result of the bad experience with that coverage, and the major insurance companies withdrew from the commercial accident and health field for a number of years. They would not write, in other words, on any basis.

Q. What was the reason for the experience in the '30's that you have told us about? A. The chief reason for the bad experience in the 1930's was that the country was in a terrible depression and jobs were not available. And frequently an insurance policy was the only source of



potential income, so that those who were not yet dis-

681 abled would claim disability in an effort to obtain income, and those who were already disabled would not recover because they had no work to return to and would have otherwise lost their sole means of support.

Q. Are you saying that such coverage was abused? A. Very definitely, yes. It is a difficult coverage to control.

Q. Are there any disciplines or controls that can be imposed to cut down or eliminate abuses of disability income insurance? A. Well, on a group basis where the plan is employer sponsored, there are certain controls. For one thing, there are what I might call supervisor controls where individuals who abuse sickness and accident coverage and as a result have a work attendance record that is spotty may be passed up for promotion. They may receive merit pay increases that are smaller than they otherwise might be.

The employee might, in considering the furtherance of his career, usually wants to get back to work because he is competing with others.

There is a second type of control unrelated to the employer controls, namely the design of the coverage whereby the use of a waiting period which serves as a deduct-

682 ible, the use of a benefit, a limit on the benefit period which cuts off claims that perhaps should not be paid, but are already on the rolls and can't be cut off, are terminated.

Use of a limitation on the amount of benefits such as 60 per cent of pay or 65 per cent of pay so that the claimant while receiving benefit would have a financial incentive to return to full-time employment and get full pay for working.

Q. In the case of pregnancy coverage is supervisor control an effective discipline?

MS. WEYAND: I object unless there is a basis. I object unless there is a basis of experience laid for shoing that this has –

THE COURT: I think the objection may be well taken. You best lay a foundation, if you can, please, sir.

MR. KAMMHOLZ: Yes, sir.

BY MR. KAMMHOLZ:

Q. Mr. Jackson, what is the insurance industry's experience with regard to female employees returning to work after childbirth? A. Well, approximately half of the female employees who have children do not return to work.

683 MS. WEYAND: Excuse me, have what?

THE COURT: Half.

MS. WEYAND: Half.

THE WITNESS: Half.

BY MR. KAMMHOLZ:

Q. How does this figure compare with return rate to work for employees who recover from other disabilities? A. Well, the short-term disabilities, that are primarily the ones that are covered by the sickness and accident benefit, 100 per cent of those who recover return to work.

There are cases where recovery doesn't occur or where death takes place, but certainly the percentage would be of the total number going on disability who eventually return to the same job with the same company would be well up in the 90 per cent range.

Q. Now, with regard to the length of claims, are there any features unique to pregnancy claims that an actuary would consider as affecting cost? A. Well, in the first place the loss of income is going to occur at a date well off in the future so that final planning is possible.



Whereas with the typical sickness and accident claim the loss has occurred and the income has stopped before
684 the individual is aware of it.

This opens the possibility of claim abuse because there is a period of time in which the person can consider the various possibilities.

Secondly, the pregnancy claims, unlike most of the other sickness and accident claims, are not wholly beyond the control of the insured, which is one of the requirements for the successful operation of an insurance program.

There is also a difference in the duration of the claims. The median duration of a sickness and accident claim is two weeks whereas for a typical maternity absence about 13 weeks, or looked at from another standpoint, the end of a six-weeks period approximately 80 per cent of the sickness and accident claims have returned to work where only 10 percent of the maternity leaves would have returned.

So that it is a situation where you have a date of claim commencement that is off in the future, coupled with the fact that the average length of time is much greater.

Q. In the case of maternity, is there an incentive present to put off return to work which does not exist in other cases? A. Well, there is the baby, which is at home, the mother would presumably be interested in looking after its welfare, and frequently the infant in the first few weeks, certainly, after childbirth requires night feedings and the mother may be tired as a result of being up all night.

685

There are some clear-cut differences between that situation and the case of an individual who is sick and gets up out of his sick bed one day feeling good and then goes in to work.

685 Q. What effect, if any, does this child care consideration have on the limiting of benefits, of benefits control you mentioned? A. Well, generally speaking it would mean that the return to work is going to be delayed considerably.

The return may never take place, in fact. And the controls that the employer might have over the situation are thereby weakened. His control only operates as to his own employees.

A return to work to someone else would not enable him to apply any of these supervisory controls.

THE COURT: Excuse me, Mr. Kammholz, let me get something straight.

Mr. Jackson, is your testimony now based on actual findings, actual statistics? You speak of the staying home. Now, is that – is there an actuarial fact or is that just
686 your opinion as a man? And I happen to agree with it, I suspect it is a good incentive to stay home.

THE WITNESS: Well, that is my opinion both as a man and as an actuary.

I was asked to estimate – I was asked to appraise the general situation and to see whether there was something that might be different about that type of absence as opposed to other absences. There are some qualitative differences as well as quantitative differences which an actuary would have to take into account in attempting to set a level of premium as being supportive of benefits under a program of that sort.

THE COURT: Let me ask one more. You mentioned malingering. Do you have any actuarial figures on that, any statistics?

THE WITNESS: On malingering in connection with pregnancy?



THE COURT: Yes.

THE WITNESS: Claims?

There is very little actuarial experience by reason of the fact that the group business has been restricted, the maternity claims, to a six-weeks period and disability income coverage under individual policies is normally not paid when the absence is due to pregnancy.

687 Now, there are many statistics that give evidence to the general fact of malingering as it affects disability income insurance in particular as a specific form of coverage.

THE COURT: But not in reference to pregnancy?

THE WITNESS: No. As a general problem that has been found to be – to have an important bearing on the operation of disability income.

THE COURT: I would hate to think that expectant mothers were more dishonest than the average person.

THE WITNESS: I don't think malingering is really a case of dishonesty. It is asmatter of judgment as much as anything.

The pure and simple fact in the insurance business, actuaries merely record these things without drawing moral judgments on it, the existence of a benefit affects the basic statistics that you start with.

THE COURT: I know, but if you get something you are not entitled to, and you know you are not entitled to it, that is dishonest, isn't it?

THE WITNESS: If you were certain that you were not entitled to it.

THE COURT: All right.

688 Go ahead, Mr. Kammholz.

BY MR. KAMMHOLZ:

Q. In these answers, Mr. Jackson, you had, in child care, the child care aspect of a mother's absence after delivery. A. That is part of it. I think there is a

natural tendency on the part of mothers to want to remain in the home with the child as opposed to working. There is probably a similar problem prior to delivery that the mother wants to make certain that nothing goes wrong, and one way of making certain is to take it easy, so to speak. So that the problem really exists at both ends of the scale and unfortunately there are no professional yardsticks that you could draw on from a medical profession that say here is one that starts and here is one when it stops. It is a gray area and a matter of judgment.

Q. You have referred several times to the cost of adding maternity benefits to disability income protection plans.

Have you made any calculations of those costs? A. Yes.

And these costs that I developed were based on the average mix of plans in the country. The 45 per cent, 13-week plans and 50 per cent 26-week plans and so on.

689 The cost per unit of benefit for a female employee is approximately 170 per cent of the male employee cost where there are no maternity benefits provided.

Where the six-week maternity benefit is provided the female, the cost per unit of benefit for a female employee would run about 210 per cent of the male employee costs.

And where full maternity coverage, if full maternity coverage were provided, it is my estimate that the cost would run from 300 to 330 per cent of the male employee costs for a unit of benefit.

Q. I hand you now a copy of Defendant's Exhibit 42 and ask you whether you prepared these cost estimates? A. Yes. This is my estimate of the cost for extending maternity benefits to various programs countrywide.

Q. Would you explain, please, the general makeup of the exhibit? A. Well, first of all I estimated the cost



of adding such benefits to the short-term disability program, such as the one which General Electric has, and then as a secondary side effect the cost of requiring something of a similar nature under sick leave programs, and finally the problematical cost, the cost of disability claims

690 that may not really be true disability claims under the long-term disability plans and possible disability pension arrangements that would result from the provision of benefit for a good many of these cases to the end of the benefit period under one program when the second program would then pick up benefits.

Did you want me to describe the basis for the estimate or the numbers?

Q. Pages one and two set out the basis, do they not? A. Pages one and two set forth the sources of the figures. The estimates and the various statistics that were used, yes.

Q. And item – A. As well as the multiplication that was used to get the answers.

Q. The total estimated annual cost which you show at D on page two is $1,353,000,000? A. Yes.

Q. And is this predicated on plans currently in existence in this country? A. The present set of programs that we have, and the present benefit levels, yes.

Q. This figure does not include projections for additional

691 coverage? A. No. Nor does it make any allowance for for the possibility that the existence of benefit might actually lead to an increase in the birth rate. Essentially it is an estimate of the annual cost of the current time on the basis of the best available evidence.

Q. On the basis of your experience as an actuary do you have an opinion as to the consequences in the insurance industry if these added costs were required, period? A. Well, there are several. In private industry, obviously faced with added costs, there would be

cutbacks in other areas eventually to make up the difference so that there would be a diversion, perhaps, of funds that might have been channeled into other forms of benefit into this form of benefit.

From the standpoint of private insurers, if maternity benefits were in effect added onto sickness and accident programs with the requirement that they be treated under exactly the same rules then the controls, the deductibles, waiting periods, the benefit periods, benefit levels and so on would have to be reviewed.

Probably this would result, it would be my guess that it would result in a trend toward 13-week plans rather
692 than 26-week plans.

It would create certain other problems that have already been discussed in the literature that normally circulates among consultants, such as the problem of pre-existing – the pre-existing condition of pregnancy. It might lead to an increased use of pre-existing conditions exclusions under sickness and accident plans, or it might lead to the complete exclusion of employees from coverage during the first nine months of employment in order to avoid the situation where perhaps a woman who was pregnant applied for a job and secured it merely in order to obtain sickness and accident benefits at a known future date.

Q. Turning now to another area, a foreign area, does Wyatt Company have a foreign division? A. We have an International Benefit Consulting Department, yes.

Q. Are you also familiar with the document entitled "Social Security Programs Throughout the World, 1971," which I hold in my hand and which is in evidence here as Plaintiffs' 85. A. Yes.

Q. What is the fact as to the extent of maternity coverage under foreign programs as contrasted with sickness and accident programs generally?



693 A. Well, under foreign social security programs, I can't find my sheet at the moment, but as I recall my review of that material where maternity benefits are provided, with two exceptions, the countries of Nigeria and Lebanon, the maternity benefits are designed with different limits, different benefit amounts, and so on than would apply to the sickness and accident benefit. It would be customary, for example, to provide sickness benefits for a 26 or 52-week period whereas maternity benefits in the social security programs will probably be restricted to 12 weeks or 10 weeks or four weeks before and six weeks after delivery or eight weeks before and eight weeks after. They have been designed, the limitations on benefits have been designed, separately.

Q. And we are here talking only about social security programs of other governments? A. Yes.

In some cases the programs, the social security programs, are programs that require employers to provide benefits, but generally the programs are provided through the government's auspices.

MR. KAMMHOLZ: May I have a moment, Your Honor?

THE COURT: Yes.

MR. KAMMHOLZ: I have no further questions at this time.

694 THE COURT: Any cross-examination?

Thank you, sir.

CROSS EXAMINATION

BY MS. WEYAND:

Q. Are you aware that some companies are today writing sickness and accident policies that cover maternity leave disabilities from pregnancy? A. On a group basis?

Q. Yes, on a group basis. A. Yes.

Q. Do you know which companies are writing those today? A. Most of the major companies will now offer the coverage.

Q. For equally as great benefits for the same duration from a disability as arising from pregnancy? A. Yes.

Q. Are any companies not writing it as far as you know? A. There are a number of companies which are still studying the matter.

I think the insurance industry view of the matter is primarily one of accommodating a legal requirement and increasing premium income at the same time.

695 On a group basis it is not – it is not impossible to make an estimate, certainly an outside limit, that every female employee will have a baby and collect 26 weeks of benefit in a given year, so there is obviously an outside limitation, and insurance company premium rates can be set at a reasonable level for the coverage.

But I believe the companies that are offering the coverage are quite concerned about the controls that will be necessary. But whether they are claim investigations or other forms of control, I couldn't say.

Q. Do you have any actual knowledge of any company that has actually had any trouble with claim control under one of these policies? A. One of the policies that provides under the maternity benefits?

Q. On the same basis as provided for other disability? A. I don't think the experience is available as yet.



Q. So anything you would say is based on conjecture? A. No, it is based on the experience of the insurance

696 companies with the disability income coverage in general as being –

Q. But not on disability coverage related to absence for pregnancy? A. Disability income coverage generally.

Q. But not income – not an experience based on any insurance covering sickness and accident for absences from pregnancy? A. No, those results are not available.

Q. So there is nothing you have said except as based on analogies or opinion, is that correct, in any of your figures? A. They are based on the experience of the insurance industry in the 1930's and in the recession in Detroit in 1958 that indicate that disability income insurance is a tricky coverage to write on a profitable basis.

Q. There was no pregnancy equation involved in that experience at all, was there? A. No. That was without the pregnancy that it was a tricky coverage to write. It has become trickier, I guess.

Q. Now, in your figures, what age limit did you assign to childbearing?

697 A. I assigned no age limit.

Q. You assumed all women could have children when you made – gave these figures? A. No.

I assumed the birth rates, the age-specific birth rates for the general population would still have a birth rate of one per thousand at the central age 45 to 49.

Q. Did you consider the age of the women in the labor force when you made this calculation? A. Yes, I did.

Q. What age did you consider to be childbearing age for women? A. I applied the birth rates per thousand of population to the total female population to obtain annual births on an age-specific basis.

Q. Then you assumed – A. I then –

Q. Excuse me. A. Then ratioed at each one of the central ages with the number of annual births, ratioed the births down in proportion to the percentage of female workers, husband present, from labor statistics to female, husbands present, in the total population to obtain an estimated annual number of births among female workers

698 at each one of the seven age groups.

Q. Do you know what age group is childbearing in our society today? A. I don't believe I understand your question, childbearing.

Q. By certain women of certain age bear children much less frequently than women of another age, is that not correct? A. That is true, yes, the birth rates per thousand are much higher in the 20's than they are in the 30's or 40's. They reach a peak, in fact, at the 20 to 24 age group.

Q. Do you know by age group what percentage of women of the various age groups are in the labor force today in the companies which you were making this calculation as to? A. I made the calculation on the basis of figures available from the Bureau of Labor Statistics for the total –

Q. Population? A. – working population.

Q. You don't know whether the companies that have – that you considered here, have primarily female employees or primarily male employees or primarily women over

699 30? A. Which companies that I considered? I took the entire population.

Q. I understand that your Exhibit 46 had to do – 42, had to do with the companies which today carry sickness and accident policies, is that correct? A. Yes.

Q. And do you know how many employees these companies have who are male and how many are female and



how many of the females are in the childbearing age? A. There are statistics, statistical sample is available in the Society of Actuaries experience figures which shows the exposure.

Q. But you don't happen to know? A. The exposure, the development here, was to develop the births among female workers and to take the simple statistics of 40 per cent coverage under sickness and accident plans and apply it to the births among female workers.

Q. Normally if you were going to figure the cost for a company you would figure the male-female mix, would you not? A. The male-female?

Q. Mix. You would also figure the age? Suppose you

700 were going to figure the cost for General Electric. You would look at what percentage, if you were going to add a coverage for disability arising from pregnancy, you would want to know what proportion male and female they had, would you not? A. I would want to know what proportion female they had.

Q. Well, you do it on a group basis, don't you? A. Yes, but our assumption would be the births that would arise from the female component.

Q. Yes, but when you are writing insurance policies you use the mix to determine the risk, don't you, and the larger the number of males the cheaper the policy would be for that group? A. It would be done that way, or more customarily would be to apply a separate rate assessment for each female worker and each male and add the individual rates up into one grand total and either divide by the number of employees or divide the total dollars by 12 and have the company pay that premium.

Q. Isn't it usual to spread the risk by taking as large a group with an many risks as possible? Why do you –

you are figuring risk per male and risk per female the way you are doing it and not averaging the risk on the two groups?

701 A. The risk is averaged on the two groups, but the risk is developed, the premium is estimated and developed separately because the total claims emerging on a group with a higher female content will be greater than the total claims emerging on a group of the same number of people and same benefit in force with a higher male content.

Q. Do you know the industries that today have sickness and accident policies in respect to whether they are industries that are predominantly male or predominantly female? Do you know which industries have sickness and accident policies? A. It is roughly a cross section of the total. I believe a percentage female in the insurance industry statistics is very close on the per cent of them in the work population as a whole.

Q. Are there sickness and accident policies in the textile industry? A. I don't work for an insurance company at this point and I don't have a client in the textile industry, so I am not familiar with that.

Q. Taking the American work force as a whole, do you know the three largest groups that have female in them according to census, the textiles, retail stores, teachers?

Now, those three groups are not included in sickness

702 and accident policies, are they?

Each group that – close to a million workers in them. A. Well, I was dealing with 90 million, 94 million workers of whom 32 million were female workers.

Q. Are the 90 million that have sickness and accident coverage? A. No. 40 per cent of them. 32 million workers have sickness and accident coverage under –

Q. Do you know if those 32 million that happen to have sickness and accident in industries that do not have



a large female component – A. I am not familiar with the industry components of that 32 million employee figure, but it would be available.

Q. You don't know the male-female component of the 32 million at all? A. No. But it is in the general order of magnitude of 30 to 40 per cent.

Q. Basing that only on the fact that is what occurs in labor as a whole, is that correct? A. No, that is based on the general percentages that the Health Insurance Institute makes available.

Q. The Health Insurance?

703 A. And it is also the typical sort of case when someone goes to develop cost figures for a so-called typical sickness and accident case, the usual assumption is 30 to 40 per cent female.

Q. If you go to a given company you look to see whether it is 10 per cent or 90 per cent, don't you?

A. This is right.

Q. Yes.

And the insurance figures have to do with hospital and medical expenses, do they not, on the group you were saying – what groups were you referring to? A. The Health Insurance Institute figures.

Q. And those are – deal with hospitalization and medical expenses, do they not? A. As well as disability income.

Q. But their hospital and sickness figures would be figures of groups larger than those that have merely sickness and accident, would they not? A. I don't believe that is true, no, I think they are –

Q. You think companies have sickness and accident, most of them have also hospital and medical, the two go together? A. I think a good many more companies have medical expense coverage than sickness and accident

704 coverage.

Q. Do you know how many more? A. By number?

Q. Percentage-wise? A. Well, an educated guess would be that perhaps 80 or 85 per cent of the employees would be covered under medical expense programs versus 40 per cent under sickness and accident plans.

Q. So you would have twice as many covered?

A. And it is not customary to provide sickness and accident coverage for larger salaried groups where it has been customary instead to have salary-continuation practices.

And in certain union contracts there are sick leave provisions which are aimed at the same general area as opposed to the insured sickness and accident program. This is the reason for the smaller coverage.

Q. The health coverage for hospital and medical expense quite uniformly covers wives of employees as well as employees, does it not, and dependents? A. I don't remember the statistics, but I believe that most plans provide for maternity benefits.

Q. They cover maternity benefits.

Now, the maternity benefits –

705 A. Well, they treat the hospital costs and doctor bills under the same program that provides for the hospital surgical benefits for other ailments.

Q. I believe you suggested that insurance did not normally want to cover events which are capricious events within the control of the insured? A. No. What I said was the insurance, the insurance program, is best aimed at capricious events which are not within the control of the insured.

Q. That is correct.

And you suggested that a sickness and accident benefit for pregnancy was not – was a capricious event – was not a capricious event within the control of the insured?

A. I would conclude that some of them certainly – that



that particular ailment can be distinguished, say, from the accident disabilities and some of the others, in the sense that it is not as capricious and more within the control of the insured.

I would not say it was 100 per cent within the control of the insured or that the others were not, but by and large it is on the one end of the scale where most of the others are on the other, towards the other end of the scale.

706 Q. Now, the hospital and doctor bills for maternity, for delivery, differs in no respect as far as an event within the control of the insured, does it, whether it is sickness and accident for pregnancy or whether it is hospital and medical expenses for pregnancy? A. You are talking now about the hospital surgical medical programs and not about the disability income?

Q. I said they are equally subject – A. Yes.

Q. – to the control of the insured. There is no difference whether the pregnancy is covered by hospital and medical expenses or whether it is covered by sickness and accident benefits as to whether it is a controlled event, is it? A. The benefits are sometimes different, though.

Q. But as far as the event being one which the insured may or may not have control over, there is absolutely no difference from an insurance point of view, is there, as to whether you are paying sickness and accident? A. That's right.

Q. Did you make any estimate as to what the cost would be for GE based on the fact that a – more than a majority of its workers, the age of its women – more than

707 half of them return to work? Did you base – did you work out figures based on GE's figures, and that some 40 per cent of its female employees are beyond the childbearing age? A. I made an estimate that the cost for the annual cost for GE currently for this sort of a –

Q. Based on figures, did you – A. Based on the GE birth rate and employment level and so on.

Q. And age? A. And benefit level.

Q. Did you go into the age of the women? A. I went into the actual rate of birth over the last three or four years.

Q. You did not consider the age of the women? A. Well, the rate of the births considers the age of the women, so indirectly it is in there.

Q. That has been going down, has it not, because the age is becoming older and the number of births is going down, did you consider that? A. If you take the -- you are referring now to the last three-year period?

Q. Yes. A. The last three-years there has been a decline, yes.

708 Q. And that reflects a national – is consistent with the national decline in birth rate, is it not? A. No. I believe the national birth rate has declined to a minimum in 1968, rose again up to 71 and has declined again.

Q. GE has had – A. And the one thing that can be said for birth rates is that the future, whatever they are today, they will either go up or down. They will not stay the same. And these things run in long-term cycles and my estimates were based on the latest figures available.

Q. Now, your figures here are all based on assumptions as to the number of weeks at which they would be off, that would be the number of weeks which 20 weeks is what is the smallest amount, is that right, that you – A. No, 13 weeks.

Q. 13. That would be 13 weeks of sickness and accident benefits? A. Yes.

Q. You assumed all the women would be off that long, did you? A. I assumed 13 weeks of benefit, yes.



Q. You assumed 100 per cent of the women who were pregnant would be off 13 weeks?

709 A. Under 13-week plans, yes.

Q. You did not take into consideration the medical opinion that today women can work until they go into delivery and come back in six weeks? A. That may well be a medical fact, but it is a medical fact that is arrived at in the absence of income benefits. And the experience of the insurance industry, and of actuaries in particular, in assessing these statistics is that the presence of benefits changes the past facts, whatever statistics you have as to the average duration suddenly when you superimpose benefits on that, the facts change.

Q. Just a conjecture on your part women will stay off 13 weeks if they have benefits whereas if doctors will say they might go back in six weeks and let them work up they wouldn't if they have insurance, that is conjecture on your part, isn't it? A. It is an estimate, not a conjecture.

Q. You have no facts on which to base that? A. Yes, I have facts.

Q. What facts do you base that on? A. The experience of companies with disability income plans of this sort.

Q. None of them were as to pregnancy, were they?

710 A. As an actuary I have been asked to estimate the cost of an insurance program. Actuaries frequently are asked to estimate the cost of programs where there is no experience available.

Q. You are making an estimate where there is no experience available today in this regard? A. This is right. And that is a matter of actuarial judgment. And if you wish to refer to it as conjecture you may, but I would say this is my business, making estimates in an area where numbers are not available. If they were they wouldn't have to employ an actuary.

Q. Now, what basis did you make your assumptions on that women are going to stay off 13 weeks if they have benefits whereas the doctor says that they can work up until labor if companies let them and come back in three to four weeks? A. I have made an estimate of the benefit cost under these programs on the assumption that with a 13-week plan there will be essentially no salvage or minimal salvage after the program is underway. That typically the maternity case will collect benefits for 13 weeks. And that is included in the price.

Q. I assume that the program – you would have a claim form that the woman must have certified by her doctor that she is disabled, this would be a control that

711 would exist if it was parallel to that examination which is on other sickness and accident forms, would it not? A. Well, the controls that will exist under these plans, I am not sure have been fully designed.

I believe the insurance companies would continue that control that exist presently, that the individual must be under the care of a physician.

I would assume that the insurance carriers would want to continue that.

Q. If a company requires a woman's physician to certify that she is disabled just as a physician is required to certify for any other ailment, is there any reason to think physicians are going to give a dishonest answer there? A. No. But there is a different sort of situation in the typical sickness and accident plan when the individual must be under the care of a physician. The individual is typically in bed. Here we are dealing with a situation where over an extended period of time the individual goes from full capacity to disability that prevents employment at some point in time. I am not at all certain that that crossover point is really determined so much by the medical aspects as perhaps by legal and insurance provisions.



712 Essentially we are not talking about a pure physical state of health. We are talking about a state of disability that prevents an individual from performing the duties of an occupation. And that is somewhat different than just a state of physical health.

And the experience result that will develop under this will only be known when the programs have been operating for a while and the benefit payments have been fully recorded. And that experience can be examined and tested out.

Q. Do you know of any group of disabilities in which the physician sees their patients as often and as regularly as an obstetrician sees a pregnant woman? A. Most of the short-term sicknesses that these sickness and accident programs cover the individual will see a physician two or three times within a matter of days, and they are back at work.

Now, the visits to the obstetrician are on a much more deliberate basis, their frequency starts out rather long and as the date of expectancy approaches the frequency increases. So that they are two different things here.

Q. Have you in figuring your long-term disability cov-

713 erage taken into consideration the experience of the Social Security Administration which covers exactly the same group which you assumed would be covered? A. Social Security definition does not include maternity benefits for normal pregnancies.

Q. We have in the evidence here in the record a letter from the Social Security Administration that they do in long-term disability cover in any long-term disability any disability arising out of the pregnancy. A. A disability arising out of pregnancy, not a normal delivery.

Q. After six months. A. Are you talking about complications due to pregnancy?

Q. I think all of this, we are not talking about paying – are you talking about paying money to a woman who is not disabled by a childbirth? We are not talking about anybody going off because – A. Let's first be clear about what we mean by the word "disabled."

Q. Not able to work at her job is what I assume disabled – A. You also used the word "disabled," I think, to mean the medical state. And the word "disabled" also means any limitation in one's ability.

714 Q. I am using disabled in terms that she could not perform her job, and that is, I guess, the Social Security's understanding after six months? A. The Social Security definition is much tighter than the insurance definition and it requires a medically demonstrative condition.

Q. I think most, and is it not true, that most of the long-term disability coverage ties in with the Social Security as, I believe, the plan, the GE we have in that you have to file your claim with Social Security too, and the amount paid, I think this is true of all insurance policies, is it not, that on long-term disability you deduct what you receive from the Social Security? A. Well, you take it into account –

Q. You get a – A. – directly, or you may have a higher limit above which it is deducted.

You may deduct the primary benefit only rather than the family benefit. There are many ways of taking it into account.

But the long-term disability coverage is usually coordinated with Social Security.

Q. That is correct.

715 A. Whereas sickness and accident plans historically have ignored Social Security and have stopped benefit payment before Social Security commenced.



Q. In making your conjectures on C did you take – did you find out to what extent the long-term disability coverage experience of the Social Security Board was greater or less than your estimate here? A. I am assuming in item C that the claims that are involved there are a result of uncontrollable claim abuse, and I am assuming that Social Security might not pay at all. Now, if they don't –

Q. Don't your plans depend on Social Security paying in coordination, involved you pay – A. No, that is the reason for coordination, because the long-term disability plans typically have a more liberal definition of disability and they pay frequently in cases where Social Security does not pay.

Q. Do you know what Social Security's experience has been on the long-term disabilities arising out of disabilities caused by pregnancy? A. I don't believe that that figure has ever been sufficiently large for them to even record.

Q. That is correct.

That is correct.

716 It is so small. A. This is because, I think, well, the long-term disability plans in order to put themselves into a similar position have historically excluded pregnancy.

Q. But the Social Security long-term disability includes it, but the numbers have been so small that they don't statistically record them? A. The Social Security definition is not a total disability definition. It is a total and permanent definition. And I would assume that at any point in the course of a normal pregnancy that when a woman decides to stop work that she could not demonstrate to Social Security's satisfaction that her disability was going to prove to be permanent in nature.

Q. Did you assume that a woman was going to just stop work for these figures whenever she decided to before delivery? A. For what figures?

Q. In your computation you used in Defendant's 42.
A. I assumed that the average benefit payment would run 13 weeks under 13-week plans, 23 weeks under 26-week plans and 30 weeks under 52-week plans.

Q. You did not assume this on any actuarial calcula-
717 tions of the number of women who have actually worked until delivery on the ground that they were not disabled, no physician would honestly certify they were disabled, and that they would come back whenever they were certified by a doctor as able to come back? You took into consideration no such facts? A. As an actuary I might state that my experience with the medical profession and their control, their ability to limit the claims in the medical expense area is not one that would lead me to any great faith in their ability to control claims in this area.

I think that claim controls have to be built in in another manner.

THE COURT: Well, Mr. Jackson, there are figures, are there not, to show the average time that people are out on a 13-week plan?

THE WITNESS: Yes.

THE COURT: You didn't use those?

THE WITNESS: Well, the average time they are out on a 13-week plan, the median duration is two weeks or a week and six days or five days.

THE COURT: I want to know why you decided that on a 13-week plan they would be out 13 weeks?

718 THE WITNESS: Well, I started with the overall statistics that developed an average of 16 or 18 weeks at the present time, and then I allowed, as any good actuary would, for conservatism, the fact that when you superimpose benefits on here, when you remove the incentive to return to work as quickly as possible because no income is coming in, and instead you are paying 66-2/3



per cent, that there is some slippage involved at that point and the slippage then went from the 16 to 18-week area up to approximately the 23-week area, but obviously for 13-week plans you are not going to pay 23 weeks.

Now, the matter could perhaps have been refined a bit more and I could have assumed 12 weeks under 13-week plans because the situation that presents itself here is one of a distribution of duration. Some return earlier and then the peaking at some point where it is 16, 18, 20 weeks and then a tailing off to where some run on out to 40 or 50 weeks, perhaps.

And in any such curve when you move the benefit limit from 26 weeks to 13 weeks there would still be some claims terminating prior to that.

I did not take that into account in this estimate because the estimate is simply not that refined. It is based on a good deal of judgment in other areas as well.

719 BY MS. WEYAND:

Q. There is here an incentive to the woman to return if her income has been geared over a period of time to her wages and suddenly gets only 60 per cent. The lack of 40 per cent which she could get if she returned does act as an incentive to return, does it not? A. This is the benefit in design control that I had indicated earlier that applies to those who return to the work force. It is not quite a comparison of 100 per cent to 6o per cent, however, because our tax laws are such that the 60 per cent may largely be received free of income tax whereas the 100 per cent is subject to not only federal income tax but Social Security tax, payroll deductions for group insurance or other benefit purposes, and the expenses of going to work, transportation, work clothes and the like. Estimates of net take-home pay from 100 per cent of pay range from 70 to 80 per cent.

The 60 per cent benefit estimate of the net portion of that might be perhaps 55 per cent. So you are not – the comparison is not 60 versus 100 but perhaps 55 versus 70 or 80. And that gap narrows, of course, from time to time as the income tax rates rise.

But it is that incentive to return to workis one of the
720 fundamental things on which disability income coverage has been based and one of the things that permits it to operate in a satisfactory manner.

Q. Did you take into consideration that employers have in the past quite often, most employers, have required women to go off from work during pregnancy at six months or seven months, a given period which is now being changed because of the law requiring the employers to let employees work up until they go into labor if their doctor says they can? A. Well, I work with the average, the average duration on the basis of recent statistics where an arbitrary six-months or five-months cutoff was not involved, but individual consideration was.

Q. Where did you get the figures on which there was no arbitrary cutoff involved? A. Well, one place was the General Electric Exhibit 1 of the exhibits which they submitted indicating the numbers of weeks of absence prior to delivery on the part of maternity leave cases in 1970 and 1971.

Q. Did they tell you that they had a uniform policy in many of these plants, and the record here shows, that you are required to go off at six months? That in 1970 and '71 as to Salem where the plaintiffs come out of, did
721 they represent to you these were figures where the women were not required to go off? A. They didn't represent anything to me other than hand – as a matter of fact General Electric did not give me the number. I believe I was given it by Mr. Strauss as part of the general



statistical material that had been supplied in connection with the case.

Q. You used that figure as the figure indicating how long women would be off and assume they were free to work or not work there according to what – A. No, I did not use that figure. I made certain estimates on the basis of that figure and it didn't indicate that they were that far from the over-all results that I was assuming of 16 to 18 weeks.

Q. Where did you get your over-all results of 16 to 18 weeks from? Any other place based on experience than GE experience? A. No, that was just based on bits and pieces of information here and there of Public Health results and things of that sort.

Q. Those were all in past years before the policy was changed, were they not? Do you know what years employers began letting employees work as long as their doctor let them?

722 A. There are some employers who did that years ago, I assume.

Q. You assume. Do you know? A. Some have been forced into it recently.

Q. Do you know how many allowed them to work before? A. No.

Q. Where did you get your figure that the average amount paid on a benefit on a female – what was that figure – you based this on an average benefit to a female? A. $60 benefit under a 13 –

Q. $70 a week? A. $70 under a 26-week plan, and $80 –

Q. Where did you get the $70 from? A. The $70 figure was derived from the Society of Actuaries average figures.

Q. For females? A. Yes.

Q. What, sickness and accident policies? A. Yes.

Q. Is that figure a public figure? A. Public. The figure is included in the reports of the Society's Committee on Mortality and Morbidity.

723 Q. Is it $10 – what year for females? A. Well, I took the last exposure and divided it out and took the exposure period, the midpoint of the period, and ratioed up to get estimates, average benefit figures.

Q. Now, GE, I assume, is the one that led you to believe it is one of the higher paid during that 1970-'71 time, it did not average $10 for females at all. Are you sure that is a figure of the industry? A. The figure I was given from GE would indicate a $90 benefit.

Q. A week? A. Yes.

Q. Well, it is less than $10 a day in the figures that – their answers to interrogatories here – well, I just want to know, do you know what figures that $10 – $70 was based on? That is $10 a day for seven days? A. No. No, it is $70 weekly average. I think the average I was using worked out to 68 and I rounded it.

Q. That was based on all the companies of the United States that have sickness and accident policies, is that it? A. Based on a sampling of some four million employees

724 under the policies that the Society of Actuaries studied.

Q. Did that Society come out with the figure of $70, or you figured that on the basis of what was in there? A. I think the Society's tables, and developed the $70 figure.

Q. Developed the 70. Do you have those tables here to show me how you developed the $70. A. I have the tapes. I am not sure I have the development of the $70 figure.

Q. Could you develop it for me, how you got this $70 figure? A. Yes.



Q. Will you get the table out and tell me? A. You mean right now?

Q. How you got the $70 figure.

THE COURT: How much time do you think it will take?

THE WITNESS: I may never find the figure.

MS. WEYAND: That is what I thought.

THE COURT: I am going to be extremely generous, but not that generous.

I was going to ask, do you think it would be easier for

725 you if we took a brief recess and you got this in conference by yourself?

THE WITNESS: Well, I would have to get out – I would have to get out my worksheets that were involved in this, and one of the items that I had, which is the Health Insurance Institute survey which unfortunately I don't have with me today. This is why I say I may just reach a point where I would have to say I believe that a 60, 70, and $80 average benefit are realistic as we sit here on July 1, or as of, let's say, July 1, 1973.

And it was not my intention in developing these figures to overstate that item or to understate it, but merely to estimate it.

THE COURT: All right.

If you insist on the question I will permit you to permit him to remain.

I will give Mr. Jackson some time to determine whether he can get it.

MS. WEYAND: I insist on it. I think it is important.

THE COURT: Do you have further examination, ma'am, of the witness?

MS. WEYAND: I don't believe I do.

726 THE COURT: You do not at this time?

MS. WEYAND: Do not at this time.

THE COURT: Any redirect?

MR. KAMMHOLZ: May I have a moment, Your Honor?

THE COURT: Yes.

Don't worry about it now. I will ask you to report to us tomorrow.

Anything further?

MR. KAMMHOLZ: Two questions.

THE COURT: All right, sir.

I hope you can do it. I have never known a lawyer that could really ask just two questions.

MR. KAMMHOLZ: Now I am under the gun.

THE COURT: Go ahead. I won't hold you to it.

REDIRECT EXAMINATION

BY MR. KAMMHOLZ:

Q. Mr. Jackson, you advise, among others, the International Brotherhood of Electrical Workers members' pension plan, do you not? A. Yes. Well, we advise the Brotherhood of Electrical Workers on their members' pension plan that are staff planned and the plan covering officers, representatives and assistants.

727 And the plan in the electrical contracting industry covering some 200,000 workers where the negotiations are with the National Electrical Contractors Association.

Q. Are the answers that you gave here this afternoon and the assumptions that you have described the same that you would have given in response to inquiry from the IBEW pension plan or Aetna Insurance Company, for example? A. Yes, they are. As I say, this is a cost estimate of what is available country-wide and what the impact is country-wide. And it is subject to a good many areas involving judgement. One of the items, for example, is that I applied a judgment factor of ten per cent discount on the average birth rate to allow for the fact that



working wives probably have a lower birth rate than non-working wives.

Now, this means that wives who are not working I have assigned a 20 per cent higher birth rate than working wives.

It was an estimate, that judgment factor.

The matter of whether or not actual statistics are available that prove these things, it has been my experience

728 that the most difficult actuarial work is that which has to be conducted in the absence of such figures.

One illustration would be the situation where the auto companies may negotiate for an early retirement benefit and we have to assume or make a conjecture with greater benefits being available that more people will retire and the cost has to be based on that.

And the cost is in effect based on a matter of judgment.

And I have done my best to set forth here a figure for, in effect, a client; that I would hand to any other client if they were to ask me for it.

MR. KAMMHOLZ: I have no further questions.

THE COURT: All right.

Any recross?

RECROSS EXAMINATION

BY MS. WEYAND:

Q. Did you assume in these figures that more women would have babies if they had sickness and accident for disabilities arising from pregnancy? A. No.

Q. You did not? You based it on the – what did you do, an average of the last three years at GE?

729 A. No. You mean this figure? This was based on the age-specific birth rates for the general population.

Q. In the year 1968? A. Yes.

Q. You made no assumption that the woman would work up until she was actually disabled, did you?

A. No.

I rather went at it from the other end and assumed an average benefit period for the purpose of determining an average.

Q. That had no reference to any facts you had about the period a woman was actually disabled from work because of pregnancy? A. Well, it relates to the facts that are normally available on the subject, but it started out at a 16 to 18-week average duration from the date that employment stopped until the date the individual returned to full-time work.

Q. But you have no figures, no data that would show you whether it is 16 to 18 weeks represented a period that she claims she was unable to work and that it was not affected by the employer requiring her to go off when she was able to work. You don't know which that figure represents. You have no basis for thinking the 16 to 18 weeks represented a period that she was actually
730 medically disabled to work, that the doctors would certify she was unable to work? A. In essence what I have assumed is that with the benefit plans we have here that these will be the approximate amounts of claim costs under those plans, and if under those plans in order to obtain a benefit an individual needs a physician's statement then that assumption is inherent in my figures.

Q. The 16 to 18 weeks, did you know whether that represented any physician's certification that she was disabled for the 16 to 18 weeks? A. No.

Q. But under the plan she would only get paid for the period she was – had a certificate from the company that she was disabled, from the physician, that she was disabled and – wouldn't she? A. Well, you have more faith, perhaps, in the fact that these plans are going to operate the way they are supposed to than I do. As an



actuary I am a little suspicious, and perhaps would be inclined to assume that if she has been out for 16 to 18 weeks that in the future if 50 per cent of pay is paid to her during that period she will be out 16 to 18 weeks plus a few more.

731 Q. If the facts were that she was required to go off by the employer at the end of six months and not allowed to come back until two months after pregnancy, which required – A. That wouldn't work out to 16 to 18 weeks.

Q. If she was required, sometimes go off at six –

A. You are up to 20-some odd weeks already.

Q. If that enters into any of these figures of the employer requiring her to go off, you do not have a period of 13 or 16 or 18 that represents any experience based on doctors certifying disability, do you? A. No.

But let me address myself to that point very briefly.

In the past employers have not used arbitrary rules because they felt that they just want to get rid of people at the earliest possible date.

Q. How do you know that? A. Because I have been associated with employers who have had sick leave programs and maternity leave. I might add that my own personal experience extends back over some 20-odd years in the field and I have had perhaps a dozen secretaries have babies and leave and I can't help but look at the situation and draw some conclusion of my own. The six-
732 month point or the seven-month point I do not believe was selected by companies just to be nasty. It had a purpose. The purpose was to prevent people from hurting themselves at work and having the company be responsible. That being –

Q. Do you know whether anybody ever hurt themselves at work? May I finish my thought?

That being the case, I can't see how a company can defend itself if a doctor comes in and certifies that the same point in time that he wishes his patient to stop working so that she won't hurt herself the company has almost put itself in the position of where its own rule is now forcing it into a certain area of action. So I would be very much surprised if as a result of adding maternity benefits to these sickness and accident plans that the combination of these requirements of not allowing companies to force people out at one point, but rather paying the people benefits while they are out, it is my judgment that that is not going to result in any shortening of the period of absence.

Q. Do you know of any study which shows that a woman ever hurt herself in the plant because she was pregnant? A. No actuarial study.

733 Q. Do you know of any other kind of a study that ever showed that? A. Well, I am familiar primarily with actuarial studies.

Q. You know of no study of any kind that showed that? A. Well, there are probably figures available in the Workmen's Compensation area that must have some bearing on the matter, but I am not familiar with them.

Q. Don't know whether there are or not? A. No.

Q. No other questions.

THE COURT: All right.

Any reredirect?

MR. KAMMHOLZ: No rere, Your Honor.

THE COURT: Help the witness down.

(The witness stood aside.)

THE COURT: Mr. Jackson, I will ask you to – I believe you said your home was in Maryland; I gather you are not going to stay – are you going to be overnight?

THE WITNESS: No, I wasn't planning to, Your Honor.



THE COURT: I will ask you to do this. I will ask

734 you to come back if you decide that you can answer Miss Weyand's questions. If not, just call one of counsel and tell them that it will take you forever to do it and I will excuse you. You will not have to come back.

Thank you.

May I make inquiry? How many more witnesses do you anticipate presenting?

MR. KAMMHOLZ: Your Honor, we have one very short witness and a second very short witness. One somewhat longer witness.

My quesstimate is Mr. Hilbert on direct examination would not be over an hour.

THE COURT: You want to finish today then?

MR. KAMMHOLZ: I am not sure our missing witness has arrived.

We certainly can finish –

THE COURT: We are going to work a little longer.

MR. KAMMHOLZ: – in good time.

THE COURT: We will do the best we can. No more half days around here.

All right, we will take a brief recess.

(A recess was taken at 4:43 to reconvene at 4:55.)

735 THE COURT: Call your next witness.

MR. BATTLE: May I have just one minute, please?

THE COURT: All right.

MR. KAMMHOLZ: Your Honor, during the recess Mr. Jackson had done some further calculating and it might be appropriate to call him back.

THE COURT: He can answer then?

All right, he may come back then.

(The witness resumed the stand.)

THE COURT: I think Mr. Jackson is going to tell us where he came up with the $70.

THE WITNESS: Yes.

I found my worksheet, Your Honor, and I have a reference on that worksheet. Most of the items on the worksheet such as the 40 perccent, 50 per cent and 60 per cent have been listed in my – in the 13, 23, and 30-week utilization, the 60, 70, and $80 benefit amount has been listed in my brief typewritten estimate.

I have a notation on top of this that indicates that the source is page five of the Health Insurance Institute reference which is the 12th annual survey, 1971, Health Insurance Institute, relating to new policies, new group insurance policies installed in 1971.

736 I also have a note that the 1971 reports were used. At this point I recall that I used the 1971 reports primarily to get the distribution between plans to adjust the distribution among the new plans by length of benefit period to something more closely approximating the actual in force at the present time because the Society of Actuaries reports I treated as a statistical sampling of some 20 or 30,000 policies, whatever the amount happens to be.

The 60, $70 and $80 averages were based on the figures on page five of the Health Institute survey which gave the average figures for new plans being issued in 1971. Those were rounded. I think, as I recall, the figures were $57, they ended in a strange amounts that would have, I am sure, looked more impressive, but since this is an estimate I rounded the numbers off to $10 amounts.

Now, the numbers are the average benefits under the plans in 1971, essentially under the new plans.

The new plans generally have a lower average benefit than many of the existing plans because it is the more

737 affluent employers who have had plans the longest



time, and many of these new plans are being written to groups of lesser resources.

I did make the assumption, however, that that is an error on one side that the figure is too low and the figure is too high on the other side if it should be demonstrated that the average benefits were lower than the average benefit. However, I might observe that these weekly sickness and accident programs rarely cover top executives. Frequently they don't even cover the salaried staff who are often under another set of working conditions entirely, and certainly for the purpose of the future I could only say that the 60, 70, and $80 figure were my best estimate, and that is the source of them.

BY MS. WEYAND:

Q. That is the maximum average of the maximum payable, is that correct? A. No. That is the average benefit provided.

Q. Maximum benefit? A. No. The average.

Q. In a plan how do you know the average benefit? A. We feel you have the total amount of coverage and divide by the people. You can determine an average amount of life insurance by adding up the numbers of thousands and by dividing by the number of employees.

738 The maximum may be 100,000. The average may be 10.

Q. These new plans, you have had no experience under the new plans. You are telling us what could be paid, not what was paid? A. No. We are saying what the average benefit in force.

Q. How do you figure what is the benefit in force? A. Well, let me give you an illustration. If a plan is issued and there are 100 people covered and 50 of them have weekly benefit amounts of $40 and 50 of them have a weekly benefit amount of $60 the average benefit in

force would be $50.

Q. These are plans? A. The maximum under the plan might be 100, but there may be nobody getting that.

Q. These are not plans that are geared to 60 per cent of your salary or something like that? A. These plans, it is the percentage of pay is usually provided under long-term disability plans. These plans are usually written on a scheduled basis where a dollar amount is provided. The dollar amount is usually provided to an individual earning between so many cents an hour and

739 so many cents an hour. There is a specified amount.

Q. Do you know how many are written for a percentage, like the GE plan is written for 60 per cent of your weekly salary with 150 maximum, the General Motors is written for 60 per cent, the Chrysler is written for 60 per cent, and you get the reflection then that the women have lower pay on the 60 per cent which again, you find out that because their weekly rate is lower, the 60 per cent results in a much lower benefit for the female?

A. General Motors program I do not believe is based on a percentage. I believe it is based on a classification and a schedule. And the schedule is negotiated.

Q. I have the contract here. But there is – the GE is certainly 60 per cent. A. I would say that is unusual. I would say whether they are scheduled or not the only primary difference is that on the schedule basis there is a top limit in the schedule, and as inflation takes place and people's pay goes up you have to in effect amend the plan to give somebody something extra.

740 My impression of a flat percentage plan is that the percentage is a constant thing and as pay goes up the benefit automatically follows.

Q. That is correct. A. Well, the General Motors plan, the benefit does not automatically follow. It is ne-



gotiated.

Q. Maximum under all of them? A. Right. That is customary.

Q. That there is a maximum on the General Motors too? A. I don't know that there is no maximum on it.

Q. Does there – is there a maximum on GE? There is a maximum on General Motors. The companies I have been dealing with there are maximums, and they are big companies. A. Well, they are scheduled.

Q. On the schedule there are different amounts per type of wage, are they? A. The schedule of benefits is –

Q. Graduated by – A. – graduated on the basis of the individual's rate of hourly rate of pay. Usually it is exclusive of overtime.

Q. Then you took an average of the amount of the

741 ones that are scheduled? A. Of the amount in effect of insurance, amounts issued under the new plans as described in that report of the Health Insurance Institute.

Q. Did you know when you figured the amount how many employees were at each level male and female of the scheduled benefits? A. No.

Q. You took an average without a female breakdown? A. That's right.

Q. Okay. Thank you very much.

THE COURT: All right.

Any further examination?

MR. KAMMHOLZ: No further questions, Your Honor.

THE COURT: Thank you.

You may be excused, sir.

Thank you very much.

(The witness stood aside.)

THE COURT: All right, gentlemen, call your next

witness, please.

MR. KAMMHOLZ: Harvey Helman.

HARVEY HELMAN was called as a witness by and on
742 behalf of the defendant and, having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. KAMMHOLZ:

Q. Will you give us your name and address, please? A. Harvey Helman, 9 Alder Court, Matawan, New Jersey.

Q. By whom are you employed? A. The General Electric Company.

Q. How long have you been a GE employee? A. Over 17 years.

Q. And what is your present position with GE A. Consultant in personnel practices working at the corporate headquarters in New York City.

Q. And how long have you held that position? A. For about four and a half years now.

Q. Mr. Helman, do you have in the file before you the turnover data at specific GE plants for 1972? A. Yes.

Q. Which has been identified here at GE Exhibit 41-A and 41-B? A. Yes. I believe it is the same.

Q. Was this prepared under your direct supervision?
743 A. Yes.

Q. When? A. In the spring of 1973.

Q. Directing your attention first to GE Exhibit 41-A, why were the seven plants selected that appear on the first page of that exhibit? A. We selected these seven plants because they had basically the largest female population in the – or at least percentage-wise represented large female population.

Q. Would you tell us what the first page is intended to show? A. The first page represents a compilation of the employment and termination data for the year



1972 of the seven plants, the actual raw data.

Q. And what does the second page of that exhibit show? A. The second page includes data from a previous study of four other locations and combines the total of the seven locations.

Oh, I am sorry, I got my exhibit – I think that is in different order than yours, I am sorry.

Q. Would you look at mine, please? A. Yes. Okay.
744 All right.

The second page gives a calculation.

Q. Excuse me.

Would you, please, arrange your pages? A. Oh, do you want yours back? I am sorry.

Q. So I may have mine back.

THE COURT: This is 41-A now?

MR. KAMMHOLZ: 41-A, Your Honor, yes.

THE COURT: Mr. Helman's pages don't seem to be as big as my pages.

Now, you are sure we are looking at the same thing?

THE WITNESS: The mechanical marvels of industry, yes.

I have it now.

BY MR. KAMMHOLZ:

Q. Turning now to page two, it reflects percentages and are these predicated on the numbers appearing on page one? A. Yes, they are based on the data we presented on one, yes.

Q. The next to the farthest column from the right-hand side shows a weighted average.

Will you, please, explain what that weighted average
745 represents? A. Weighted average is the proportional weight to the size of the sample so that a component like Louisville, which was very large, would get its

proportionally large representation in the percentages.

Q. In the last column showing arithmetic average?
A. The arithmetic average just divided the percentages of each of them by seven, not giving proportional representation to the larger locations.

Q. Turning for a moment now to the first page of 41-B. A. Is this it?

Q. Does that show comparable data from four other locations? A. Yes.

Q. How did you happen to select those four locations?
A. Those four locations were selected earlier in 1972 prior to the first trial date in May.

Q. In '72 or '73? A. In '73. Prior to the first trial date. They were selected at random and in an ex-
746 pedient way to get the data quickly because we didn't have much time to get it. The only provision we made was that we get it fast and that they be locations that were represented by the IUE.

Q. And were the figures on the first and the second pages of 41-B compiled on the same basis as the figures in 41-A which you have already testified about?
A. Yes.

Q. What was your reason for including the four-plant study with the seven-plant study? A. Well, they were two independent studies. One was run independent of the other. And so we thought it would be useful looking at the two separate numbers to see how well they compared.

Q. Let's return now to 41-A and calling your attention to the third page, the last page, I am sorry, the fourth page of 41-A – A. Yes.

Q. –will you explain, please, the numbers that appear there? A. This is a presentation of the data from the two separate studies, the seven locations and



the four locations giving both the arithmetic and weighted average for both and then combining both studies and
747 giving the arithmetic and weighted averages for both studies.

Q. I do not believe that you have – that I have interrogated you about the difference between the quit and the termination figures. What is that data?
A. The termination figures include all people who during the year 1972 broke service with the company. That means left for any reason whatsoever. Quit voluntarily, with discharge, retired, died, anything that would have broken their service with the company.

Q. And what does the quit figure represent?
A. Quit limits the termination to those people who voluntarily left the company and broke service during the year '72.

THE COURT: In other words, the quits are included in the termination?

THE WITNESS: Yes.

THE COURT: While I have interrupted you, let me finish on that. On the last page of 41-A, left-hand column, you have 18 per cent, 12 per cent. Do you see that?

THE WITNESS: Yes. Yes, the term female was left off.

THE COURT: I take it you have them in there?

748 THE WITNESS: Yes. I am sorry.

THE COURT: If there is no objection I will write them in in case I am looking at this. I think I would be able to figure it out.

MR. KAMMHOLZ: Thank You, Your Honor.

THE COURT: I am sorry. Go ahead.

BY MR. KAMMHOLZ:

Q. And again on the last page to which the Judge has just referred, the arithmatic and weighted averages

are compiled on the same basis as you have heretofore testified? A. Yes.

Q. On the separate numbers? A. Yes.

MR. KAMMHOLZ: I have no further questions.

THE COURT: All right. Any cross-examination?

CROSS-EXAMINATION

BY MS. WEYAND:

Q. This is for which one of the Fort Wayne–

A. Just a special transformer department.

Q. Doesn't use the whole Fort Wayne plant?

A. That's right.

749 Q. How did you happen to pick the special transformer division at Fort Wayne? A. Because that is the only one that I could get the data that we requested in the time frame that we requested it.

Q. Where did you request it? A. I called the Employer Relations Manager at each of the locations and asked if they could give us the data in this period of time.

Q. When did you call them, the man at Fort Wayne?

A. Which one, the man from the transformer? I don't recall the exact date, it was back in April, I believe.

Q. Of '73? A. Yes.

Q. And what figures was it that he had these available? Did you call the other plants at Fort Wayne to see if they had the figures available? A. Yes.

Q. They told you they didn't have the figures?

A. Well, they couldn't put it together in the form I wanted this data.

Q. What they couldn't put together was what?

750 A. They couldn't give me the termination and quit data that I had requested in the form I had requested it.

Q. You called each of the other four or five plants



at Fort Wayne? A. No. I just called the Employer Relations Manager for the Fort Wayne operation.

Q. And the only one he claimed to have available was Specialties Division? A. No. I called Specialties separately because they operate pretty independently of the remainder of the Fort Wayne operation. They do their own employment pretty much.

Q. In April of '73 the manager of the other – of the other plants at Fort Wayne claimed not to have this information, is that true? A. He said he could not put it together in the time that I requested it and it would require a lot of, you know, effort and so on, and said that if we could get it elsewhere he would prefer it.

Q. You asked him for just the figures that are on here, is that what you asked him for? A. No. I asked him for this information and for additional information.

751 Q. He didn't tell you he couldn't tell you the total number of people employed in each of the plants or the number of males and females or quit or hired, did he? A. No. He couldn't give me the quit data and the termination data that I requested under the definition that I requested.

Q. What was your definition? A. We wanted only those who broke service for terminations and we wanted only quits with those who voluntarily quit and broke service during this period.

Q. And you are not using the hires on any of this turnover data. You are looking only at terminations?

A. The information presented here is only terminations, yes.

Q. What date is the total taken and what date is the – this is of what? A. This is average employ-

ment for the year 1972

Q. And average quits? A. No. The continuation would be the average quits. It would be the total quits during the year '72 and the total terminations during the year '72.

THE COURT: Let me see if I understand. What do you mean by average employment?

THE WITNESS: That the employment for the 12 months
752 and average it by 12 so that at one point it might be 1,000 and then at the end of the year it might be 2,000, but you have an average employment of 1,500.

THE COURT: So on 41-B where it says Fort Wayne, does that mean at any one time you had an average of 1,642?

THE WITNESS: During the course of 1972, yes, the average employment was 1,642.

BY MS. WEYAND:

Q. You took what, the end of each month and averaged it? A. I believe so. I don't know exactly how they did it.

THE COURT: But quits are not averaged, that is an actual –

THE WITNESS: That's right. That is the total number of quits during the course.

THE COURT: And the same with terminations?

THE WITNESS: Yes.

THE COURT: All right.

BY MS. WEYAND:

Q. So if the average employment went up substantially during the year, there were a lot of new hires, you would not have that reflected here, the quits as to
753 the increased employment would show a low turnover rate which would really be, if the total employment hadn't gone up, the quits would have been a lower turnover rate, is that correct? A. Excuse me. Would you repeat the question?



Q. It is not reflected here if you started out with 2,000 employees in the plant and it remained 2,000 and 200 quit during the year you would have a ten per cent turnover rate, is that correct? A. Yes.

Q. But if the employment, total employment in the plant went from two to four thousand and you still had 200 quits you would have a ten per cent turnover rate? A. You would have less because you would use a 3,000 as your average.

Q. You would have seven and a half? A. Something like that.

Q. Yes. If it had gone up there more – A. Right.

Q. So increased employment is only reflected in the average of employment? A. Yes. Because in some
754 plants it might have gone the other way.

Q. Do these figures represent the production and maintenance employees only or do they include the salaried, all employees in the plant? A. They include all employees.

Q. Supervisory? A. Yes.

Q. This is not a turnover rate based on the production-maintenance employees? A. No. All employees.

Q. Do you have figures on the turnover rate in the production and maintenance unit? A. No.

Q. In the objections to interrogatories GE said it had a 40 per cent turnover rate. Were you acquainted with where that figure came from? A. No.

Q. Were you acquainted with the fact that they filed that figure here in court in answer to interrogatories? A. I heard the number, but where it comes from –

Q. As far as you know nobody on your staff figured that figure out and gave it to them? A. No.

Q. You don't know where the lawyers got the 40
755 per cent figure? A. No.

Q. Don't know whether that is applicable to production and maintenance employees as distinguished from an employee complement made up of production and maintenance and technical and salaried, engineers and so on? A. No. I don't know. As I say I don't know where that 40 per cent comes from. It sounds high to me.

Q. Have you had occasion to previous – have you had previous occasion to figure turnover on a company-wide basis? A. Yes.

Q. How recently did you figure turnover on a company-wide basis? A. Well, from my operation we issue a report that is prepared by our corporate personnel accounting operations on turnover, and that is done quarterly.

Q. That is based on all employees? A. Yes.

Q. You do no turnover figures on production and maintenance employees as such? A. I don't. No.

Q. Has your department ever done, as far as you
756 know, a turnover on production and maintenance employees? A. To my knowledge, no.

MS. WEYAND: That is all the questions I have.

THE COURT: All right. Any redirect?

MR. KAMMHOLZ: May I have one moment, Your Honor?

THE COURT: All right.

THE WITNESS: May I add something here?

REDIRECT EXAMINATION

BY MR. KAMMHOLZ:

Q. Would you like to add something to you testimony? A. Yes. To the question –

THE COURT: You know, I admire an alert attorney.



THE WITNESS: I believe I corrected, I answered incorrectly in your question about information broken out by production and maintenance employees. The quarterly reports that we issue are broken down by hourly non-exempt salary and exempt. I am sorry.

MS. WEYAND: Hourly are done on a nation-wide basis?

757 THE WITNESS: Company-wide.

MS. WEYAND: I am sorry.

THE WITNESS: I am sorry for that.

THE COURT: All right, sir. Do you have any further questions?

MR. KAMMHOLZ: Just a few, Your Honor.

BY MR. KAMMHOLZ:

Q. On direct examination you testified with respect to those exhibits as to quits and terminations, did you not? A. Yes.

Q. You were asked some questions about turnover on cross-examination. What did you understand turnover to relate to? A. I would assume terminations. People who leave the employment of the company.

Q. This is the context in which you answered the questions? A. Yes.

MR. KAMMHOLZ: No further questions.

THE COURT: All right. Any recross?

MS. WEYAND: No. I don't believe so.

758 THE COURT: All right. Help the witness down. Thank you, sir. Unless I hear an objection the witness will be excused.

(The witness stood aside.)

* * * * *

762 PROCEEDINGS

(July 26, 1973) (Thursday at 9:30)

THE CLERK: Civil Action 142-72-R. Martha V. Gilbert, et al., versus General Electric Company.

Continued from yesterday.

THE COURT: Good morning.

* * * * *

All right, call your next witness, please.

MR. KAMMHOLZ: Mr. Hilbert, please.

THOMAS F. HILBERT, JR., was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. KAMMHOLZ:

Q. Your full name and residence address, please, Mr. Hilbert? A. Thomas F. Hilbert, Jr., 91 Davis Avenue, White Plains, New York.

Q. Are you an employee of General Electric Company?

763 A. Yes.

Q. What is your position with the company?

A. Labor Relations Counsel.

Q. How long have you held that position? A. Since 1960.

Q. Would you state for the record, please, briefly, the job description relating to Labor Relations Counsel?

A. Well, in effect Labor Relations Counsel is the lawyer in corporate headquarters who advises the corporate Employer Relations operation on legal and contract matters relating to employee relations and act as consultant to operating lawyers in the field in that area.

Q. You have a staff reporting to you? A. I have two lawyers assigned to me, yes.



Q. Very briefly, Mr. Hilbert, what is your background in terms of education? A. I went to Fordham College, A.B. and Fordham Law School.

After law school I went into the Army. And when I left the Army I joined a New York law firm of Cravath, Swaine, and Moore, working primarily on labor relations matters.

764 In 1950 I joined GE as an attorney in the Apparatus Department and in 1960 was appointed Labor Counsel.

Q. Have you participated in collective bargaining negotiations with the unions with whom General Electric has bargaining relationships? A. Yes.

Essentially GE bargains with two unions on a nation or corporate headquarters basis. One is IUE and the other is the UE.

During the years 1952 and 1954 I participated in, on an in-and-out basis, in the negotiations with those unions. Again in 1955. And in national negotiations since then until this year I participated pretty much full time in those negotiations.

This year I participated again only on a part-time basis.

Q. Mr. Hilbert, are you familiar with the General Electric Company benefit plans and programs including the General Electric insurance plan since 1950? A. Yes, I am.

Q. Will you describe for us briefly, Mr. Hilbert, GE's experience in matters of race and sex discrimination?

A. Well, in my opinion the company's record has been

765 quite excellent in this respect. The company has never been found guilty by any adjudicatory agency or any court of a violation of any discrimination law, sex or race. This includes not only Title 7 of the Civil Rights Act of 1964 but also the many state laws that have been in existence covering these subjects in states where we oper-

ate since the post-war period, during and since the post-war period. In addition every plant and office of General Electric Company is covered by the Presidential Executive Orders, particularly the one that prohibits discrimination on account of sex, which was issued in 1967.

We have had hundreds of compliance reviews by federal agencies as to our compliance with that Executive Order and have never been found out of compliance by any such agency.

Q. Will you relate briefly the bargaining history of GE with IUE on anti-discrimination language? A. Well, the company began bargaining with IUE in 1950. That was our first negotiations. That year we signed our first contract.

In that year a non-discrimination clause was negotiated which covered race, color, creed, religion, national origin.

In 1955, as I recall, we added sex to the pledge in the
766 contract that the company had. The union pledge agreed that they would not discriminate on account of sex in addition to the other considerations.

Q. Was this language changed at a later date in 1962? A. Well, I should have said that.

In 1955 the contractual provisions said it is the policy of the company, the union, and its locals, not to discriminate on account of race, color, religion, sex, and so on.

In 1963 we and the union agreed to change that to a flat provision reading, "The company, the union, and the IUE Locals, shall not discriminate against any employee on account of race, color, sex, creed, marital status, or national origin."

Q. Is this contract language contained in your current agreement with the IUE? A. Yes, it is.

Q. Does that agreement provide for mandatory arbitration on matters arising under the language you have re-



ferred to? A. No. Not of that – the contract itself contains an arbitration article which makes arbitration
767 mandatory for certain subjects in the contract, but makes other subjects arbitrable only on a mutual submission, on a voluntary mutual submission basis, but the provision that I read to you is not arbitrable as a matter of right.

Q. May I turn now to the bargaining history with the IUE on sickness and accident benefits on the subject of related pregnancy?

What provision has been made in GE-IUE agreements since 1950 on the subject of sickness and accident benefits? A. Well, in our first negotiations with IUE in 1950 we negotiated a broad agreement, collective bargaining agreement, which included wages and many conditions of employment, and it also provided for a number of benefit plans, pension plan, insurance plan, and others.

The insurance plan itself provided life insurance, medical expense insurance, accidental death and dismemberment insurance, and so-called sickness and accident disability insurance. Under this provision employees who were totally disabled because of sickness or accident would receive partial makeup pay while absent.

And this provision also included the language which
768 is currently in issue here which makes specific that benefits under the weekly sickness and accident insurance are not payable for an absence due to pregnancy.

Q. And when was this provision first incorparated in the GE-IUE contract? A. In the 1950 negotiations.

THE COURT: May I interrupt and ask you, is that the only expressly excluded disability, Mr. Hilbert?

THE WITNESS: Yes, sir.

BY MR. KAMMHOLZ:

Q. Will you tell us what happened after 1950 on the

subject of sickness and accident benefits? A. Again I was not present in the 1950 negotiations, but reviewing the records and speaking to those who were, it appears that the union had no objection to the exclusion of pregnancy from the plan in the negotiations.

MS. WEYAND: I object to that as hearsay unless you state the basis on which you understood that the union did not object.

THE COURT: Well, I understood Mr. Hilbert had participated.

THE WITNESS: No, sir, I did not again participate
769 until 1955.

THE COURT: All right.

Objection is sustained.

BY MR. KAMMHOLZ:

Q. What happened in subsequent negotiations when you did participate? A. In the 1955 negotiations the union requested that the so-called exclusion of pregnancy absences from S and A payments to be modified so that female employees absent because of pregnancy would receive a maximum of six weeks of weekly S and A payments. This is against the plan maximum of 26 weeks for sickness and accident absences. During the course of the negotiations the union demand was not accepted and a contract was signed without change.

Q. The '55 agreement, as I recall it, was a five-year contract? A. Yes. That's right.

Q. What occurred in the 1960 negotiations? A. In the '60 negotiations the union made no demand for any change in the contract in the S and A plan and the plan, as it had previously existed, was incorporated without change in the 1960 agreement.

Q. The agreement executed in 1960 was for a three-
770 year term, was it not? A. That's right.



Q. And in '63, '66 and '69 agreements were executed with the union? A. That's right.

Q. What change, if any, was made in the union contract language with respect to sickness and accident benefits? A. Well, in respect to the exclusion of pregnancy absences there were no changes.

In each of those negotiations the union repeated its request that there be an allowance of maximum of six weeks for such absences, but the requested change was not agreed to and the contract as executed retained the existing language.

Q. During these negotiations, Mr. Hilbert, and I ask you to state in summary form, what was the nature of the discussions with IUE on the subject of demands concerning maternity leave? A. The discussions were in each of the years, '55, '63, '66, and '69 very brief, very minimal.

MS. WEYAND: I object to this as not the best evidence.

We have the portions of the minutes in the record of
771 the recent negotiations, and I believe the minutes speak for themselves.

THE COURT: Well, I don't belief you can get everything in the minutes, though.

No, I am going to hear it.

Go ahead, sir.

THE WITNESS: In 1955 the union broached the subject by saying that General Motors had just given the six-week maximum for pregnancy absences under this plan, which is a 52-week plan. They pay weekly sickness and accident benefits for everything other than pregnancy for 52 weeks maximum.

But in 1954 they apparently agreed to the six-weeks maximum for pregnancy.

The union's discussions and presentations were, as I say,

brief, and we interpreted what they were saying and their opinion and their attitude to indicate that this was a –

MS. WEYAND: I object to the interpretation unless –

THE COURT: That objection may be well taken. I will sustain it.

THE WITNESS: Well, perhaps I should say that in any collective bargaining negotiations one of the functions of,

772 I guess both sides, is to seek to estimate the priority consideration of the other side. Whether in one year it is wages and another year it may be pensions and so on.

MS. WEYAND: Object to any estimate or estimation unless the exact basis for the estimation is given.

THE COURT: I am going to overrule that.

I think the witness is trying to give me a picture and I think I am getting it.

How much time did they spend on discussions of this with comparison with discussions of other matters?

THE WITNESS: Very little. Very little.

THE COURT: All right.

BY MR. KAMMHOLZ:

Q. Your answer – does your answer, Mr. Hilbert, relate to the negotiations in '63, '66, and '69? A. Yes. Yes.

Now, in '69, I think I might mention, that the union made a long list of demands at the beginning of negotiations, including the demand for the six-week provision for pregnancy absences.

Subsequently we made an offer which did not include it. Subsequent to that the union indicated to us that

773 they had given up their demand for the six-week premium – the six-week benefit for pregnancy absences.

They of course had many, many other demands that they were insisting on throughout the contract and throughout the strike that followed it.



Q. Turning now to the mid-'60's, and calling your attention particularly to 1964 and the enactment of Title 7 of the Civil Rights Act of 1964, let me ask you this question: In your administration of the contract did GE recognize any potential problems under Title 7? A. Yes. I felt that once the Act was passed I should review our contracts generally and our practices generally and seek to turn up any potential problem, no matter how remote it might seem.

In the area of benefits and sex discrimination two of the areas that it seemed to me possibly might be a consideration at some point in time were one, this exclusion of pregnancy from S and A, and another provision in the pension plan which permitted women to retire earlier than males, male employees.

Of course the first one if argued would have been argued as discrimination against women, and the second would have been argued as discrimination against men.

774 Q. Did you consider views expressed by EEOC in connection with either of these subjects? A. Well, yes.

When the Act was passed it was passed in the context of the existence of a number of statutes in states in which GE operated, as I have indicated, which for years had prohibited sex discrimination.

Many of those Fair Employment Commissions in those states charged with the enforcement of those Acts were aggressive and we had many complaints and investigations over the period of time prior to 1964.

At no point in time did any state agency ever question the exclusion of pregnancy from the S and A benefits in the period beginning 1950 through 1964.

Now, in addition to that – well, that was a predicate for my belief that there was no legal problem in that exclusion.

I felt also that there was no problem in the exclusion, in the provision for earlier retirement for females than for males.

Subsequently in the labor services, particularly the one published by Commerce Clearinghouse, there appeared an opinion letter by the General Counsel of the EEOC.

Q. Showing you what has been received in evidence
775 is Defendant's Exhibit 5. I ask you whether that is a copy of the opinion letter to which you refer? A. No.

Q. Is it an excerpt dealing with the subject matter of that opinion letter? A. Yes. This is a summary in the CCH Employment Practices Service of the letter itself.

Q. Showing you now a copy of what has been received as Defendant's Exhibit 4, I ask you whether that came to your attention? A. Yes. This is the opinion letter of the General Counsel, Equal Employment Opportunities Commission, dated October 17, 1966, and released December 9, 1966.

Q. Did you rely on those opinions letters? A. Yes.

I informed management that this confirmed my feeling based on the existence of state laws without any question of our exclusion it confirmed my belief that there was no violation of law in the exclusion of pregnancy under the S and A benefit.

Q. Subsequent to that time, when did any information come to your attention which might cast a shadow over the validity of the opinion letters that you have described? A. Well, as I recollect, sometime in May,
776 1971, another opinion letter, another – not another but a decision of the EEOC, it appeared in CCH.

Q. Would you have this marked, please?

THE COURT: Do you have to have it marked or is it already marked?

MR. KAMMHOLZ: It is not marked.



BY MR. KAMMHOLZ:

Q. Mr. Hilbert, would you look, please, at the document marked Defendant's Exhibit 52 for Identification, and would you tell me now whether –

MS. WEYAND: May I see this, please?

MR. KAMMHOLZ: I am sorry. I am sorry, Ms. Weyand.

MS. WEYAND: This is a reference to a decision which I listed and offered the full decision as Plaintiffs' Exhibit 63 and Your Honor rejected it on the grounds that it was –

THE COURT: On the grounds that it is not necessary to put those in as exhibits.

I will consider them anyway. I will consider any authority.

MS. WEYAND: This is an excerpt from it, not the full decision, and I think –

777 THE COURT: I don't know the purpose for which it is being offered, and it hasn't been offered as yet, so I cannot rule on an object if it hasn't been.

Now, would you look at that?

BY MR. KAMMHOLZ:

Q. Would you look at it again, please, Mr. Hilbert? Specifically decision number 71-1474? A. Yes, sir.

Q. And the reference is to CCH Employment Practice paragraph 1310.25? A. Yes.

This is a summary of the decision itself rather than the decision.

Q. And is this the decision to which you referred?

A. It summarizes that decision.

Q. Summarizing the seeming change in direction by EEOC? A. Yes.

MR. KAMMHOLZ: Your Honor, I am not going to offer it.

THE COURT: There is no need.

MR. KAMMHOLZ: I think it has been identified.

778 THE COURT: I can think of a way to get it in if it is important, but I will have to make my own summary ultimately, I guess.

BY MR. KAMMHOLZ:

Q. Do you recall, Mr. Hilbert, whether in April, 1971, CCH still continued to publish the General Counsel's decision which has been referred to here as Defendant's Exhibit 4? A. Yes. They continued to publish that until, my recollection is, about May of '71 when the decision we spoke about appeared in the labor service.

Q. In 1971, May, 1971, there was in effect between GE and IUE a three-year term contract continuing to what date? A. The contract ran from January 28, 1969, to May 26, 1972.

January 26, 1970.

Q. 1970 to what date? A. To May 26, 1973.

Q. And EEOC guidelines dealing with maternity leave issued in April, 1972, did it not? A. Yes, that's right.

Q. What was the first communication that you had from IUE on the question of discrimination, alleged dis-

779 crimination, relating to maternity benefits? A. Well, John Shambo, who is the Chairman of the IUE Conference Board that deals with GE, sent a letter dated February 24, 1972 to John Baldwin, who is Manager of Relations for General Electric Company.

Q. Will you look, please, at the document marked Plaintiffs' 110, and would you tell us whether that is the letter to which you have referred? A. Yes, it is.

Q. You may have touched on this point earlier, Mr. Hilbert, but I want to be sure that it is in the record.

General Electric is heavily engaged in Government contract work, is it not? A. That's right.



Q. And on this account General Electric over the years has been subject to Executive Orders 11236 and 11375? A. That's right.

Q. Issued by the Office of Federal Contract Compliance? A. Well, the Executive Orders issued by the President.

Q. Issued by the President and enforced by the OFCC?

780 A. That's right.

Q. Are those Executive Orders different from the EEOC guidelines of April, 1972? A. Well, the OFCC issued guidelines in, I think, 1970, and those guidelines, these guidelines on sex discrimination, Executive Order 11375 prohibits sex discrimination by Government contractors, the OFCC guidelines as published in the services in effect follow the rationale of the letter of the EEOC General Counsel, which is Exhibit 4, in that it permitted the exclusion of pregnancy from weekly S and A disability benefit payments.

Those guidelines are still in effect and the OFCC still operates under a rule of law under the Executive Orders that permits employers to exclude pregnancy absences from weekly disability payments.

This is also true of the Health, Education and Welfare Department in its guidelines issued with respect to sex discrimination by universities and colleges.

Q. Mr. Hilbert, may I turn now to the formulation of GE's benefit plans, and may I ask you first whether GE considers costs as relevant to the formulation of such plans? A. Oh, yes.

781 Costs are, I guess there is no American company that doesn't consider costs in any kind of benefits.

THE COURT: Just a moment, please, sir.

MS. WEYAND: I believe I have a continuing objection.

THE COURT: As to the relevancy?

MS. WEYAND: I hope it was clear that the objection I made to the exhibits was applicable to the testimony too.

THE COURT: Well, I have already expressed my views on that, Miss Weyand, and I have serious doubts that costs mean anything when you are talking about discrimination. But somebody along the line may feel differently, so I am going to get a full record here and they may even change my mind.

MS. WEYAND: I did want to continue for the record that it is clear that I object to all this line of testimony.

THE COURT: I understand.

All right, sir.

MR. KAMMHOLZ: I think that is the most we can ask, Your Honor.

782 THE COURT: I would think so.

I think I knew that before he said it. Of course they are considered.

BY MR. KAMMHOLZ:

Q. In negotiations, and I refer now particularly to 1966 and 1969, Mr. Hilbert, did the company furnish the union the cost documentation relating to benefit plan proposals? A. Oh, yes. We gave the union a considerable amount of cost information in 1969.

Q. And would you tell us briefly what occurred in the 1960 negotiations – I am sorry, 1966? A. Well, '60 or –

Q. No, – A. Well, this is just an illustration of the impact that costs have on negotiations.

The company had made an offer to the union which included, among other things, four per cent wage increase to be effective, as I recall, April, 1962.

As an option to the union, after the union indicated that there were not enough benefit provisions in our offer,



the company indicated to the union that within the cost framework of one per cent of that wage increase we could provide some benefits.

So we offered as an alternative a three per cent wage

783 increase plus an additional holiday and additional week's vacation after 25 years service.

The union did accept this alternative offer.

Q. The 1966 contract was finally settled in Washington, D.C., was it not? A. Yes, at the culmination of negotiations when the contract was about to expire President Johnson called the parties down to Washington and appointed a sort of mediation panel of the Secretaries of Defense, Labor, and Commerce, and we had to, both sides had to appear before them and that panel insisted on a complete cost justification of every element of our offer, and we understood that the panel itself communicated this cost information to the union.

Q. Now, in 1969 in the negotiations culminating in the 1970 agreement, what, if anything, was done with reference to specific elements of cost under the cost proposal? Or let me phrase it this way: Did the company turn over to the union its cost experience under its major benefit plans? A. Well, yes, we turn over to the union every year the prior year's costs of our benefit plans, by the separate plans, pension, insurance and so on. That may be in evidence, I am not sure, some of the reports that we give.

784 Q. Yes, sir.

Is there in this context, and I am referring now to bargaining over the years, is there concern about cost information finding its way into competitors' hands?

A. Oh, yes. We are also concerned about specific cost information, particularly at the bargaining table. Particularly in some years past, perhaps not as much now, such

information when given, or information when given, we felt, was almost in the public domain and an employer is always, a corporation is always concerned about the value of, in effect, confidential information of this kind getting into competitors' hands for strategic planning reasons.

Q. Turning now to a non-bargaining subject, Mr. Hilbert. Has GE had experience in connection with birth rate among GE employees or wives of employees in the context of a bonus or incentive for births? A. Yes.

October 15, 1953, was the 75th anniversary of GE's existence. So on January 14 of that year the company announced that as a part of the program for noting the anniversary the company would on October 15th, the anniversary, would pay a bonus to any employee, male or female, who had a baby in the family on October 15, 1953. And the bonus was five shares of GE stock. So

785 that if a male or female employee – if a female employee or the wife of a male employee had a baby on October 15 that employee would be given five shares.

THE COURT: When did you announce that? Did you wait until the 15th to announce it?

THE WITNESS: January 14 we announced it for an October 15 due date.

THE COURT: Did you consider all births on that date to be completely voluntary, Mr. Hilbert?

THE WITNESS: I would say yes, sir.

THE COURT: You didn't think that the stock was an incentive to planned parenthood?

THE WITNESS: This I think is – this is perhaps, I should go on and say what happened.

BY MR. KAMMHOLZ:

Q. Incidentally, what was the value of GE stock at that time? A. Well, at about October 15 it was about $78 a share.



The company statisticians, really our public relations people, made a quick calculation that there would be 15 to 20 births on that day, and as it turned out there were 189.

786 Now, I don't know that we can justify the estimate made by our internal estimator, but in any event the talk around the company in October '53 was about almost miraculous percentage rise from the prediction that had been made.

That is the only experience we have had that would indicate that the paying of a bonus or a benefit could have an impact on the number of births.

Q. Mr. Hilbert, what are General Electric's reasons for not paying sickness and accident benefits in a pregnancy case? A. I think they are multiple.

First of all, of course the plan is intended to cover only sickness and accident disabilities resulting from sickness and accident, and it specifically excludes pregnancy which is neither a sickness nor an accident.

Secondly, the plan follows standard insurance practice which historically, traditionally, and still today does exclude pregnancy in most cases from the payment of such benefits.

As we have heard in a few cases there is, let's call it a minimal or a lesser differential in which a plan of some companies might or doles allow a maximum of six weeks for pegnancy disability as against a much greater maxi-

787 mum for absences caused by sickness or accident.

The inclusion of, we believe, the inclusion of pregnancy absences in weekly sickness and accident benefits is really an improper, and improper is not the word, it is just not a rational use of benefit money, and this is where the cost aspect comes in.

We pay a lot of money on benefits to GE employees,

but we feel that we should justify each of them on a rational basis and we feel that for many reasons the inclusion of pregnancy in this kind of coverage is not reasonable and rational.

There are a number of reasons for this.

For one thing, we don't know to what extent the inclusion of this benefit could increase the number of pregnancies. We just have no real way of measuring that.

We feel that the benefit would be subject to abuse, to a stretching of the time of absence.

And we feel that this would occur both before and after delivery.

Before delivery we feel that the natural concern of the mother for the fetus, for the possibility of injury to the child, plus her own discomfort, would tend to stretch the
788 time of leaving before pregnancy earlier than it would otherwise be.

And after the delivery we feel that the natural affection of the mother for the child, in some cases the concern of the mother for the health or well-being or psychological situation of the child, would tend to stretch the post-delivery absence time.

So we feel that this kind of coverage as contrasted with sickness or accident coverage would be subject to more abuse.

THE COURT: Well, if I may interrupt you at this point. When you really analyze it, doesn't it all get, except for your subject A, that you said you didn't know how much it would increase, doesn't it all get down to dollars and cents? Aren't you talking about costs, the abuse, leaving early, staying longer? That all adds up to costs, isn't that what it is?

THE WITNESS: Yes, sir.

THE COURT: Nothing else?



THE WITNESS: Well, in that aspect.

Now, I think I should say that whenever the company or any employer considers a benefit that is proposed or being considered it must and should consider all aspects of the problem.

789 Now, one aspect of this kind of a – of this part of the problem is that the temptation, the normal temptation of the mother before or after delivery to extend her time of absence, if that is going to be paid for, we believe would tend to create a good deal of conflict, of straining of employee tension, grievances, maybe even strikes, because the employee's tendency to move the parameters of her stay before and after beyond the delivery in each direction would be countered by the company's natural, each plant manager's natural desire to minimize the expense.

And as a result we feel that there would in effect be confrontations.

Despite what I think one of the doctors testified, we believe that doctors generally, obstetricians generally, would be sympathetic to the mother and would tend to want to give her the dates she is asking for. To the extent we challenge them we feel that we would be creating grievances, and there would be tension.

THE COURT: That is distinguished from just cost, there is more to that aspect?

THE WITNESS: Yes, sir. But it flows from the cost in that sense.

THE COURT: I understand.

790 THE WITNESS: Then beyond that and looking at the over-all picture, of course, in today's world pregnancy is completely voluntary, and remember the concept of a sickness and accident plan of this kind is to take care of unforeseen, sudden, usually sudden kinds of disabilities.

THE COURT: I don't want to create any more problems,

but suppose – you say completely voluntary. Suppose it is Catholics? Then we get into First Amendment problems, practicing your religion and so forth.

THE WITNESS: I think we can look at it from a slightly different point of view, and maybe statistics in this connection. GE statistics in the record would help.

We have about 300,000 employees. It is slightly more than that. But I think it is, with my poor mathematics, it is easier for me to use round numbers.

Of those 300,000 employees approximately a little more than 40,000 are female employees between the ages of 19 and 40.

This we would consider to be the primary source of childbirth. That is, let's say, one-seventh or one-eighth of the company's employees. This is the general, in general this is the group of employees for whom this benefit would be treated.

791 But we have to limit that even further because in a practical sense again in today's world, which may change in years to come, but in today's world only the married women in that category would be eligible, in effect, would be the ones who would enjoy that benefit.

So we cut the one-seventh or one-eighth in half, I am estimating half, that half of our female employees in that category are married.

We have some figures from Salem which indicate that one-third of all female employees at Salem are married.

But we didn't break it down by age.

So to be conservative we would say half are married. That makes the one-seventh become around one-fifteenth of the employees in the company.

Now, again I don't know how many Catholics or other religions that feel as Catholics do about contraception and abortion, but let's assume a third of our employees



are Catholics. That means that for two-thirds of this one-fifteenth the option is purely voluntary, the option whether to have a child, or if it happens to get conceived, whether to abort is really voluntary.

792 Now, if that were a controlling consideration, if there were no Catholic doctrines, everybody – it would be voluntary for everybody.

And if a Court or any adjudicatory body were to say well, as long as it is completely voluntary, we don't think it should be fitted under S and A. That is not part of the insurance, standard insurance concept. In that event, if we considered the Catholics, what we are really saying, if we hypothesize that kind of conclusion, that voluntariness makes it okay to exclude. Then if we say but, however, there are Catholics who can practice birth control, rhythm and other methods, but nevertheless may get pregnant and may have to go full term, in a sense we are really favoring one religion over another.

And I think it would be improper for the company to propose or the Court to rule that only Catholic employees who have scruples against contraception and birth control, would be eligible for this kind of thing.

THE COURT: I don't think there is any problem with that.

THE WITNESS: So really in a sense from the neutral, let's call it the neutral employer's point of view, point of view of the employer who must be neutral, there is sort

793 of a public relations impediment to seemingly favor one religion over another.

Now, there are other considerations that we have in mind.

And again this flows from the nature of sickness and accident insurance, which is intended to take care of the loss of pay by an employee who suddenly gets sick, who

suddenly breaks his arm. Pregnancy by its nature is a long-term proposition and in today's climate parents plan, most parents, even Catholics, of course seek to plan their pregnancies, their childbirth.

And the planning involves at least a nine-months cycle.

So that employees know some eight or nine months before birth that they are going to have a baby and they can prepare for it; just as if they were to decide in November of one year that they would like to attend or have an extended European trip, they can plan it for the following summer. They can plan for it over that, whatever it is, eight or nine-month cycle. They can put away money. They have savings plans and so on.

They can get themselves ready for it. In a very real sense in today's world planning to have a baby is financially very much like planning to take a trip or to take

794 a course in college, any exercise, any option, almost any luxury, you might call it.

So that we think that that is a consideration that we should keep in mind and which runs against the granting of this kind of benefit.

Now, beyond that, of course, in GE, as in most companies, women utilize, women employees, utilize the S and A benefits more than men. They are absent more frequently and their absences are of longer duration.

Dumping pregnancy on top of this would only further unbalance those already unbalanced scales of utilization.

Again, in General Electric Company about 40 per cent of the women who go out to have babies do not come back. We are somewhat gratified to realize that this is more of our women coming back, 60 per cent, than is apparently true of American industry generally. But still 40 per cent is quite a segment of employees who go out,



don't come back, and therefore, if they were getting weekly sickness and accident payments would be in effect getting a form of severance or termination pay.

Now, we do have a form of severance pay in our contract, but it relates primarily to employees who were laid off. So this in effect would be granting those female

795 employees the kind of termination pay benefit which nobody else has.

Beyond that in a sense the granting of this extension of the S and A benefit plan for pregnancy would be conferring a benefit on women that we would not be able to equally confer upon men. And in that connection we see in terms of employee friction that we foresee a tendency, particularly after delivery, once S and A is paid, to make a kind of allowance for some period of child care. We might not call it that, but I think the pressures of employees and of unions are such that boundaries always get stretched.

And inevitably men would see that women were being paid for staying home to take care of a baby. And we think this would ultimately precipitate a demand for child care leave for men. And we see this as only one step in a sort of chain that has further repercussions.

BY MR. KAMMHOLZ:

Q. Thank you, Mr. Hilbert.

Would you look, please, at the document in evidence as Defendant's Exhibit 50 and tell me whether that is the GE – that contains the GE maternity leave policy in effect prior to 1971? A. Yes. This is a bulletin issued

796 by the company's consultant on health and safety and plant protection on July 7, 1964, and it is entitled "Termination of Active Work During Pregnancy."

Q. Could you summarize very briefly the gist of the policy as it is there stated? A. Well, in effect it

provides that – it reflects the advice of a Medical Advisory Council, council of doctors, primarily industrial medicine doctors, who are pulled together by John Grimaldi, the consultant that issued the bulletin. This is a bulletin issued to all the plants of the company in accordance with the Medical Advisory Council's recommendation. The bulletin in effect provides that women can work beyond the sixth month of pregnancy when the pregnancy is uncomplicated, and may resume work at the end of six weeks following termination of pregnancy.

It reflects, however, a general medical agreement that women should leave at the end of the sixth month, but it is not in any sense a command or requirement.

Q. Would you now, please, look at Defendant's Exhibit 6 and tell us what it is? A. This is a later bulletin issued by the Corporate Medical Operations, a changed name for the same corporate service that had issued the

797 earlier one. It is a health bulletin issued to the field entitled "Pregnancy." And it makes clear that pregnant employees may continue to work beyond the sixth month of pregnancy provided they have the approval of their attending physician.

This is the bulletin which is currently in effect, or this is the instruction which is currently in effect throughout the GE –

THE COURT: Now, a woman can work right up to the day before?

THE WITNESS: Well, a good many apparently have, but the bulletin recommends at the end, it says –

THE COURT: No. No, you misunderstood the question. I don't care what they recommend. I want to know what you do.

THE WITNESS: Well, I would say that that varies, Your Honor.



THE COURT: Is that a policy?

THE WITNESS: There is no company policy on that except for the basic policy statement that they can work beyond the six month if their attending physician permits it, and provided the plant physician has no concern of his own.

The instruction does, however, go on to point out that

798 there are a number of factors that must be considered.

THE COURT: I understand that.

I dislike having to interrupt you, but I want to be sure that we are on the same wavelength.

You said that was simply a recommendation. Now, have you all adopted those, accepted those recommendations in practice? Do you do that?

THE WITNESS: Yes.

As of this time I think they are all accepted and in effect.

But I cannot say that they would all permit an employee to work up to the last day.

THE COURT: Does it preclude an employee working, does your policy?

THE WITNESS: Does not preclude, no, sir.

THE COURT: I guess I will get it.

THE WITNESS: It might be clearer if I – the health bulletin, I should have called it, does state there are many factors that must be considered. First, desire of the individual.

Second, the approval of the attending physician and concurrence by the GE physician.

Third, the maintenance of good health and wellbeing.

799 Fourth, appropriate and safe work assignment.

And fifth, continued efficient work performance.

Now, I think in this connection maybe it would help, and I should say, that the bulletin then recommends

strongly that in any event pregnant employees should discontinue working at least two weeks prior to the expected date of delivery so that the employee may prepare for her confinement and to avoid the complications of early delivery, precipitantly, or other events associated with childbirth.

I think in this connection over the years I have talked to a number of the company doctors and plant managers and to my mind some of the testimony, I guess it was yesterday, Dr. Hellegers did not paint the real world at GE.

It seemed to me that he was talking more in terms of developing trends in medicine or cases that he sees on a sort of consultant basis.

In GE plants the mandatory norm is production. This is what the company is in business for. It cannot in effect afford to be a country club or a relaxed atmosphere.

Many of our jobs held by men and women are tough jobs. They require concentration and a constant, in many cases, constant movement and constant action.

800 The problem that arises in a plant with a woman who wants to work toward the end of her pregnancy is not only the danger to the woman and the fetus but also just efficiency and the concerns of other employees.

Now, in many of our plants we have incentive systems and some of them involve teams, groups that are on group incentive.

In typical group incentive situations, all members of the group must work actively and constantly in order to achieve the incentive goals and rates.

If one of those members has to be pampered because of size or slowness or imbalance because of advancing pregnancy the other members of the team tend to resent it.

So that a manager in a plant, and the plant doctor,



have to consider not only the health considerations, and I must say that our plant doctors are much more concerned about, well, I would say that they are much more malpractice conscious than Dr. Hellegers seems to be, they are industrial medicine doctors rather than obstetricians, but their concerns are for the health of the woman and the health of the child.

But in addition to the health considerations the plant manager and his staff must consider the efficiency of the

801 plant and the concerns of other employees in deciding at what point in time a woman employee should leave.

MR. KAMMHOLZ: May we have these marked as exhibits, please?

THE COURT: Are these marked now, Mr. Kammholz? If not, I would like you to explain why they weren't.

MR. KAMMHOLZ: These, Your Honor, were submitted by us in connection with a proposed stipulation, answers to interrogatories. Plaintiffs' counsel refused to stipulate. They are illustrative of the in-plant application of the policy that Mr. Hilbert has testified about.

I think the relevance comes into play particularly in view of the testimony of Portsmouth's yesterday.

THE COURT: That is not my query.

That is something I will have to decide. The query is why were they not listed and filed prior to now?

MR. KAMMHOLZ: They were submitted to plaintiffs' counsel and plaintiffs' counsel refused to stipulate.

MS. WEYAND: I stipulated –

THE COURT: Just a moment, please, ma'am.

802 I think you are missing – perhaps it is me.

You didn't agree on every exhibit that you put in your list of exhibits as evidenced by the fact that there were objections to some filed by the plaintiff. As you filed some with the plaintiffs'.

I want to know why they were not listed pursuant to the pre-trial order, if they weren't listed.

MR. KAMMHOLZ: They were not listed, and I think the relevance comes into play particularly in view of what happened here yesterday while the young lady from Portsmouth was on the witness stand.

There was received in evidence then the GE employee handbook from that location, and also from Salem. These merely point out that there has been an implementation of the GE policy in other plants.

Now, I don't think it really amounts to a federal case, but it seems to me that if we had a bit more evidence on the subject it might be helpful.

THE COURT: It seems to me, if I could try this case I wouldn't have any trouble deciding it, but that is not the way the system works.

I let the lawyers try it, and I must decide.

There is obviously an objection, and pursuant to the Court's usual practice, if there is an objection, they don't
803 get in unless they were filed as exhibits.

MS. WEYAND: I did not object to them. I did want to state, however, there was not a single plant bulletin that he offered to me that I did not stipulate.

THE COURT: Ma'am, let me ask you, do you have any objection?

MS. WEYAND: I have no objection.

THE COURT: Then they are in.

You will have to supplement your list, I assume.

MR. KAMMHOLZ: Should they be marked now or later?

THE COURT: I would like to put the burden on you. The clerk has enough to do.

MR. KAMMHOLZ: I would like to mark them now.

THE COURT: We can mark them in sequence, but



you must file a list describing them. I won't have my clerk sitting over here spending all his time trying to figure out what they are.

While we are waiting for that, Mr. Hilbert, let me ask you if under your policy a woman is being treated simultaneously for her pregnant condition and hypertension, for example, a latent situation which came about as a result of or at least came to the forefront as a result of
804 this rapid gain in weight that the doctors have been talking about, does she get disability?

THE WITNESS: No, sir.

THE COURT: Why not?

THE WITNESS: Well because in effect I guess the short answer is because the language of the plant excludes any disability resulting from pregnancy.

THE COURT: But supposing it didn't result from pregnancy, it was there all the time, or a condition that was there that wasn't noticeable, wasn't known?

THE WITNESS: Well, under the language of the plan it is our contention, and we have applied it to it this way, in that situation the benefits are not payable.

THE COURT: How about the chap that goes off on a gourmet holiday and comes back with a rapid weight gain and starts being treated for hypertension. Does he get disability?

THE WITNESS: If he is under the care of a physician who certifies that he is sick and disabled, he has suffered total disability, inability to work because of sickness, then we will pay.

Of course if he is being treated at home the plan does not pay for the first week.

THE COURT: I understand.

805 THE WITNESS: First eight days.

THE COURT: Do you pay for elective surgery time out?

THE WITNESS: I beg your pardon?

THE COURT: For elective surgery, a fellow says I have decided to have my nose straightened out.

THE WITNESS: That is elective cosmetic surgery. We do.

THE COURT: What I had in mind was a hair transplant, but just anything.

THE WITNESS: We pay weekly sickness and accident benefits for time lost from work, but do not pay the medical expense of that.

THE COURT: But he does get disability benefits?

THE WITNESS: Yes, sir. To the extent that we have it.

This almost never occurs.

THE COURT: But isn't that voluntary?

THE WITNESS: Yes, sir. In that sense. But it is a minimal occurrence. It is a de minimus problem.

THE COURT: Then you get back to dollars and cents. You pay it because it doesn't cost you?

THE WITNESS: In that sense, yes.

806 THE COURT: All right.

MR. KAMMHOLZ: I am nearly through, Your Honor

THE COURT: So am I.

BY MR. KAMMHOLZ:

Q. Mr. Hilbert, do you have the current earnings level of GE employees in 1973 to date? A. Yes.

The current earnings level of male employees in the company is at an annual rate.

Q. A projected annual rate? A. Projected annual rate of approximately 10,000 a year. That includes overtime.

Q. What is it wihtout overtime? A. May I check quickly?

Without overtime my recollection is it is $9,200 at the



rate of $9,200 per year.

Q. What is it for female employees? A. For female employees the overtime rate was $7,750 average.

Q. And the straight time without overtime?

A. $7,200.

Q. And what is the lowest job rate in GE? A. It is $2.74 an hour for both men and women, which I think comes out to $5,700 or $5,800 annual straight time.

807 Q. Mr. Hilbert, were you in the courtroom yesterday when a young lady from Portsmouth testified about dire circumstances in which she found herself? A. Yes.

Q. Does GE have an emergency aid program?

A. Yes.

I was somewhat distressed at the plight she described because we have a plan called the emergency aid program which is designed for sudden emergencies, financial emergencies. This plan permits the loan without interest of up to $300 to an employee and up to $500 with a minimal interest, four or five per cent, I am not sure what the current rate is, which is, can be paid back through payroll deductions after the emergency passes.

The company's operation of this plan has been very liberal. As a consequence I checked with the Portsmouth plant yesterday after her testimony and they informed me that she had not applied for emergency aid under the plan and they didn't know why.

THE COURT: What constitutes an emergency?

THE WITNESS: Well, the plan –

THE COURT: Unsuspected events?

808 THE WITNESS: An unexpected financial disaster.

THE COURT: But you have been telling me that everybody knew the baby was coming and I follow that.

THE WITNESS: But here personal disaster was that she had no money, which we don't anticipate in the usual

pregnancy or in any pregnancy. She was listed as a married employee and in that situation we don't anticipate or look for financial disasters.

In addition, they told me that she had money in the company savings plan which she – that was a small amount, something like $66, but she didn't seek to withdraw that, which she could have withdrawn immediately. It concerned me primarily because obviously an employer cannot protect against every one of life's difficulties, but we feel that we have a balanced program of benefits and that we have one designed for this sort of problem.

MR. KAMMHOLZ: May I have the exhibits?

THE COURT: I will give you an opportunity before the witness is through before you cross-examine to examine them more closely.

MR. KAMMHOLZ: I think, Your Honor, I can, without too much difficulty, do this in summary form.

THE COURT: All right.

809 BY MR. KAMMHOLZ:

Q. Mr. Hilbert, would you look at Defendant's Exhibit 53 through 60 for identification and tell me in summary form what they are? A. These are employee handbooks and pages from employee handbooks and other communications to employees at a number of GE plants, which include, among other matters, the description of the rules for maternity leave.

THE COURT: Thank you, sir.

MR. KAMMHOLZ: That is all, Your Honor.

THE COURT: All right.

It may be appropriate to take – I imagine cross-examination might be a little protracted, I hope not, but it might be.

Help the witness down, please.

(The witness stood aside.)



THE COURT: Mr. Hilbert, don't misinterpret the questions. If we had a jury I wouldn't ask any, but since I must determine the facts there are some things in my mind. It doesn't mean they are material, but things I want to find out.

Thank you, sir.

You may step down.

810 THE COURT: We will take a brief recess.

(A recess was taken at 10:48 to reconvene at 11:05)

(The witness resumed the stand.)

CROSS-EXAMINATION

BY MS. WEYAND:

Q. Under the insurance plan, if you would look at page 33 of Plaintiffs' Exhibit 6, the provision there in the next to the last full paragraph on the page provides that weekly sickness and accident benefits will be discontinued on the date you cease active work because of total disability or pregnancy. This provision means that if a woman has an automobile accident two days after she goes on pregnancy leave she does not get sickness and accident, is this correct? A. That's right.

Q. Turning to the next page on page 34 under the heading of "Layoff and Leave of Absence," looking at the last sentence in that large full paragraph just below the middle of the page, it says that sickness and accident benefits will not be payable for any period of disability which begins more than 32 days after layoff or leave of absence accrues? A. That's right.

811 Q. This means that anyone who is on leave of absence that has an automobile accident after two days * * * [they go on] does get accident and sickness benefits?

A. That's right.

Q. It means that a person who is on layoff on an

automobile accident 20 days after they go on layoff gets sickness and accident, does it not? A. That's right.

Q. And get sickness and accident beginning after eight days unless they are in the hospital, then from the first day they are disabled up until 26 weeks, even though they would not have been working because they were on layoff, is that correct? A. That's right.

Q. A person who is on vacation, goes off for two weeks vacation, he has an automobile accident the second day, he gets his vacation pay and he also gets sickness and accident from the time he goes to the hospital or eight days after the accident begins, does he not? A. That's right.

Of course vacation time is time off with full pay in itself in effect equivalent to being at work.

Q. He gets both of them? A. That's right.

Q. He gets his full pay plus sickness and accident
812 on that vacation? A. Wait a minute.

Yes, he would. He or she.

Q. Yes, yes. He or she. Correct.

Now, assuming a man is on layoff, a sudden layoff, is buying a home, has had trouble making his budget, he goes on layoff, and about three weeks after he goes on layoff he goes to his doctor and says, "I have an ulcer, I am in a nervous condition, so upset having this layoff I didn't intend to have, and I don't have any income and I really think I need to go to the hospital, I am sure I am bleeding."

He has four children. Is there any more incentive for any doctor to malinger and help a woman stay off on pregnancy when she has a husband and earning and she goes off on pregnancy than there is to have this man malinger? A. Remember that the man on layoff is receiving unemployment insurance benefits and under our



contract he is guaranteed 50 per cent of his normal income.

Q. Budget doesn't allow him. He is going to lose his home with 50 per cent. He was on a close budget before, I told you. A. I guess we could accept any hypothetical case that would present problems to anybody
813 under any program.

Q. There is no more incentive for both the employee and doctor to cooperate in malingering when a man goes on lay off, with a family, a family trying to buy a home, than there is with a woman in pregnancy, wouldn't you agree with me? Generally isn't that true? A. It could be true, but we have had no experience with it. I know of no such situation that has ever occurred that has come to my attention.

Q. All right.

Now, if an employees goes on strike and the third week of the strike he is injured on the picket line and goes to the hospital, he gets sickness and accident benefits, does he not? A. No. He does not.

Q. He does not? A. Unless we make arrangements to continue it.

Q. What? A. Unless we make arrangements to continue S and A. Paragraph three on pages 34 and 35.

Q. 1969 would he have gotten S and A in that situation? A. In 1969 I think we voluntarily agreed to continue S and A for, I think, 31 days following the
814 beginning of the strike; but that is at the company's option, any time a strike occurs, as to whether or not it gets cut off right away as paragraph three provides, or whether it can or should be extended.

Q. It has been the custom of the company to continue it for 31 days, has it not? A. We have done it on a number of occasions. I can't say that we do it

all the time.

Q. And on occasion you did, if he was injured on the picket line, was taken to the hospital, he got paid, is that correct? A. If it happened within the period of time that we extended it, yes.

Q. Now, having regard to the Defendant's Exhibit 4, the CCH summary of alleged opinion in which you based your reliance, that is Defendant's Exhibit 4 – I don't have it. Yes.

You will notice that under this plan, or the facts, we do not know who the company is, the EEOC relied on the fact that there were certain exclusions from the male for recovery, he would not have recovered in the picket line situation, very likely he would not have required –

A. I don't see that.

815 Q. On Exhibit 4. A. Yes.

Q. Goes down. You further state that there are three exclusions, namely that disability must not be, one is for pregnancy, the one we are talking about, two is due to intentionally self-inflicted injury – now you paid for an attempted suicide, I understand? A. I don't know that we have ever had one, but if it came up I think we–

Q. You stipulated that in answer to interrogatories that yes, you had paid. And too, you had an established policy of paying? A. Yes, in our opinion it is really a nonexistent problem. Certainly it is not like 3,000 births a year.

Q. But you stipulated you had paid and you had an established policy of paying. This company would not have paid in this situation? A. That's right.

Q. Self-inflicted injury.

And also says a disability resulting from the commission by the employee or attempt to commit an assault or battery or felony. In most picket lines arbitrators – plans



under that would exclude a situation where there is vio-

816 lence on the picket line, assault, and depends on who is the attacker, but you would cover it regardless of whether he was the attacker? A. What we cover, Miss Weyand, is a disability resulting from an accident no matter how the accident occurs.

Q. Correct. This company did not? A. We don't usually know how the accident occurred.

Q. Right.

This company had exclusions from its plan which the EEOC thought were worth mentioning? A. Right.

Q. Now, I would like to go back to – A. Well, in that connection of course the opinion in itself makes no reference to those other two minor exclusions and the rationale of the opinion is clearly stated, the commission's policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. So the rationale of the General Counsel's letter obviously prescinds completely from these two other minor exclusions.

817 Q. Don't you think you might regard the rationale of the present decision, if you have a plan that pays for things that obviously aren't sickness and accident, as for instance elective plastic surgery, that the plan might be discriminatory when it failed to pay for pregnancy?

A. Well, in my opinion you have to put things like this in context.

We could conjure up perhaps exclusions of the nature that this company in the opinion letter had, things which almost would never happen, which almost never or never, and in our experience the elective plastic surgery falls in that category.

Q. Have you made a specialty of the subject of sex discrimination, as a lawyer? A. I would say no. I cover the whole field of the labor law.

Q. Are you now the Chairman of the Subcommittee of the Labor Laws Section of the American Bar Association on Equal Protection? A. Equal Employment Opportunity Law, it is a committee rather than a subcommittee.

Q. I am sorry. I did not mean to low rate you. I am sorry. I apologize.

818 That includes sex discrimination, I take it? A. Yes. All forms of discrimination under the current discrimination laws and Executive Orders.

Q. That is the only section of the Labor Sections of the American Bar Association which makes a specialty out of sex discrimination, is that correct? A. It is the only committee of the Labor Law Section. There is another committee of another section which deals with civil rights. I think they are really three or four committees over all that deal with civil rights questions. It is all, of course, interrelated.

Q. Now, had you had occasion to look into the payment of sickness and accident benefits for disabilities arising from a pregnancy prior to the time that Title 7 was adopted? A. Well, we have the provision in the plan. We have had it since 1950. I guess I am not sure of what context you had in mind.

Q. Do you look up the law to see what precedents there would be which had held that it constituted sex discrimination not to pay sickness and accident benefits for pregnancy prior to the time that Title 7 was enacted? A. Well, I don't recall that I made any specific research project of it.

819 As I said, we have been living for years, decades really,



under state discrimination laws and had never had any problem raised even though we had many investigations, many cases involving alleged discrimination.

Q. You had many issues involving sex discrimination raised in the plan at grievance procedures and –

A. Yes, when you consider a period of years why, I guess you could use the word "many."

Q. When Title 7 was enacted did you do a thorough research job on the subject of paying maternity or sickness and accident benefits? A. I would say no.

Q. You did not? A. No. I assumed that Congress passed the law in the context of the approach to state agencies, and since there had been no problem in our case with any state agencies I assumed that Congress was carrying forward that same concept or rule. And of course when the General Counsel's letter appeared about two years, a year after the effective date of the Act, in effect it confirmed my feeling this is what Congress had in mind.

Q. Do you know to what employer this alleged, any of these alleged General Counsel's opinions were issued?

A. Well, when I saw this one in CCH it was about May

820 of '71. No, I am sorry. No, I don't know this.

Q. One of them in 1966, do you know? A. Right.

Q. In 1971 you made an effort to find out?

A. Yes.

Q. Did you make any effort to find out in 1966 the employer to which it was issued? A. No. Because the inquiry doesn't describe, the General Counsel's letter does not describe the company involved. It described it as in a certain business and with a certain number of employees.

Q. And this one, you do not know any more facts than are stated in the letter? A. That's right.

Q. Isn't it accepted law that to be a General Counsel's opinion on which you can rely the opinion must be given to the employer who relies upon it and be issued with the direction of the Commission? A. Well, what you are asking now is whether we are claiming, and we do claim full protection under, I guess it is Section 713(b). We do claim that, but –

Q. And you claim this is – A. In addition.

Q. This is the letter on which you claim such reliance,
821 is it? A. Yes. This letter. There were other statements of the Commission that I think confirm that, tend to confirm it.

Q. Was there any letter addressed to General Electric– A. No.

Q. – by the EEOC? A. No. We didn't ask for an opinion on this.

Q. And you never received one? A. No.

Q. You rely on any letter issued to any company whose name you know? A. No.

Q. Do you rely on a letter issued to any company with the direction of the Commission that the letter be issued? A. I guess I am not sure I know what you mean.

Q. The Federal Register reciting the ruling or regulation of EEOC says that for the purposes of reliance it must be issued with the – pursuant to the direction of the Commission. And I wondered if you can point out any letter issued with the direction of the Commission on which you rely? A. Well, at about, sometime later,
822 of course, this letter stated in the CCH service, my recollection is, I think one of the exhibits indicates as late as April 22, 1971.

Q. You had nothing but the CCH? You have no other copy of the letter or anything else but the CCH



print that you have here, is that correct? A. That's right.

Now, I am not sure I know how to answer your question, your earlier questions, Ms. Weyand, but the CCH also published another letter, not a letter, a decision of the EEOC, dated December 16, '69. This was published while we were negotiating in '69.

Q. You mean the EEOC published it? A. Not a letter. I say letter, I mean it is a decision.

Q. Was the EEOC the one that did the publishing? A. Well, the CCH published it, but it is listed or published as a decision of EEOC.

Now, that dealt with a question of giving leave to women for pregnancy purposes, but the opinion, the decision, rather, of the EEOC as published in CCH, says "in an opinion letter dated November 15, 1966, the Commission's
823 policy was stated as follows: The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex."

Now, this is a paraphrase, really, of the language that the General Counsel had used in his October, 1966, letter. It is almost the same. It is just changed slightly.

Q. That is the letter in which they said because there were a list of the exclusions and showed it was quite a different plan than your plan, it was a narrower plan? A. Well, they listed them but didn't refer to them in the opinion.

Q. But listed them in their decision, did they not? You mean didn't refer in the paragraph where they gave their reasoning, is that what you mean? A. That's right.

Q. It is listed in the opinion? A. Right. To my

mind the reasoning indicates that they paid no attention to the other exclusions.

Q. You think they put them in the opinion because they didn't pay attention, they thought they were irrelevant when they listed? A. Yes. I think the opinion
824 itself fairly read requires that conclusion.

Now, in answer, though, to your earlier question, this decision of the EEOC in December of '68 over three years later refers in itself to an opinion letter dated November 15, 1966.

Now, I have not seen that letter, at least I had not seen it until perhaps a few weeks ago.

I certainly didn't see it in 1969.

But that indicated to me that there was more than one opinion letter on the subject and I think a reasonable conclusion was that in 1966 EEOC obviously released one opinion letter on this general subject in order to avoid overpublication, let's call it.

You have no facts except just the inference from what– A. That's right.

Q. – facts that you have here stated? A. I have the reference, incidentally, to the EEOC of this decision, which is paragraph 6084, if you would like it.

I don't think it is in evidence.

Q. There is no indication that the other opinion that it referred to may not have had other facts which dis-
825 tinguished the plan from your plan? A. Well, at that time I did not. Will that suffice?

Q. You are not the Employee Benefits Manager are you? A. No.

Q. You are not in that field. Yours is the legal department, is that correct? A. That's right. Yes.

Q. And in stating that you did not – that the company when it received the February, 1972, letter from



John Shambo, you did not mean to suggest that the facts stipulated here, that Mr. Friedman pointed out the EEOC decision to Mr. Willis, who is your Employee Benefits Manager, did not constitute notice to the company of the union's position, did you? A. I have no knowledge of that.

Q. Yes. A. If we –

Q. So you are just speaking of the legal department, as far as you are concerned? A. Yes.

Q. Didn't mean to suggest there weren't attempts to file claims in August, as was specified here, and that Mr.
826 Willis took it up and there was directions give to Salem that you have not – you are not meaning to say that didn't happen or anything? A. No. I had no knowledge of it myself.

Q. Do you have knowledge of whether or not the UE during the 1940's had made attempts to secure six weeks of sickness and accident benefits from GE? A. I don't.

Q. You don't know whether they did or not?
A. I don't know.

Q. And you don't know whether the lack of very extensive presentation in 1966 reflected the fact that the UE had made some extensive presentations before and not gotten anywhere. You don't know anything about that, do you? A. You are talking about pregnancy?

Q. Yes, sickness and accident for pregnancy.
A. Well, I hesitate to go back that far. It was ten years before I joined the company, but I have a distinct impression that we never had pension and insurance negotiations with UE.

Now, remember this was in the period before the Inland Steel and W.W. Cross decisions.

Q. 1955 was before Inland Steel? A. You are

827 talking about 1940.

Q. Oh. A. These were the decisions that held that pensions and insurance plans are bargainable.

Q. But you don't know if the union didn't ask before? A. I would have to say I don't know.

Q. You don't know at all.

You don't know whether they made an extensive presentation and it wasn't listened to because it didn't deal with insurance?

THE COURT: No. He doesn't know.

BY MS. WEYAND:

Q. Okay.

In 1955 were you aware of the extent to which your competitors paid sickness and accident benefits for pregnancy? A. My recollection of discussions that we had within the house was that very few of them did.

Q. General Motors is a direct competitor, is it not? The Frigidaire plant that the IUE represents and in which we took a pay cut, and down bargaining historically in 1972, and you make refrigerators, you are direct competitors, are you not? A. In that field, yes.

828 Q. And General Motors, are you aware General Motors had paid sickness and accident benefits six weeks, for pregnancy, in 1972? A. No. That surprises me because in 1955 the union benefits expert, Joe Swire, came to one of the meetings and said, "Why don't you fellows do what General Motors did last year. They gave six weeks for pregnancy."

Q. I am going to – A. So we got the impression that General Motors had just –

Q. You didn't look into it? A. I beg your pardon?

Q. You didn't look into whether they had or not?

A. I didn't.



Q. I am going to have to ask to have marked as an exhibit this.

I am going to ask to have marked for identification, as soon as I can get it out, an answer to interrogatories provided by General Motors in the suit of *Gregg v. General Motors* in which they have a signed statement that they have provided six weeks of sickness and accident benefits since 1948. I have a suit, class suit in General Motors parallel to this one pending in the New York Courts and we just got an answer which I brought along, and I will

829 ask to have it marked.

THE COURT: Do you want to wait until they decide that one?

MS. WEYAND: I hope not.

I hope to have a precedent from Your Honor which they will follow.

No, I have a very delightful and fair judge there, I believe, too.

I am given to picking out delightful and fair judges.

BY MS. WEYAND:

Q. You made no study of how many companies at that time provided? A. We may very well, but it didn't come to my attention. The impression I have from discussions is that we felt that most of our competitors did not have this.

Q. Would you name your competitors whom you thought did not have it? A. I would guess that we probably have 2,000 competitors, Ms. Weyand.

Westinghouse didn't have it. Sylvania, General Telephone and Electronics –

Q. You are talking about – A. AT&T, IT&T.

830 Q. You are talking about in '55 or to date?

A. '55 I think you were mentioning.

Q. Yes. A. All right.

Q. Could you name your five largest competitors?
A. Well, Westinghouse is certainly in there, Western Electric perhaps. No, I guess they are not top.

United Aircraft, jet engines.

Sylvania.

THE COURT: Why don't you suggest them, if you know.

MS. WEYAND: I don't know which he regards as the largest, I am sorry to say.

THE WITNESS: Sylvania, which is a part of General Telephone and Electronics. Westinghouse, GT&E, United Aircraft, RCA, Allis-Chalmers.

BY MS. WEYAND:

Q. What? A. Allis-Chalmers.

Is that five?

Q. I am not going – I am going to, since we are putting in additional exhibits, I am going to ask to –

THE COURT: Well, you are putting in additional
831 exhibits if there are no objections.

MS. WEYAND: I am going to offer additional exhibits.

I have obtained from the United States Department of Labor, Bureau of Labor Statistics, a digest of health and insurance plans, 1971 edition, in the form of a separate sheet for each company. It gives their sickness and accident plan and indicates whether or not they give sickness and accident benefits for disabilities arising from pregnancy and indicates that they give the number of weeks for which they give.

I am going to have that – I would like to have it – it appears in volume two. It is a three-volume loose-leaf service and the volume two is composed of the list of the major companies in the United States and a very, very substantial number of them, 54 of them do give six weeks and two give full pay.



Five give eight weeks and two under the –

THE COURT: Miss Weyand, I don't think it is fair for you to tell me what is in there.

MS. WEYAND: I wanted to tell you what I was offering it for. I will have it marked.

I would like to have the sheets which contain, I have the companies that give it, marked as plaintiffs' next,
832 Plaintiffs' Exhibit 121.

THE CLERK: 122.

MS. WEYAND: 122. Thank you.

THE COURT: All right. Mark it for identification.

(The document referred to was marked Plaintiffs' Exhibit Number 122 for Identification.)

MS. WEYAND: I will offer Plaintiffs' Exhibit 122 in evidence.

MR. KAMMHOLZ: We object, Your Honor, on the grounds that it is irrelevant. I think implicit in the offer, and certainly in the light of the testimony to date, the proposition that benefit plans provide larger benefits in one area and lesser in others, and for a comparison of this kind to have relevance, vis-a-vis the GE plan would require in-depth study of this area of coverage, the spectrum of coverage.

THE COURT: I am going to sustain it on the grounds, sustain the objection on the grounds that it was not filed before. It has been the Court's rule when ou don't file in your list of exhibits and there is any objection it cannot be accepted.

You may, of course, leave it for the record, and your
833 exceptoin is noted.

BY MS. WEYAND:

Q. Are you aware that Armour and Company provided eight weeks of sickness and accident benefits for maternity? A. No.

Q. Are you aware that –

THE COURT: I am sorry. I didn't hear the answer.

THE WITNESS: No.

BY MS. WEYAND:

Q. Were you aware Campbell Soup Company provided eight weeks sickness and accident benefits for maternity?

A. No. I have no information on that.

Q. Are you aware that Retail Clerks Local 689 provided full coverage? A. I am sorry. I am not aware of it.

Q. Swift and Company provided five weeks plus additional weeks for each year of service over six with a maximum of eight weeks? A. I have no knowledge.

THE COURT: Can we save time? Can you tell us of which companies, if any, that you have direct knowledge of, Mr. Hilbert? We might be here for three days.

834 THE WITNESS: I think all of the automobile companies pay six weeks maximum.

THE COURT: You have knowledge of the automobile companies?

THE WITNESS: Yes.

That was brought to our attention in 1955 by IUE.

THE COURT: Wouldn't that save time, Miss Weyand.

MS. WEYAND: I would like to ask him about RCA has six weeks. That is one of your competitors. That is one you named.

THE WITNESS: I didn't know that. No, I certainly don't know it now.

THE COURT: I am going to stop you, because it makes it very difficult for the Court. I am trying to separate counsel's statements from evidence. I have got to decide the case on evidence and your statements are not evidence.

MS. WEYAND: If you could take judicial notice of



this, because it is a publication of the Bureau of Labor Statistics, even if it is not in, I believe it may be taken –

THE COURT: All counsel, it could help the Court, if they bear in mind that I must decide it on evidence.

835 And evidence is what the witnesses say, not what counsel suggests in their questions.

You are not the only guilty party.

MS. WEYAND: I believe, with due respect to Your Honor, that the matters of which the Court may take judicial notice are evidence equally.

THE COURT: I am not talking about judicial notice. I am talking about other matters.

MS. WEYAND: I wanted to mention a couple, ask him about a couple of others.

Did you know that Johnson & Johnson had eight weeks in maternity coverage?

THE WITNESS: No.

BY MS. WEYAND:

Q. Did you know that Penn Central Transportation had coverage for, full coverage, for six months?

A. No.

Q. Now, did you ever make a study of the arbitration awards to see whether arbiters had held that sickness and accident should cover, did cover, disabilities arising from pregnancy?

MR. KAMMHOLZ: Objection, Your Honor. Irrelevant. I see no basis.

836 THE COURT: I am sorry, I was distracted by what appeared to be backfiring out there. I didn't hear the question.

Would you mind repeating it?

MS. WEYAND: I asked the witness if he had made a study of the various arbitration decisions to determine if arbiters had ruled that the payment of sickness and acci-

dent benefits should be made in cases of disabilities arising from pregnancy?

MR. KAMMHOLZ: Objection as irrelevant.

THE COURT: I will overrule the objection to the question.

The question is, did he make a study. And I don't see anything objectionable about that.

Would you answer that yes or no, sir?

THE WITNESS: No special study, no.

THE COURT: No study.

BY MS. WEYAND:

Q. Were you aware that as early as 1951 an arbiter, Mr. Lesser, respected arbiter, had ruled that it constituted sex discrimination not to treat pregnancy in employment situations the same as any other medical situation?

MR. KAMMHOLZ: Objection. Irrelevant and immaterial.

837

THE COURT: Objection sustained.

MS. WEYAND: I submit to Your Honor that if there is going to be any contention of good faith reliance the fact that in the legal field there was an issue that existed on which people might take different positions and were taking different positions over the years, shows that there could not be good faith reliance on one side.

THE COURT: Wouldn't that cover it when the witness said he made no study?

MS. WEYAND: I asked if he was aware the legal issue then existing going back that far.

I think it is an appropriate question.

May I rephrase the question?

Were you aware that going back to 1951 there had been a legal issue as to whether or not sex discrimination was involved in the failure to treat pregnancy the same as other medical disabilities?



MR. KAMMHOLZ: Objection. Irrelevant. Calls for a conclusion, for a legal judgment.

THE COURT: Overruled. He ought to know.

Were you aware? That is the question.

THE WITNESS: Well, I would like to have, if possible, a definition of what is a legal issue.

838

THE COURT: Would you refine your question to that extent, what you mean by a legal issue? I have one view of it and Mr. Hilbert may have another.

BY MS. WEYAND:

Q. Well, were you aware that there were conflicting positions being taken by lawyers and arbiters with respect to whether or not it constituted sex discrimination to fail to treat absences due to pregnancy the same as absences due to other medical disabilities? A. Well, again may I ask sex discrimination in violation of what law?

Q. Sex discrimination in violation of a contract that provided there should not be sex discrimination. A. No. I was not aware of that. It had never come to my attention and the IUE had certainly never raised it.

Q. Now, the IUE, I believe, requested you, not in connection with this case, but in connection with bargaining, a list of all – requested GE a list of all complaints issued against you and all the charges against you before state and federal agencies because of race and sex discrimination and the company refused to provide them, is that not so? A. That is so. And we explained in a letter why.

839

Q. Would you care to state the explanation?

A. Yes.

We felt in large part that there are sections of Title 7 which require EEOC to keep confidental charges, names and so on during the investigative phase of the charges.

And we felt that we would be breaching the spirit of

that section if we were to disclose that sort of material to the IUE, and we stated that in a letter that we sent to you, and we received, to my recollection we received no response from the IUE to our letter refusing to, explaining why we did not give that information.

Q. Do you know how many such charges you have pending against you? A. Relating to all aspects of discrimination?

I am trying to recollect our latest report.

My guess would be about 200. I don't have the report with me, though. I wish I wouldn't be held to that.

Q. How many cases do you have pending against you that EEOC has filed? A. One.

Q. Lynchburg, Virginia? A. That's right.

840 Q. How many cases do you have pending against you by the Department of Labor filed under the Equal Pay Act? A. One.

Q. *Hobson v. GE* in the Northern District of Ohio? A. That's right.

Of course that case, you recall, involved a correction that was made many years ago of a claim of Equal Pay violation.

And the point of the lawsuit now is that at that point in time the company with IUE agreement red circled certain men's rights and the Labor Department is saying yes, you corrected the Equal Pay violation back in the '50's, if there existed one, but you should not have, with the agreement of the union, red circled those men.

I consider it a technical case and, of course, it has not yet been –

Q. Does not the complaint allege that as of the time the complaint was filed in June of 1972 that there are males receiving pay for wire drawing jobs at a higher rate than women at that time were being paid for the same



wire drawing jobs? A. That's right.

MR. KAMMHOLZ: Your Honor, I object.

841 Your Honor, this, I suggest is irrelevant.

I gather that counsel for plaintiff here is counsel for plaintiff there and –

THE COURT: Fortunately I am not the judge there.

MR. KAMMHOLZ: I wanted to be sure we don't get a res judicata problem here.

THE COURT: Well, the witness has already answered it.

Yes, he answered, but I don't think it really helps me.

MS. WEYAND: His direct testimony, I believe, was that they had not ever been found to have violated.

THE COURT: That is why I let you.

MS. WEYAND: I think I should –

THE COURT: Well, I think –

MS. WEYAND: And –

THE WITNESS: This is just a complaint filed.

THE COURT: I said, a complaint is not a finding.

THE WITNESS: Oh, I am sorry, Your Honor. Yes.

BY MS. WEYAND:

Q. You have settled with very substantial payments

842 two sex discrimination cases within the last 18 months, have you not? A. We have in ongoing procedures. We are constantly making changes in wage rates at various plants and we have agreed on changes in rates in at least one plant over this period.

Q. You have settled with a settlement approximating 300,000 in back pay and 250,000 in increases a suit known as *Burry v. GE* in the United States District Court in Indiana, have you, an Equal Pay case? A. Yes. This was a settlement without any finding or admission of violation of law.

Q. But you did give the women, some women, $200,000 in back pay and raised their wages $250,000 a year

when they claimed that they had been paid less than men who did equal work? A. Certain women, yes.

Q. You also had a sex discrimination case against you known as *Allen v. GE* which you settled by hiring every woman involved, giving her a pre-hire seniority date and full back pay to the date of which she filed her EEOC complaint, did you not? A. I don't recall that case.

What plant?

843 Q. That is the pipe case in Tyler, Texas. A. This was an EEOC charge, right?

Q. Yes, Title 7 case. A. Yes, well again –

THE COURT: Before Judge Justice?

MS. WEYNAD: What?

THE COURT: Wasn't it before Judge Justice?

MS. WEYAND: It was settled before a decision by the judge.

THE COURT: I say, it was pending before Judge Justice?

MS. WEYAND: I believe so, yes.

THE WITNESS: That case was settled with no admission of any kind of violation of law.

BY MS. WEYAND:

Q. But you did hire all the women with a prehire seniority date, gave them back pay to the date they applied for their job, did you not? A. Well, I am not – I don't recall right now the details of the settlement. I think there was a very limited amount of back pay, but I don't recall the specifics.

Q. And they were hired with a pre-hire seniority date, were they not? A. Yes.

844 Q. And the ones that were hired were given back pay to the date they were hired, were they not? A. That is the part I am not sure about.

Q. There was back pay, you recall? A. I think



there was a very limited amount of back pay.

Q. The IUE had made an effort over the years and made an effort in 1969, '70, again in '73 to persuade the company that it should submit to arbitration grievances involving a violation of a clause against discrimination because of sex and race, has the IUE not? A. That's right.

Q. The IUE has also asked the company to agree to to arbitration grievances arising over the denial of payments for sickness and accident benefits, has it not? A. That's right.

Q. And the company refused? A. Well, that's right. Generally speaking all our benefit plans are exempt from mandatory arbitration, so the IUE has never made a specific request that S and A claims be made arbitrable. They have made requests that benefit plans generally –

Q. All denial of claims? A. Right.

845 Q. So under the malingering issue, if the company claims that a woman is not properly entitled to a claim she files a grievance under the contract, she has no further recourse if the company denies the claim, does she? A. Yes.

She has two forms of recourse.

One would be a suit on the contract.

Q. Go to court and sue on the contract? A. Yes.

And the union has done this on behalf of employees.

Secondly, the union can process a grievance, such as the grievance here involved, and once they have been processed through three steps of the grievance procedure the union can then strike in support of that grievance.

So there are the two forms of pressure or relief, if you want to call it that, that the employee has available through his or her union.

Q. The company has a very effective control over

malingering, does it not, if in order to recover the woman has to hire a lawyer and go to court and prove she didn't malinger? A. Well, I don't like the word

846 "malingering" because when I spoke earlier of the normal temptation of a mother to be or a mother who has delivered to want to stretch the period of her absence, I was not thinking in terms of what to my mind, at least, is malingering.

To my mind a malingerer is somebody who is lazy, who wants to either avoid duties when he is at work or avoid work when he can.

And the problems that I have been speaking of are really problems of employee relations. The kind of problems that will come up, we feel, when a woman says to her doctor, "I don't want to work in the plant more than five months, six months, seven months while I am pregnant. My mother had a baby that was stillborn because she felt that she was working too hard or straining, or something hit her." And the temptation of the woman after the birth is to want to stay with the child out of natural love and affection, perhaps out of concern for the child's health or psychological state. So I don't like to use the word "malingering."

But I do foresee, I think we in the company foresee, that in the context of that kind of situation doctors, in my opinion, generally are going to go along with the employee, with the mother, with the patient.

847 And there are going to be conflicts. There are going to be arguments. There is going to be discontent, frustration, and possibly really a lowering of employee morale.

Q. If the company were to grant sickness and accident benefits for the period an employee was disabled, that would not require any change in the right of the company to grant a leave to any employee who wished



to go off on a personal leave of absence for the period preceding pregnancy without pay, would it? A. Well, I think this is where you get to the rub.

The question, I think, the employee, I think quite naturally would like to get pay as one of the doctors said here the other day, he has yet to see anybody turn down money. So I think this is where the employee friction, the grievance problem, would arise.

Q. Today the employer does not give a leave of absence when a woman wants to go on pregnancy. On other leaves of absence, if you get – if you had a pulmonary embolism within 31 days you would get pay, but instead of putting a woman on leave of absence it is your benefit policy not to treat pregnancy leave as a leave of absence, is it? A. Well, it is an absence.

848 Q. Your benefit bulletin says it is not to be treated as a leave of absence, it is not a personal leave of – A. I don't think that we should get caught on semantics here. It is an absence from work without pay.

Q. But it does not constitute a leave, as you admitted, for the 31-day provision? A. It does not. Weekly S and A coverage ends when she goes out, that's right.

Q. But if she goes on any other kind of personal leave of absence S and A continues for 31 days, does if not? A. That's right.

Q. That would not make it like other leaves of absence, would not constitute any more confrontation, would it? In fact it constitutes less to make her go out without anything, doesn't it, without even a leave of absence? A. It seems to me if we are talking about the payment of weekly S and A benefits when she goes out, her natural desire and temptation is to go out with those benefits being paid to her.

Q. That about the woman who –

THE COURT: Before you get away from that, let me
849 be sure that I have that straight now.

Talking about semantics. What is a leave of absence? Forget females. What happens when a male gets a leave of absence? He goes off without pay?

THE WITNESS: Yes, sir.

THE COURT: But for a certain period of time he is covered under the policy so that if he becomes ill he gets benefits, is that correct?

THE WITNESS: Yes, sir.

Well, yes, if he becomes ill within 31 days, right.

THE COURT: Now, if a female asks for a leave of absence because of pregnancy, she doesn't get it; is that correct? She is told you can't have it?

THE WITNESS: Well, she is permitted to be absent and notation formally is "absence – pregnancy," some word like that. Sometimes may even say, "leave of absence."

THE COURT: So she is not covered for any benefits she would have if she were not pregnant and just took a leave of absence?

THE WITNESS: Yes. That is correct.

THE COURT: So a male who voluntarily wants to take a little vacation, gets a leave of absence, I don't
850 know whether that is grounds for a leave of absence, do you have to have a special ground for leave of absence?

THE WITNESS: Well, a vacation is a matter of right to the employee.

THE COURT: Well, let's forget that grounds.

What grounds do you have to have?

THE WITNESS: Well to work for a union, let's say he wants a leave of absence to work for the union.



THE COURT: You don't give everybody who asks for it a leave of absence, I take it?

THE WITNESS: Not necessarily, but if the request is reasonable, if an employee wants to take six months off to go to college or take courses, that leave is granted for that purpose normally.

Now, if he did that every year I think there would be a point in time at which the leave would be denied. It is discretionary, of course.

THE COURT: But it is a voluatary thing, isn't it?

THE WITNESS: Take a leave of absence, yes, sir.

THE COURT: A fellow does it on his own?

THE WITNESS: Yes, sir.

THE COURT: He gets certain benefits for a period of
851 time?

THE WITNESS: He is covered by weekly S and A for 31 days.

THE COURT: The lady that voluntarily gets pregnant, as you suggested happens in most of the case, why she doesn't – she takes a leave and doesn't get any?

THE WITNESS: She is not covered by S and A from the time she goes on absence.

THE COURT: I want to be sure you and I are not dealing in semantics. She doesn't get any benefits, does she, any more than the fellow that goes off to college doesn't get any other except for the S and A?

THE WITNESS: He gets coverage, not benefits. Is that understood? You said benefits.

THE COURT: He gets coverage and she doesn't?

THE WITNESS: Right.

THE COURT: Do you consider coverage a benefit? I bet you do when you talk to the union.

THE WITNESS: Yes.

THE COURT: I suggest you do when you talk to the

union and I guess it is.

THE WITNESS: Coverage is a benefit, I would have to agree.

THE COURT: So to that extent there is a difference,

852 even though they are both voluntary acts?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MS. WEYAND:

Q. I would like to have you look at Defendant's Exhibit 7, page two, if you would.

Would the marshal, please, show it to you?

Under the paragraph numbered two on the second page – A. Yes.

Q. Would you read the next to the last sentence out loud? A. Next to the last?

Q. Read the – well, why don't you read the whole paragraph out loud? I think it is inconsistent with something you said and I would like to have you straighten it out. A. "The pregnant employee may elect to voluntarily discontinue working, and have her status designated as 'illness – pregnancy' which is treated the same as an absence due to illness for continuity of service purposes. During this period the employee will be covered by current rules and benefit plan provisions relating to such pregnancy absence. The employee will be expected to return to work within eight weeks following culmina-

853 tion of pregnancy, unless she presents evidence that she is unable to return due to illness or complications from pregnancy. In this instance, illness absence would thereafter become the reason for absence on employment and payroll records. If the child's condition necessitates the employee's continued presence at home, her service may be protected beyond eight weeks after termination of pregnancy only if a leave of absence is granted for



such purpose."

Q. And this is the way they are entered on the books, is that correct, illness – absence? A. Well, this again is a headquarters statement. It is a health bulletin sent to the field. I don't want you to understand that the field copies this in their handbooks. They paraphrase it. They may have minor changes here or there.

Q. You do not exercise uniformity of control for the national office on this subject, is that correct? A. That is basically right. It is uniformity of recommendation, but not of control.

Q. And the same is true about whether there is a requirement in a plant that the employee go off at the end of six months, that is subject to the local plant management control? A. Well, no. I would say that to the

854 extent we find out or hear or know that any plant has a fixed rule to that effect we would exercise control to that extent, but we would not insist on repetition in a handbook or in local rules of paragraph two.

There is in evidence here a Murfreesboro, January 1973, notice on the front page of the bulletin, employees are required, pregnant employees are required to cease work at six months. You are acquainted with that bulletin? A. Yes.

Q. It was issued by Murfreesboro in January, 1973? A. Yes. And as you know, we corrected it as soon as we found –

Q. As soon as we introduced it and asked you to stipulate about it you sent another bulletin out? A. Murfreesboro did.

Q. Yes. A. Okay.

Q. Do you take any steps to find out if – made any survey to keep track of what the local management does about this subject? How does Murfreesboro happen like

that? A. Well, in this area as distinguished, let's say
855 from a company-wide benefit plan where the plan is mandatory on everybody in the company, in the area of personnel practices we don't exercise the same degree of uniformity of control.

In this respect many of our plants conform to local area practices. Many such areas, I assume from having seen some of the documents in the past, maybe still follow what is called a conservative medical advice. And I think that is where some of these plants have adopted some of these rules, but we think we have got them all corrected.

Q. Any survey to find out that you have? A. Yes. We have had our consultants in employee relations check their locations.

We have four consultants and they have been asked to check all locations to see that everybody is in line.

Q. Have they completed checking them yet?

A. Well, I haven't had a report back. I assume if they found anything negative that I would hear.

Q. You assume you would, but you haven't heard?

A. I haven't.

Q. You don't know whether it is completed as yet?
856 It is going on at the present time? A. Well, I don't know. I would assume it is completed. It was started sometime back.

Q. Did you make any study as to whether the fact that you gave a bonus in, for the baby on the anniversary date, what was that – A. 75th.

Q. That is of your predecessor company, isn't it? GE was incorporated in 1892, was it not? A. I will have to subtract 75 years from 1963.

1878, I think. Yes, that's right.

Q. First annual report is 1892 and a lot of the litera-



ture, it was your predecessor company, was it not, on the 75th? You don't remember? A. It was bad enough going back to 1940 and now we are going to 1878?

Q. Do you know whether the fact that there were these large number of babies on that one day had any distortion in the long run, I mean with the five years before and five years after, affected by the fact that you had babies on one day, or is this the – A. I don't know.

Q. You don't know the effect on the ten-year span at all? A. No. I don't know. I don't think we
857 made any study.

Q. You don't know at all?

THE COURT: I wonder if that public relations fellow who drafted that is still with the company.

THE WITNESS: No.

THE COURT: No.

THE WITNESS: Actually it was considered, though, a public relations success. It received attention in the paper, and I guess that is the purpose of public relations.

THE COURT: Sure

BY MS. WEYAND:

Q. You have a number of EEOC findings against you, do you not? Do you know how many times the EEOC has found you in violation as to sex and race combined?

A. I don't have any specifics. I would say that the ratio of EEOC findings we have in the cases we have had runs about three to one in our favor, that is, of no violation.

Q. And they found against you in Cleveland Wire Plant, the charge of failure to promote and Equal Pay, did they not? A. Well, Equal Pay would not be and EEOC consideration.

858 Q. They made a finding, the red circling situation

which existed violates Title 7, doesn't it? Anything that violates Equal Pay also violates Title 7, does it not?
A. I think that remains to be decided. I think that is an open question.

Q. Anything that violates Equal Pay Act may not violate Title 7, or the other way around, might be an open question, isn't it?

MR. KAMMHOLZ: Argumentative.

THE COURT: Yes. Objection sustained.

MS. WEYAND: I was very surprised, because I didn't know anybody had a question on that one.

MR. KAMMHOLZ: Still argumentative.

MS. WEYAND: I am sorry.

THE COURT: And gratuitous.

BY MS. WEYAND:

Q. Do you have a finding against you in Waynesboro?
A. I don't recall that specifically, no.

Q. Came out in the last two weeks. You are not acquainted? A. Nope. Haven't seen it.

Q. Coshocton? A. Coshocton? No.

859 Q. Bucyrus? A. I don't recall the Bucyrus one either.

Q. Philadelphia? A. Yes. That is race.

Q. I am asking both race and sex on these.

You have a suit pending or against you pending for some time in Philadelphia, do you not, on race?
A. On race, yes.

Q. Are you acquainted with a medical study that shows that women have a higher exercise coefficient during the period of the 24th to 36th week of pregnancy than either non-pregnant women or women during earlier stages of pregnancy? A. Higher what? I am sorry.

Q. Exercise coeffiient? A. No.

Q. Have you ever investigated what the medical findings are? A. No. I haven't.



Q. Do you have any study which shows that employees have objected to having a pregnant employee work with them in incentive groups? A. I don't have

860 specific indications, no.

I have never seen a particular grievance on it. I think I entered into that discussion on the basis of my general experience with the company and with other companies while I was in a law firm in terms of employee attitudes.

Q. What has been your experience about employee attitudes towards a pregnant woman in the plant?
A. Well, I would say ambivalent, some are protective, chivalrous, helpful, protective. I said that. Others, I think, are unhappy, frustrated, annoyed. Some others I would assume in any American group, whether a working group or elsewhere, would have probably some problems concerning matters of personal decorum.

Q. What facts do you have on which you base these statements? A. Just my impression of life in the GE Company.

Q. You have no specifics? A. As you know, we are a company that has many, many plants in different parts of the country. Some urban and some rural. Some even potentially suburban. All kinds of mores from A to Z.

Q. How much experience have you had in what plants and what years would lead you to this impression that

861 you have expressed here? A. Oh, I couldn't pick specifics. I review periodically grievance matters that our people bring to me. I get phone calls from our lawyers, from our employee relations people in the field. I have tried arbitration cases involving things like group incentive matters.

Q. Do you remember any phone call that reflected

an attitude about pregnancy from anyone? A. I would say not specifically, no.

Q. Do you remember any grievance that raised an attitude about pregnancy from anyone? A. No, not at this moment.

I would, I suppose if I looked back through the files I might find some.

Q. You don't know whether you would or not?
A. Well, I think I would, but I can't be sure.

Q. You never looked? A. I never looked, no, for this purpose.

Q. Do you have an impression as the attitude of management in the local plants in regard to the presence of a pregnant woman on the work staff? A. Again, GE managers like GE employees generally run the gamut. We have some very, let's call them liberal managers, and
862 we have some prudish managers. Generally speaking a company does not pick its managers in relation to their attitudes on this subject.

Q. Do you have any specific facts on which you would base a statement as to the attitude of management?
A. Well, just that I know the managers, at least a high percentage of them, and had conversations with them and you can't avoid getting some impression of a man's political, moral, even, in a sense, religious approach in those contexts.

Q. Ever had discussions with any of them about a pregnant employee in the plant? A. I can't recall anything specific.

Q. Wasn't it admittedly the company's position in negotiations in 1960 that it would not negotiate costs but only negotiate a level of benefits? A. Well, this has always been the company's preference, to negotiate level of benefits rather than specific cost elements. But costs,



of course, are a part of any employer's considerations in the contesxt of the best use of corporate money for particular employee benefits.

Just as an example, if somebody said, "Well, we think a good benefit would be to give every employee a $100
863 gift on his birthday, his or her birthday, I am speaking for our benefits people, but I think I know how they feel, they would calculate the cost of that 300,000 people times $100, and they then evaluate the extent to which that would be A, in accord with current practice, industry practice; and B, whether generally speaking it would be a reasonable, rational, desirable expenditure of the money for that benefit.

In a sense it is, to use a Department of Defense phrase, it is trying to get the biggest bang for the buck.

Q. Is it not true that throughout the 1960 to 1963, 1966 and 1970 negotiations the company repeatedly stated to the union that they bargained only level of benefits and did not bargain costs? A. Which negotiations?

Q. '60, '63, '66, '69 and '70. A. Well, I would say that is not true of '69 and '70.

Q. That wasn't true of '69? Are you acquainted with Mr. Moore's statement? A. Generally.

Q. At the beginning of the opening he had a five-page statement he made that included that? A. I was there.
864 I don't remember the specifics of it.

Q. All right.

Will the marshal, please, show the witness Plaintiffs' Exhibit 42-C, Stipulated Exhibit 00.

Mr. Willis, who is referred to there, is the GE Employee Benefits Manager, is he not? A. Yes.

Q. And the Joe Swire at that time was the IUE expert on pensions and employee benefits? A. Yes.

Q. Would you have any reason to doubt the colloquy

there recited was not accurate? A. Well, I don't know what these are.

Q. That is the IUE version of minutes. A. IUE minutes?

Q. Yes. A. As I recall, these are taken by a man who is not a skilled reporter. They are really – so they are not verbatim, is that right?

Q. They are not verbatim. The GE are not verbatim either, their version of the minutes, yes. A. I agree.

And in that context I can't be sure.

865 Q. This was a recurrent refrain throughout the previous years, was it not? A. Well, again, as I have said, we prefer to bargain on level of benefits. We give the union quite a bit of cost information, both future information and information as the plants, on how they have operated.

We have found that in collective bargaining negotiations not only is such information – are we concerned that such information will get to our competitors, but also we find that discussions of costs, particularly predicted future costs, involve us in arguments that prescind from, detract from the arguments, whether the benefits in question are good ones for the employees, are in line with what other industry – other companies are doing.

Q. Again, it was no question that you had that kind of a refrain throughout '63 and '66 whenever the issue came up, you would say bargaining benefits we don't bargain costs? A. We prefer to bargain level of benefits.

Q. And you told that to the union repeatedly?

A. Yes.

Q. And 1973 is the first year you departed from that refrain, is it not? A. Well, no. In 1969 I would say

866 that we gave a large amount of cost information that the union requested.



Q. The cost information was requested by the union as cost information? A. Yes. And we were willing to give it to them.

Q. I would like the marshal to find Stipulated Exhibit MM, if he would, the stipulation that is a speech by Mr. Moore at the beginning of negotiations.

I would like the witness to look at this exhibit and see if that is not the speech Mr. Moore made on the date there shown? A. This is 1966.

Q. I am sorry. A. Is this what you said?

Q. That is – there is no question that speech was made in '66? A. Yes.

Q. Yes, there is no question.

Did you participate in the 1969 negotiations?

A. Yes.

Q. And you are not aware that the refrain was still used at that time? A. Well, again, we still preferred to bargain level of benefits, but at the union's insistence

867 we gave cost figures.

Q. You gave cost figures ever since the decision came down in '69 that said you had to? A. No, that didn't enter into it.

Q. Okay. Okay. Thank you.

In addition to cosmetic or elective cosmetic surgery you also pay for other elective surgery, do you not?

A. Well, could you refine that?

Q. Someone had a trick knee and wanted to play or participate in athletics and elected to have a repair on his knee? A. Yes. That would either be a sickness or the result of an accident.

Q. Or sickness, accident, however his knee got in a trick condition? A. Right.

Q. No matter if it was years ago and he elected to have it fixed up, you would pay sickness and accident

benefits? A. Yes.

Q. Do you ever have occasion where you require a male, I think it is good policy for a male to go off, for
868 people to go off for a period of resting up for an operation for a pacemaker or elective surgery operation? Does the company concern itself whether that would be good, encourage the employee to take a period off before the operation? A. I am not familiar with that.

Q. You pay sickness and accident in instances of removal of benign tumors? A. Yes. If the doctor certifies that it is a sickness and the employee is disabled, then we will pay.

Q. Does the certificate ask anything about it being a sickness? A. The form itself?

Well, I should –

Q. It speaks for – you aren't purporting to make any different statement. He certifies it as a disease and they pay and whatever the form shows, okay? A. Well, it does indicate what the cause is.

We have some – we have the forms that the ladies filed in the Salem case. We could discuss them if you like.

Q. I believe that is all I have.

THE COURT: All right.

Any redirect?

869 MR. KAMMHOLZ: Very little, Your Honor.

THE COURT: All right.

MR. KAMMHOLZ: I should like only to clarify the witness' reference on cross-examination to an EEOC opinion of 1969.

Would you refer to it, please, Mr. Hilbert?

THE COURT: Do you have it? Has it been marked? Mr. Marshal, give it to the witness, please.

THE WITNESS: Oh, yes, I am sorry. Here it is.



THE COURT: Do you have a copy?

THE WITNESS: I have a copy.

THE COURT: You use your copy and then counsel can use his.

THE WITNESS: Yes, sir.

REDIRECT EXAMINATION

BY MR. KAMMHOLZ:

Q. Will you state for the record, please, Mr. Hilbert, the EEOC decision number? A. Decision number 70-360, case number JAU9-026.

Q. Dated? A. December 16, 1969.

Q. And reported where in the Commerce Clearinghouse
870 Service? A. Commerce Clearinghouse Employment Practices Service at paragraph 6084.

MR. KAMMHOLZ: I have nothing further, Your Honor.

THE COURT: All right.

Any recross?

MS. WEYAND: No, Your Honor.

THE COURT: Help the witness down.

(The witness stood aside.)

* * * * *

THE COURT: Call your next witness, please.

MR. STRAUSS: Defendant calls Charles Duncan.

THE COURT: Come around, Mr. Duncan.

CHARLES DUNCAN was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified on his oath as follows:

871 MS. WEYAND: I have a statement I would like to make at this point.

The EEOC in this case issued an order against another former employee of the EEOC who GE had subpoenaed as a witness. GE subpoenaed Mrs. Sonia Pressman Fuentes as a witness, and I have not pursued the full extent of the EEOC ruling. I was told by staff members that the

EEOC had issued an order under its regulations to Mrs. Fuentes not to testify, and Mr. Strauss told me he withdrew the subpoena.

The EEOC was in the process of sending me copies of the order, and I told them they didn't need to because I had no occasion for it.

I would like to defer the hearings of the testimony of Mr. Duncan until I can check with the EEOC.

They had told me in that connection they had a regulation against a former employee testifying as to internal matters that went on. I would like to have an hour or so to call the EEOC and make some determination and perhaps to ask you to wait because they told me that had an order against the other employee.

THE COURT: I don't mind that except that assuming arguendo that they tell you they do, what does that have to do with this Court?

872 MS. WEYAND: We have a former General Counsel sitting in the witness box now and I don't know just what even what grounds to object on because I have not checked those regulations or what the scope is.

THE COURT: Assuming the regulations say he cannot testify, what effect do you think that would have on me? Considering the separation of powers, that is.

MS. WEYAND: Well, I think you are a very fair-minded judge and there may be arguments which can be presented that I had not prepared for because they withdrew them. I would like to check with the EEOC as to regulations and rulings before proceeding.

THE COURT: I will permit you to do that. I suggest to you, you best have some authority if you wish to persuade the Court to say Mr. Duncan is not qualified to testify.

I am not impressed with the fact that somebody in



Washington says he is not supposed to, at the moment.

Like you say, I am a fair-minded judge and I will listen.

Would you mind, I will give you a very leisurely lunch, if you acquiesce in the slight delay so Ms. Weyand –

873 MR. STRAUSS: I prefer to go ahead, Your Honor.

The reason is that, as Mr. Duncan would state – well, first I would like to correct an error of fact here, and that is this.

The defendant never served a subpoena on Miss Fuentes.

THE COURT: I was about to – I was going to make inquiry at a later date if you had authority to cancel a subpoena from the Court.

MR. STRAUSS: We requested one. It was never served.

Now, Ms. Weyand is right. Mr. Duncan, as will develop, is former General Counsel of the EEOC.

I have asked – well, the testimony that he had on a conversation within the last several weeks, I believe, with the Associate General Counsel of the EEOC –

THE COURT: May I interrupt you? These are matters perhaps, if you gave them to counsel then –

MR. STRAUSS: We were given –

THE COURT: She may withdraw her objection.

But can you tell me why I ought not to accord the courtesy of an hour and a half or an hour and 15 minutes for lunch now?

874 MR. STRAUSS: Yes. I will tell you. In a nub, I am sure Your Honor is familiar with the Marchetti case in the Fourth Circuit and I am sure that your views that you have expressed on the bench just now reflects that opinion. I think it would be futile.

THE COURT: All right.

MR. STRAUSS: That is my reason.

THE COURT: All right.

Step down, Mr. Duncan.

(The witness stood aside.)

THE COURT: I am just not going to let a simple courtesy interfere with you. And I don't want to be tagged as what we may be tagged as anyway, Mr. Strauss.

MR. STRAUSS: No. No, I was most interested in –

THE COURT: I will protect you if you protect me.

MR. STRAUSS: I will certainly be delighted to. Thank you for protecting me.

THE COURT: Hopefully the emergency that is supposed to be heard at two o'clock will not take too long.

I will recess court until 2:15 with the proviso I will do my very best to get right back on this case.

875 Now, may I suggest that you don't have to move your papers, you may be assured they will be safe, but would you push them up a little bit and give room for the counsel that are coming in on this other matter.

Mr. Duncan, I will ask you to return at 2:15. I am sorry, sir. The delay will be until at least two o'clock.

(A recess was taken at 12:45 to reconvene at 2:30.)

THE COURT: I apologize for the delay.

All right, Mr. Duncan, do you want to try again?

(The witness resumed the stand.)

THE COURT: Are there any motions?

All right, you may examine.

Excuse me. There are?

MS. WEYAND: Yes.

THE COURT: You may proceed.

MS. WEYAND: I called the EEOC and spoke to attorneys on its staff who have been concerned with Mr. Duncan's testimony in other cases. They told me that Mr. Duncan testified under oath yesterday that he resigned and left the EEOC on the date of October 31,



1966, which precedes the date of the only two exhibits

876 which are offered here by the defendant as purported opinions. They are Exhibit 12, which purported to be dated November 15, 1966, and a letter dated November 10, 1966, both after the date which Mr. Duncan admittedly ceased to be the General Counsel of the EEOC.

They therefore felt there was no need for any order because they could not see how any Court could admit his testimony in any matter relevant in this case as I told them this was the only letter that was offered in evidence.

MR. STRAUSS: Shall I respond, Your Honor?

THE COURT: If you will give me a moment I will try to digest the last gratuitous statement from the EEOC to the effect of what a Court might or might not do, could or could not do.

Is there something further?

MS. WEYAND: Yes. I will say that if he does testify I would like to call a witness offered by the EEOC who will give further facts in reference to Mr. Duncan's activities as a witness.

THE COURT: Well, I take it that there really isn't any objection before me except as to the relevancy of Mr. Duncan's testimony, anticipated testimony, is that

877 correct, ma'am?

MS. WEYAND: I think it would be perfectly proper to let him be called as a witness and questions put and I will object at that time.

THE COURT: I mean that is, so we get the procedural aspect straight, that is the posture?

MS. WEYAND: Yes.

THE COURT: All right.

So there isn't any objection at this moment. You may examine.

MR. STRAUSS: Thank you, sir.

DIRECT EXAMINATION

BY MR. STRAUSS:

Q. Would you state your name and residence address, sir? A. Charles T. Duncan, D-u-n-c-a-n, 1812 Upshur, U-p-s-h-u-r Street, NW, Washington, D.C.

Q. Mr. Duncan, what is your occupation or profession? A. I am an attorney at law admitted to practice in the District of Columbia.

Q. Private practice? A. Yes.

Q. How long have you been so engaged? A. Since
878 May of 1970.

Q. Of the bars of what jurisdictions are you a member, sir? A. In addition to the District of Columbia, the State of New York and State of Maryland.

Q. Are you an officer of the District of Columbia Bar? A. Yes. We have a unified D.C. Bar and I am this year President of that organization.

Q. Now, prior to your becoming engaged in the private practice of law in the District of Columbia were you employed in an official capacity by the District of Columbia Government? A. Yes. I was Corporation Counsel for the District of Columbia.

Q. And what were your duties and responsibilities as such Corporation Counsel? A. In general I was responsible for the legal affairs of the District of Columbia, to represent the District in all court proceedings, and to give legal advice to District officers and employees.

Q. When did you – when did your function as Corporation Counsel terminate, sir? A. It terminated sometime in May of 1970. I am not sure of the exact
879 year – date.

Q. You were, were you not, at one time, employed by the EEOC? A. Yes, I was.

Q. And in what capacity were you so employed?



A. I was General Counsel of the Equal Employment Opportunity Commission.

Q. And would you pinpoint the dates? A. I believe I became General Counsel on August 8, 1965, and I took the oath of office as Corporation Counsel on October 31, 1966.

I assume I went off the EEOC payroll on that date, but I am not sure.

Q. You just don't remember, but in view – A. It was sometime very late in October.

Q. In October, 1966? A. That is correct.

MS. WEYAND: May I object and ask that he clarify that it is to be clear that you left the EEOC prior to October 31, 1966?

THE COURT: Ms. Weyand, I will ask you to wait until you get a chance.

MS. WEYAND: It was ambiguous. I wanted it on voir dire before he goes further.

880 MR. STRAUSS: May I proceed, sir?

BY MR. STRAUSS:

Q. Mr. Duncan, as General Counsel of the EEOC, briefly would you state what your duties and responsibilities were? A. In general to interpret Title 7 of the Civil Rights Act of 1964 to the Commission and to members of the public who made inquiries of the Commission.

Q. And your office as General Counsel was where?

A. Located in Washington, D.C.

Q. Headquarters of the EEOC, is that right?

A. Yes. Yes.

THE COURT: Let the record show now what you have handed to the witness.

MR. STRAUSS: Yes.

Mr. Duncan, I show you Defendant's Exhibit Number 12 and I ask you to explain what those letters are.

MS. WEYAND: I object to any testimony by Mr. Duncan with respect to these letters because, as I understand his testimony, he ceased to be the General Counsel of the EEOC prior to the date of these letters.

As I understand, you became Corporation – he became Corporation Counsel October 31 and ceased to be employed by the EEOC prior to that date.

881 THE COURT: All right.

I am going to overrule the objection on the grounds that you have just stated.

I don't think an appropriate foundation has been laid to whatever questions you are going to ask from this point on, Mr. Strauss.

Suppose you find out if he is familiar with them.

Did he write them?

BY MR. STRAUSS:

Q. Mr. Duncan, the letters which represent the Defendant's Exhibit Number 12, are you the author of the letters? A. Well, let me respond this way. These letters were prepared in my office. As to whether I drafted particular language, I don't remember that, but I do recognize the two letters as being letters which were prepared in my office or certainly similar to letters which were prepared in my office.

Q. Now, the dates that appear on the letters are November 12, November 15, pardon me, and November 10.

A. That is correct.

Q. Now, those dates are in fact ones which were subsequent to your leaving the Commission, is that right?

882 A. That is correct.

Q. Can you explain that? A. I recall that at this point in the life of the Commission letters would very frequently be written, and by the time they were subjected to various review processes two weeks, three weeks, a



month, as long as six weeks might pass between the date of the writing of the letter and its actual mailing.

I know further that at one point letters were dated when they were typed. Because of the situation I have just described, that procedure was changed and letters were dated when in fact they went out, either by typewriter or by a date stamp.

Q. So that these letters may very well have been authorized and prepared under your supervision before you left the Commission?

MS. WEYAND: I object. There is no testimony they may have been. It is a purely theoretical and conjecture and I think that is an improper question. I object to it.

THE COURT: Objection is overruled.

THE WITNESS: I will go further and say they may have been, Mr. Strauss. I recognize these letters, not necessarily the particular document itself, but I certainly

883 recognize this style and I particularly recognize the content of the letter as being matters which were authorized by me and by the Commission before October 31, '66.

MS. WEYAND: I ask the matter be stricken to say they were authorized by the Commission when there is obvious evidence that he does not know whether these letters were similar to or worded in the way they were. His testimony indicates that, and I ask it be stricken, that they were authorized before.

THE COURT: I am afraid, ma'am, that I will have to be the judge as to what is – as to what his testimony means.

Your objection is overruled.

BY MR. STRAUSS:

Q. Is it a fair statement to say, sir, that letters containing similar opinions to those expressed therein were sent out by you before you left the Commission in re-

sponse to inquires made of the Commission? A. Yes.

MS. WEYAND: I object to this question.

The best evidence of what is sent out were the actual letters, and in the absence of actual letters I believe it is irrelevant and immaterial that letters similar to this were

884 sent out.

THE COURT: Objection overruled.

BY MR. STRAUSS:

Q. Mr. Duncan, before written opinions – let me strike that.

What was the practice of the Commission while you were General Counsel as to prior discussions within the Commission with respect to opinions similar to those opinions expressed therein?

MS. WEYAND: I object to any testimony as to what the method of operation and internal affairs of the EEOC were. I believe this is improper testimony in court.

The operations of an agency are shown by its guidelines and its decisions, and it is improper to have the testimony as to what went on in the agency.

THE COURT: Unfortunately operations don't always conform to the guidelines.

In any event the objection is overruled.

May we have it understood that you have a continuing objection, Ms. Weyand, to keep you from having to get up? And I will accept, after the witness has been excused, whatever reasons you wish to assign as reasons to protect yourself on appeal.

885 I can hardly rule on the relevancy of somebody's testimony until I know what they are going to testify to.

Now, if we had a jury here I would send the jury out and I would have the witness answer whatever questions were propounded and I would let you cross-examine. Then I would rule on it.



But we don't have a jury. The only way I can rule on the relevancy of the matters is to know what they are.

I don't know yet.

I am not fussing with you, ma'am. I want you to do your job, but we might save some time if we have it understood that you are very unhappy about his testifying to anything on the ground that it is irrelevant, immaterial, foundation has not been laid. If you can think of anything else –

MS. WEYAND: Not the best evidence.

THE COURT: Not the best evidence.

MS. WEYAND: Not the proper evidence as to what the results of any agency are.

THE COURT: All right.

MS. WEYAND: The only way you look at an agency is its decision and there is no right of any Court to look

886 to anything but the decisions or the guidelines of an agency. On the statute it provides that only opinion letters or interpretations can be relied on by a corporation and these must conform to certain standards.

THE COURT: What makes you think I am going to rely on any of it, Ms. Weyand? I don't know yet.

MS. WEYAND: I am sorry, Your Honor.

I was talking about the good faith reliance of the defendant, which was the issue in that regard.

THE COURT: Oh, you mean the defendants.

All right.

I think we have covered any and all of the possible reasons for objecting. If there are any more, let's put them in the record later.

MS. WEYAND: Thank you, Your Honor.

THE COURT: Thank you, ma'am.

You may go ahead.

MR. STRAUSS: May I ask the reporter to, please, read

the last question and the witness' last answer, please?

THE COURT: Assuming he can find it.

(The reporter read the question and answer referred to.)

THE WITNESS: In 1966 during the year plus that I
887 was there, and because of Title 7 was new, the Commission received literally hundreds of letters addressed either to the Commission, to individual Commissioners, or to my office requesting interpretations of various provisions of Title 7.

To the extent that legal interpretations were requested the inquiries were routinely routed to the Office of the General Counsel for the preparation of a reply.

At my discretion some letters would be answered directly and others would be cleared with the Commission itself.

BY MR. STRAUSS:

Q. Do you recall whether letters setting forth opinions such as those set forth in Defendant's Exhibit 12 were discussed at any time with the Commission? A. You mean on the specific point of pregnancy? Maternity leave?

Q. The matters discussed and set forth in those letters? A. Yes.

This was one of the issues that I would not have decided on my own initiative, and indeed did not.

This particular question, how to treat pregnancy and
888 maternity leave, was particularly discussed at the Commission level and with senior staff in order to formulate the Commission's policy.

Q. What about the matter of the treatment of pregnancy disabilities under an employment – under an employer's disability plan? A. That subject was discussed at the Commission level.

Q. Do you recall who was present at those discussions?



A. I cannot pinpoint a discussion or a date. I do know that this question was considered by the full Commission, and I know who the Commissioners were.

Q. Now, do the letters, that is, do the letters which are in evidence as Defendant's Exhibit 12 reflect the policy of the EEOC during your incumbency as General Counsel with respect to the treatment of pregnancy disabilities under an employer disability benefit plan? A. Yes.

Q. That is, it reflects such policies at least until October, 1966, is that right? A. Yes.

You said during my incumbency, that is correct.

889 Q. Now, how thoroughly was this matter discussed within the Commission? A. I would have to answer you this way. The whole question of sex discrimination occupied a good deal of the Commission's attention during the first year.

Pregnancy, maternity leave was one aspect of the sex discrimination.

It was also one of the problems that I think baffled the Commission the most. So I would say that this aspect of sex discrimination certainly as well as the broader problem of other aspects of sex discrimination were thoroughly discussed by the Commission.

Q. When the Commission was considered in the formulation of these policies which are set forth in the exhibit, was there any consideration given to the legislative history of Title 7 with respect to sex discrimination?

A. Unfortunately, Mr. Strauss, as I am sure you know, there is little or no legislative history of Title 7 insofar as sex discrimination was concerned.

We wished that there had been some, but as you know, the word was added to race, color, religion, et cetera, almost fortuitously and without any legislative history.

890 Q. But whatever legislative – but you did make an

inquiry into the question of whether there was explicit legislative history? A. Oh, indeed, because in interpreting Title 7 we relied heavily on the legislative history whenever it was available. I am saying in the instance of sex discrimination there wasn't any.

Q. Looking more closely, Mr. Duncan, at the exhibit, can you explain why the November 10 letter seems to quote language that appears in the November 15 letter and seems to reverse dates? A. Yes.

I am reasonably certain that the quoted language had been earlier developed and had become boiler plate by that time.

Many of the letters would ask essentially the same question, and once we had formulated a responsive answer we would just use the form as it were, and I think that the language quoted here had become boiler plate by that time.

Q. I wonder if you would – A. Excuse me. Boiler plate is an inelegant word.

THE COURT: Well, lawyer and judges know.

THE WITNESS: All right, sir.

891 BY MR. STRAUSS:

Q. And as an ex-government employee, if I might say on the record, I have used the term many times myself.

Would you look at the last sentence, please, in the November 15 letter? A. Yes.

Q. Would you explain, if you can, what the term "fringe benefits" means as used in that sentence?

A. Yes. Fringe benefits would include wage continuation, pay, pay in the nature of sick pay, hospitalization, any other benefit like that that applied in the case of absence due to other illnesses. But I think the chief thing was pay.

Q. Pay continuation, are you saying? A. Yes.



Q. During pregnancy? A. Yes. During the absence.

Q. Whether or not the pregnancy was covered by a disability policy, is that what this refers to? A. No. I am trying to say that it was the Commission's position that pregnancy could be treated differently from a medical illness and that it was not necessary to make the same provision in the case of pregnancy as was made in the case of medical illness, be it under company policy or under various sickness and health plans.

892

Q. Now, would you look, please, at the November 10 letter, Mr. Duncan, and in particular to the last two paragraphs thereof? A. Yes.

Q. I note that there is a reference in there to an employee disability plan, benefit plan financed by both the employer and the employees.

Would the response set forth in the letter have been any different had the letter been concerned with a disability benefit plan sponsored by the employer alone?

A. No, clearly not. It was put that way because that is the way the question was put to us. It was our style to answer the question as asked. However the plan is financed, on a contributory basis or solely by the employer, the Commission's policy was that you did not have to provide the same benefits for maternity absence that you did for illness-caused absence.

Q. Mr. Duncan, would you state, if you can, what the policy may have been when you were General Counsel as to the publishing, the reproduction would be a better word, the reproduction of these letters in the re-

893 porting services? A. Yes. If you will notice on the Exhibit 12, both parts of it, the name of the addressee of the letter is not present.

The reason for that was that we customarily, after a letter had been sent, would delete the name from – delete

the name of the addresse from the letter so that the letter could be made available to the reporting services without disclosing the identity of the addressee, to give a confidentiality.

Q. How did the reporting services acquire these? A. They were very interested in the activities of our office and would frequently come by to peruse recent opinions. They would come by more or less on a regular basis, particularly, I remember, the representative of BNA, Bureau of National Affairs, and we would make copies of the letters available to them.

It may have been at some point that we mailed the reporting services letters. I don't particularly remember that.

Q. Do you recall whether Commerce Clearinghouse, CCH, was a service that was interested? A. Yes, they were too.

Q. Can you state whether or not these letters which
894 are in evidence were or were not published? A. Were or were not published?

Q. Reproduced in the service, I should say. A. I have seen in connection with this testimony CCH, and I think BNA services, as they appear at that time, where the substance of these letters does appear, yes.

Q. Mr. Duncan, to get on with it, have you had occasion to read the guidelines on discrimination because of sex which were issued by the EEOC in 1972? A. Yes, I have.

Q. How recently was that? A. As recently as today.

Q. You are then familiar with the policies expressed in such guidelines, that is the 1972 guidelines, concerning the matter of disability insurance coverage and so-called pregnancy and childbirth disabilities? A. Yes.

Q. Now, in 1966 when the policy formulated in the



letter we have here was taking place, was there any discussion within the Commission of a policy such as appears in the 1972 guidelines? A. I would say yes, Mr. Strauss, to the best of my recollection.

As I indicated earlier, the Commission policy on this
895 point was extensively considered, various alternatives for treating this problem, how do you handle maternity leave, various alternatives were discussed.

One of the alternatives that was discussed was, necessarily, would have been to treat it as an illness-induced absence. So that was discussed, yes.

Q. And rejected? A. Well, the Commission's policy was as these letters state.

Q. So that this may be clear, may have been evident, but I presume then that when the so-called 1972 policy was discussed in connection with the 1966 formulation the presence or absence of legislative history was also discussed at the same time? A. I am sure it was. I don't specifically remember that.

MR. STRAUSS: I have no further questions.

THE COURT: All right.

Any cross-examination?

## CROSS-EXAMINATION

BY MS. WEYAND:

Q. Were you shown these? Did you testify recently in a Delta Air Lines case? A. In Atlanta last Tuesday.

896 Q. Last Tuesday? A. Yes.

Q. That is day before yesterday? A. Yes.

Q. Were you shown these letters during that testimony? A. Yes, I was.

Q. When you were asked where did these letters come from you testified you did not know, is that correct? A. That is not correct.

Q. What did you testify? A. I testified that I had received the letters in Atlanta from an attorney in Washington, D.C.

Q. Now, what attorney did you have in mind?
A. Mr. Strauss.

Q. Received the letters form Mr. Strauss? A. Yes.

Q. You were asked, do you remember signing these letters, and you said no; is that correct? A. Would you repeat that?

Q. I understand you testified, do you remember signing these letters and you testified no? A. I believe I was asked if I remembered signing the letters and my answer to that was no.

897 Q. That you did not remember signing these letters?
A. These particular letters, that is correct.

Q. I believe you were asked, do you remember who the letters were addressed to and you answered no, is that correct? A. That is correct.

Q. And you were asked when did you leave the Commission and you testified October 31, 1966, is that correct? A. That is correct.

Well, no, again I testified, as I recall, that I commenced my new job on October 31, 1966, and I assumed that I went off the EEOC payroll on that day or within a few days thereof because I remember going directly from one job to the next without any hiatus.

Q. Is there any question that you were not on the payroll of the EEOC on November 10, 1966? A. No question whatsoever.

Q. You were not on the payroll? A. I was not on the payroll.

Q. Were you on the payroll – you were not on the payroll any subsequent dates? A. Nor at any subsequent date even as a consultant, that is correct.



898 Q. Have you testified in other cases besides the Delta Air Lines case? A. And this case, no. Only two.

Q. With respect to any activities? A. That is correct.

Q. As to being General Counsel.

Were you ever informed that there were retractions sent to employers with respect to certain of the letters issued after you left that bore your signature? A. No.

Q. You were never – you are not aware of anything like that? A. I am aware that the Commission changed its policy from time to time, as all Government agencies do. I don't think anyone ever specifically told me that any given letter, any given policy had – which I had signed, had been changed.

Q. And any letter which is sent out over your signature after you left the agency, there was no clarification as far as you know? A. No, I would assume that not very many letters went out over my signature after I left the agency. In fact I was surprised to notice the

899 dates of these.

Q. You don't know if these did go out over your signature, do you? A. No.

Q. You don't know if any company ever received them? A. These particular letters I cannot testify that any company ever received letters like this.

Q. You don't know about letters sent out by the EEOC? A. These two letters here? Letters like this carrying the same policy I do remember went out.

Q. But you would not remember the specific facts or what differences they might have – A. No.

Q. – in the wording? A. No, not at this time.

Q. Had you ever heard before that there were letters that went out, someone purported to have letters which went out over your signature at a date subsequent to

October 31, 1966? A. I am sorry, Ms. Weyand, would you repeat that? I didn't understand.

Q. Had you, prior to the time that Mr. Strauss showed
900 you these two letters, ever heard that there were copies of letters around which purported to have been signed by you which bore dates subsequent to October 31, 1966? A. No. Until I saw these two letters I was not aware that that was a problem.

Q. And you never heard that there were such letters sent out? A. I either never heard it or long since forgotten.

As I say, the question of letters going out over my name after I left really never became a question in my mind until I first talked to Mr. Strauss.

Q. As far as you know, all letters which bore your name were issued before October 31, 1966, is that correct? A. I can't say that.

I am sure that there were 10, 15, maybe as many as 40 letters lying around in various states of being processed on October 31. What was done, signed by me – whether they were retyped and signed by Mr. Berg or not I don't know.

Q. You don't know at all what happened after you left on October 31? A. No.

901 MS. WEYAND: That is all the questions I have.

THE COURT: Any redirect?

MR. STRAUSS: No, sir.

THE COURT: All right. Thank you.

Unless I hear an objection, Mr. Duncan will be excused.

Thank you, sir.

(The witness stood aside.)

THE COURT: Call your next witness, please.

MR. BATTLE: Mr. Clerk, may I have the deposition of Dr. Wilbanks?



THE COURT: I really look forward to your smiling face.

MS. WEYAND: I didn't know whether you wanted a statement at this time, or briefed in writing later. I was uncertain how you left matters.

THE COURT: On this last? If you would just file any additional objections that you can think of, and any authorities you want, I will be glad to look at them.

MS. WEYAND: Thank you. I wanted to be sure there wasn't anything else called for from me at this time.

MR. BATTLE: If Your Honor please, you may recall
902 yesterday Mr. Strauss making a reference to a deposition that was taken of Dr. G.D. Wilbanks which had been marked as an exhibit in this case, and I think Your Honor –

THE COURT: Yes. I said I preferred it not be an exhibit.

MR. BATTLE: Yes, sir.

And I think that that is exactly correct and therefore I am at this time tendering the deposition of Dr. G.D. Wilbanks taken pursuant to Rule 30(b) on April 12, 1973, in Chicago, Illinois.

I ask that that depositon be received as part of the testimony in the case.

THE COURT: In toto?

MR. BATTLE: Yes, sir.

It was a de bene esse deposition, therefore I think it contains very little irrelevant material.

THE COURT: Were there any objections made?

MR. BATTLE: I don't recall that there were.

THE COURT: Do you recall, Ms. Weyand?

MS. WEYAND: There are no objections remaining to be ruled on.

I think there was one question put, I reput it in another form and I think it went through.

903

## CURRICULUM VITAE
## GEORGE DEWEY WILBANKS, JR.

BORN: February 24, 1931
Gainesville, Georgia

MARRIED: July 31, 1954 – Evelyn Freeman Rivers –
B.A. Wellesley, 1954
M.A. Duke University, 1956

CHILDREN: George Rivers – Born: May 21, 1958
Wayne Freeman – Born: October 18, 1960

EDUCATION:

High School: Riverside Military Academy, Gainesville, Georgia
H.B. Plant High School, Tampa, Florida
Graduated June 19, 1949

College: Duke University –A.B., June 1953
University of Florida – Summer, 1951

Medical School: Duke University School of Medicine – M.D., June 1956

Internship: Pennsylvania Hospital, Rotating, June 1956 – June 1957

Residency: OB-GYN, Duke Medical Center, July 1957 - June 1961
Fellow-OB-GYN Pathology – Boston Lying-In Hospital and Free Hospital for Women, January-June 1959

PROFESSIONAL EXPERIENCE:

Resident Instructor, Dept. OB-GYN, Duke Medical Center, July 1961 - June 6.

Clinical Instructor, Dept. OB-GYN, Univ. Oklahoma School of Medicine, March 1963 - June 1964

Associate, Dept. OB-GYN, Duke Medical Center, July 1964-June 1965.



Special Fellow, National Cancer Institute, Dept. OB-GYN & Pathology, College of Physicians & Surgeons, Columbia-Presbyterian Medical Center, New York City, July 1964 - July 1965

Assistant Professor, Dept. OB-GYN, Duke Medical Center, July 1965 - December, 1969

Associate Professor, Dept. OB-GYN, Duke Medical Center, Jan. - June, 1974

Director, Gynecologic Oncology Division, July 1967 - July 1970

Professor & Chairman, Dept. OB-GYN, Rush Medical College, Chicago, Illinois, July 1970 -

905 HOSPITAL APPOINTMENTS:

Chairman, Department of Obstetrics & Gynecology, Rush Presbyterian-St. Luke's Medical Center, Chicago, Illinois, July, 1970 -

MILITARY SERVICE:

Captain, USAF, Assistant Chief, OB-GYN Service, 2792 USAF Hospital Tinker Air Force Base, Oklahoma, July 1962 - June 1964

BOARD QUALIFICATION:

American Board of Obstetrics & Gynecology, Diplomat 1965
Florida Board of Medical Examiners, 1956
North Carolina Board of Medical Examiners, 1956
Illinois Board of Medical Examiners, 1970

SOCIETY MEMBERSHIPS:

American College of Obstetricians & Gynecologists, Fellow
American College of Surgeons (Fellow)
Society of Pelvic Surgeons

Society of Gynecologic Oncologists
American Association of Cancer Research
American Society of Clinical Oncology, Inc.
American Society for Cytology
Tissue Culture Association
American Association for Advancement of Science
American Society of Colposcopy and Colpomiscroscopy
Bayard Carter Society of Obstetricians & Gynecologists
Baker-Channing Society
Ex-Residents Association of Pennsylvania Hospital
International Society for Prevention of Cancer
American Medical Association

MISCELLANEOUS ACTIVITIES:

North Carolina Regional Medical Program - Duke Representative to Cancer Subcommittee, January 1967 - Sept. 1969

Director, Cancer Information Service, North Carolina Regional Medical Program, April 1968 - June 1970

Director, American Cancer Society, Durham County Unit, 1965 - 1968

RESEARCH INTERESTS:

Gynecologic Cancer
Clinical: The study of early neoplastic changes of the cervix, endometrium and ovary, with emphasis on pathogenesis, methods of early diagnosis and treatment. Chemotherapy of gynecologic cancer.
Basic: Cell physiology as related to *in vitro* behavior of human genital cells, normal and malignant, and their relationships to each other, and in response to various agents, carcinogenic and chemotherapeutic. Chromosomes, DNA synthesis, and mitosis of these normal and malignant cells *in vitro*.

905 PUBLICATIONS:

1. Hamblen, E.C., Ellington, R.N., Wilbanks, G.D., Crenshaw, M.C., Williamson, R.M., and Johnson, H.W.:
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2. Onetto, E., Palma, E., Onghena, G., Haim, L., Sukanthanak, A., Garcia, F., Wilbanks, G.D., Ellington, R.N., Massad, L., and Hamblen, E.C.:
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3. Cherny, W.B., Wilbanks, G.D., and Peete, C.H., Jr.:
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Southern Med. J. 55: 568-572, 1962

4. Wilbanks, G.D., and Carter, B.:
Vaginitis Emphysematosa. A Report of Four Patients
Obstet. Gynec. 22: 301-309, 1963

5. Klinges, K.G., Wilbanks, G.D., and Cole, G.R.:
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Obstet. Gynec. 25: 619-626, 1965

6. Wilbanks, G.D.:
Colporrhexis: Definition and Case Report
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7. Richart, R.M., and Wilbanks, G.D.:
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Cancer Res. 26: 60-74, 1966

8. Wilbanks, G.D., and Richart, R.M.:
The Postpartum Cervix and Its Relation to Cervical Neoplasia. A Colposcopic Study
Cancer. 19: 273-276, 1966

9. Wilbanks, G.D., and Richart, R.M.:

The *In Vitro* Interaction of Intraepithelial Neoplasia, Normal Epithelium and Fibroblasts From the Adult Human Uterine Cervix
Cancer Res. 26: 1641-1647, 1966

10. Wilbanks, G.D., and Richart, R.M.:
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Obstet. Gynec. 27: 597, 1966

11. Wilbanks, G.D. and Richart, R.M.:
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Amer. J. Obstet. Gynec. 97: 1105-1110, 1967

906 12. Wilbanks, G.D. and Klinges, K.G.:
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Obstet. Gynec. 29: 44-49, 1967

13. Wilbanks, G.D., Richart, R.M. and Terner, J.Y.:
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Amer. J. Obstet. Gynec. 98: 792-799, 1967

14. Wilbanks, G.D.:
In Vitro Observations on the Barr Body Throughout a Mitotic Cycle
Obstet. Gynec. 29: 443, 1967

15. Moore, D.T., Watts, C.D., and Wilbanks, G.D.:
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16. Parker, R.T., Wilbanks, G.D., Carter, B., and Yowell, R.K.:
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17. Wilbanks, G.D., Ikami, E., Prado, R., and Richart, R.M.:
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18. Wilbanks, G.D.
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N.C. Med. J. 29: 246-247, 1968

19. Wilbanks, G.D.
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20. Schomberg, D.W., Campbell, J., and Wilbanks, G.D.:
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21. Shingleton, H.M., and Wilbanks, G.D.:
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Amer. J. Obstet. Gynec. 108: 28-33, 1970

22. Wilbanks, G.D. and Richart, R.M.:
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Amer. J. Obstet. Gnynec' 106: 726, 1970

23. Wilbanks, G.D., Campbell, J.A., and Kaufmann, L.A.:
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25. Wilbanks, G.D., Bressler, B., Peete, C.H., Cherny, W.B., and London, W.L.:
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26. Parker, R.T., Parker, C.H., and Wilbanks, G.D.:
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Amer. J. Obstet. Gynec. 108: 6, 878-888, 1970.

27. Wilbanks, G.D.:
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29. Wilbanks, G.D., Campbell, J.A.:
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Amer. J. Obstet. Gynec. 112:5, 704-715, 1972.

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908 THE COURT: The only reason I asked the question whether it was necessary for me to read it now. I will be glad to if necessary and then rule on objections for the record, but if it isn't, if it is all right I will just read it at my pleasure, which will be as soon as I get off the bench.

MR. BATTLE: Yes, sir. That is the purpose of the offering.

THE COURT: Thank you.

Call your next witness.

MR. BATTLE: Defendant rests, Your Honor.

THE COURT: Is there any rebuttal?

Would you like a few minutes recess?

MS. WEYAND: If I might, please.

(A recess was taken at 3:05 to reconvene at 3:25.)

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(Below follows a deposition of Dr. George Wilbanks.)

DR. GEORGE WILBANKS being previously sworn,
909 testified as follows:

DIRECT EXAMINATION

BY MR. KAMMHOLZ:

Q. Will you state for the record, your full name?
A. Dr. George Dewey Wilbanks.

Q. And where do you live?
A. I live at 39 East Elm Street in Chicago.

Q. Are you currently practicing your profession in Illinois?
A. Yes, I am.

Q. And what is that profession?
A. Obstetrics and gynecology.

Q. Have you prepared for me, at my request, your curriculum vitae?
A. Yes, I have.

Q. And does it set forth your personal history, professional experience?
A. Yes.

Q. Professional experience, hospital appointments, Board qualifications, Society memberships, miscellaneous activities, research interests and your publications?
A. Yes, it covers most of these things.

910 MR. KAMMHOLZ: I would like to have this curriculum vitae marked as Defendant's Exhibit G.E., Exhibit Number 1 for identification.

(Whereupon, the curriculum vitae of Dr. Wilbanks was marked as Defendant's G.E. Exhibit Number 1 for identification.)

BY MR. KAMMHOLZ:

Q. I show you, Doctor, a five-page document now marked Defendant's G.E. Exhibit Number 1 for identification and ask you whether or not that is your curriculum vitae? A. Yes, it is.

Q. What is the medical definition of "disease"?



A. The medical definition of disease would be abnormal state which is deleterious to the patient.

Q. What do the terms "sickness" and "illness" mean, medically speaking? A. I think, medically, it would be similar to "disease." I think I would prefer that "disease" would be the medical term and "illness" and "sickness" would be more lay terms for a similar condition.

Q. Are the terms "disease", "sickness" and "illness" synonymous from a medical point of view? A. Yes, I think, in general, they would be, although there are some innuendos of illness and sickness. Some lay people

911 use these terms meaning nausea and maybe just a feeling of poor feeling, where I think "disease" as used by the medical person, would be critically defined as a definite condition.

Q. Doctor, what is "pregnancy"? A. I would define "pregnancy", I suppose, as an altered state of physiology in the female, in which there is a fetus or embryo present.

Q. Under your definition, is "pregnancy" a state of abnormality? A. No, I would more call it a normal variant formational alteration of physiology.

Q. Is pregnancy a sickness or disease? A. I would not class it as such.

Q. Doctor, what is a morbid process? A. There are a number of definitions for morbidity. I would think, in obstetrics, for example, we define morbidity after delivery by certain degrees of fever. I think that perhaps the lay person might define morbid as having to do with death.

Q. Is pregnancy a morbid process? A. No, by no means, at least in my definition.

Q. Is your definition, as you understand it, a commonly accepted medical definition? A. Yes, I would

912 think so.

Q. Is pregnancy frequently accompanied by nausea? A. I could use the words "how frequently" and I would say it occurs in early pregnancy. I guess "frequency" would be a good word to use.

Q. Is it accomapnied by backache? A. Sometimes.

Q. And it is a fact of life, of course, that there is abdominal swelling in connection with pregnancy?
A. Yes, there is.

Q. This occurs always? A. Well, unless pregnancy terminates before the fetus gets to a certain size.

Q. Is it accompanied on occasion by constipation?
A. Yes, occasionally.

Q. Are all of these conditions symptoms of pregnancy?
A. Yes, I would think so – symptoms that are indicating something the patient complains about. Yes, I think those would be symptoms that could be attributed to pregnancy and occur in early pregnancy.

Q. Do these same symptoms also occur in connection with the female menstrual period? A. Yes. As a

913 matter of fact, many of them would occur with this. Many women notice some nausea, backache or cramping, actually some swelling and even some constipation immediately prior to menstruation.

Q. Now, Doctor, are these conditions, either when they occur in connection with pregnancy or in connection with the menstrual period, symptoms of disease?
A. They may be a symptom of disease but they might not actually reflect a disease. I am trying to think – if we don't drink enough or eat properly, anyone can become constipated or, say, if you have been nauseated and if you eat or drink too much.

Q. Are these conditions, in either circumstance, pregnancy or the menstrual period, symptoms of altered physiological condition? A. Yes, I would say they are.



Q. And this is true during the menstrual period as well as during pregnancy? A. We could draw some parallels in that just prior to menstruation there is elevation of certain hormones, which are also elevated in pregnancy and so we have a somewhat similar altered physiology, if you will, with some of the same results and symptoms. This is thought to be the cause of some of these symptoms.

914 Q. Are women, during pregnancy, usually under a doctor's care and do they usually deliver in a hospital?
A. Yes.

Q. Does such care and hospitalization indicate sickness? A. I would say "no." We would like to have every person or every woman, speaking from the standpoint of he obstetrician-gynecologist, under the care of a physician for routine examination. Therefore, I don't think this would necessarily say that one must be ill to see a physician.

Q. As a matter of fact, do you recommend at least annual examinations? A. At least examinations annually, yes.

Q. For all of us? A. Right and realistically what we have to offer a woman insofar as obstetrics goes, is care before delivery and delivery in a hospital.

Q. Why the delivery in a hospital, Doctor?
A. Well, I think for perhaps a couple of reasons. One is that certain emergencies that arise with delivery are best handled in a hospital and I guess perhaps one of the things is that it is a bit more convenient for medical personnel to be located in one place rather than to have, for

915 example, delivery in a home, which would be the opposite of delivery in a hospital.

Now, I might say that in England they have what is

called a "flying squad," wherein women are delivered in the home by midwives and if something goes wrong, a doctor with blood, instruments and an operating table are in the ambulance and they are rushed to the home so that the patient can be taken care of. As I say, this is not very efficient for such emergencies.

Q. Did I understand correctly then, Doctor, that one reason for hospitalization is the more efficient use of medical manpower or perhaps more efficient use of doctor power? A. I think physicians, as well as the ancillary personnel, do give support to the mother, do assist in helping with nursing. Therefore, it is not simply delivery – it is care of the mother and the infant's psychological support.

I think there is soemthing to a group of women being together after they have delivered. They can talk over their problems about the baby, the nursing and this sort of thing.

Q. Should pregnant women be restricted from physical activities during pregnancy? A. If the pregnancy is
916 not complicated, no. We do not recommend any real limitation of activities on our patients.

Q. Can pregnant women continue to hold gainful employment during pregnancy? A. Yes. As a matter of fact, two of our office nurses now are both pregnant.

Q. And when I asked you about holding gainful employment, for what period of pregnancy and how long prior to delivery? A. We don't make any restrictions on this. A woman may work as long as the pregnancy is progressing normally, even up until time of delivery.

We recently had one of our nurses go into labor while on duty and she delivered at the end of the shift without complication.

Q. You would say this is indeed an efficient utilization



of woman power in the hospital? A. Yes, a woman will do this at home. For example, in caring for children and taking care of her general household duties, she will not go to bed for the last six weeks or so.

Q. Would the lifting of weights or the climbing of stairs during pregnancy be harmful? A. I will merely
917 say "no."

Q. Are there any particular kinds of jobs you would restrict pregnant women from performing during pregnancy? A. Probably one or two that you might restrict pregnant women on. There have been some data recently on nurse-anesthetists who work in operating rooms with various anesthetic gases and there seems to be some increase in abortion in women who work in these noxious fumes. Therefore, any type of occupation in which the person was exposed to certain chemical fumes, that might have an effect on the fetus, I think should be limited.

I would imagine that in most jobs the safety factor would control this so that probably no one should be in that much of an atmosphere.

As a matter of fact, in relation to our anesthetics, we are now making certain that the gas is exhaled by the patients and conducted out of the operating room by an exhaust tube rather than just into the air as we have been doing it for many years.

Q. That is a new development? A. Yes, this is a new development, really in the last year or two.

Q. In the operating room? A. In the operating
918 room.

Q. Other than the example you just have referred to, are there jobs you would restrict pregnant women from performing? A. Offhand I would not think of any. The patients that I have had in pregnancy have been proceeding normally and we have not suggested change in

jobs. I cannot recall one.

Q. What about the physical activity, such as golfing, bowling, horseback riding? A. Well, our usual recommendation to the patient is that they continue their usual activities at a reasonable rate. If a woman plays golf or tennis, does horseback riding, then it is suggested they may continue whatever they are used to. About the only thing we suggest is "don't overexert" in connection with what they are normally used to.

Q. Does pregnancy affect coordination? A. I would say generally not. The only thing that might affect it would be in very late pregnancy, protuberant abdomen, very much as in a man or anyone who was twenty or thirty pounds overweight and had a protuberant abdomen. It would be, under those conditions, a little more difficult to get around.

919 As a matter of fact, one of my patients who played a lot of golf said that playing golf during pregnancy caused her game to improve because she had to hold her left arm straight in order to get around the uterus.

Q. Doctor, does pregnancy affect judgment?

A. I would say not. Women care for their families, purchase groceries and, insofar as I know, their judgment is still good.

Q. Does pregnancy affect I.Q.? A. No, not that I am aware of.

Q. Doctor, do you consider the period of labor and delivery as times of periods of sickness? A. Well, this is still part of the normal process of pregnancy. I guess the delivery and labor would be the ultimate of this sort of altered process but I would not really define it as illness, I think, unless there is something abnormal.

In the majority of labor and deliveries there are no difficulties. However, there are a small percentage that



may be abnormal.

Q. Are the periods of labor and delivery accompanied by pain or at least extreme discomfort? A. Yes. I would say it is probably a majority that would be. I

920 have seen women who were well controlled, have done lamaze exercises in connection with natural childbirth and really have had very little discomfort during labor.

Q. Is the pain or extreme discomfort, when it does occur during labor and delivery, a symptom of disease?

A. It may be a symptom of disease but not necessarily. For example, if you wear tight clothing you may have some discomfort but that is not a disease.

Q. However, in terms of the pregnant state and the ensuing labor and delivery, are those conditions disease?

A. Would you repeat the question? A.

Q. Let me restate it. I think you may have answered it. Are the conditions of labor and subsequent delivery conditions of disease? A. No. As I have defined it, pregnancy, which would include labor and delivery, is a normal process. I don't think anyone would want to walk back from the labor room, although this has been done and although I would not class it as a disease.

Q. Doctor, are you familiar with the book entitled "Common Sense Childbirth"? A. Yes, I have seen it.

921 Q. By Lester Desses and Hasell, published for the record, by G.P. Putnam and Sons, New York, copyright 1969? A. Yes, I have seen it.

Q. I refer you to page 34 of the introduction and from this page read this statement:

"Pregnancy, labor and delivery are states unto themselves but they are by no means illnesses. In fact, most women benefit physically from experiencing them."

Now, do you agree with that statement in the text?

A. Yes. As I have said, pregnancy and labor and delivery

are really not disease and I would say that most women probably do benefit from having a child. I think perhaps the most happy couples that we see after delivery are those who have gone through the labor, pregnancy and delivery together. It is a rather rewarding experience and a happy experience in the high percentage of pregnancies.

Q. What about the period after childbirth – is it a period of sickness? A. It is a period of return of the altered state of physiology back to the more usual states but, again, I think there is a normal process of involution

922 of the uterus, return of the uterus to normal size and other body functions that also return to the pre-pregnancy state.

Q. To put it in lay terms, this is a return to normal from the altered state? A. Yes, from the altered state.

Q. The altered state which continued to grow during the term of pregnancy? A. Right.

Q. In terms of physiology, how long is the period for the return to the normal state? A. Characteristically it has been defined as six weeks. Now, Dr. Williams at Johns Hopkins, one of the grandfathers of American obstetrics, did some studies indicating that the uterus returned to its normal state, at least the placental area, after birth or no later than six weeks and so most people have used this as their norm, I would say, for return to normal.

Q. To put it another way, is it fair to say then that the return to normal physiology occurs over a roughly six-week time span and that is a six-week return as contrasted to nine months during which the altered physiology developed? A. Right.

923 Q. Prior to delivery? A. Yes, I think that would be correct. Certain things return to normal much faster



than others. Certainly, for example, the hormone levels return to normal within forty-eight hours after delivery. It is more of a progressive thing over, roughly, a six-week period.

Q. During this six-week period, normally, is a woman disabled? A. Certainly in the early part of this I think she would be somewhat disabled. We send patients home now in three days, suggesting they take it a little easy for a couple of weeks, but most of the women are back taking care of their families fairly shortly after this. Most of the families now do not live in the same town with Mama or Grandmother and so they are back pretty much taking care of their house and the new baby as soon as they go home.

For example, I understand, in relation to a young woman who was finishing her residency at one of the neighboring hospitals, she was out for a total of two weeks from her internship with her first pregnancy, I guess it was. She was back working in two weeks. Therefore, this becomes quite a variable thing, I think.

924 Q. Did the two weeks cover the pre-delivery, delivery and post-delivery period? A. Yes. We do not usually recommend this but it is being done.

Q. You referred earlier, Doctor, to abnormal pregnancy. Would you tell us, pelase, about the kind of abnormalities that occur in connection with pregnancy and delivery? A. Probably I can group abnormalities, as we do for teaching medical students, into three trimesters of pregnancy, the first three months, the middle three months and the last three months.

Abnormal pregnancies in the first three months are usually related to some mal-development of the embryo, resulting in abortion called a spontaneous abortion. That would be by far the most common abnormality or com-

plication in early pregnancy.

In the mid-trimester, again, this is a relatively innocuous time during pregnancy, if you will, and about the only thing that occurs during the middle trimester is a rather rare condition called "the incompetent cervix" – maybe this is too detailed – in which there may be an early delivery.

An immature delivery, in the last trimester, really one
925 of the few, I guess we call it a disease state, something which complicates pregnancy is called a "toxemia pregnancy," which is a complex of high blood pressure, swelling and some kidney problems. Then abnormal pregnancies around the time of labor and delivery would be usually problems with bleeding due to some abnormalities associated with the placenta, the afterbirth.

Q. You made reference to high blood pressure during the toxemia condition which may occur during the third trimester? A. Yes.

Q. Can such high blood pressure be a continuing condition existing prior to pregnancy, for example, and continuing on during pregnancy? A. Yes. Women can have many diseases and still get pregnant. Therefore, if a woman has hypertension or high blood pressure, she may become pregnant and this would continue during the pregnancy. Here she would have a disease and the pregnancy would be on top of this disease state.

Q. What might be the nature of the disease state as pregnancy continues? A. Well, any disease state will alter the pregnancy. I am thinking of hypertension.

926 Another one that comes to mind is diabetes. Both of these have been characterized by problems of blood vessels which prevent nourishment of the fetus through the placenta. As best we know, however, once pregnancy is over, these diseases return to their pre-pregnant state.



Q. Does disability result, on occasion, from this combination of disease and pregnancy? A. Yes, I would say these would be what we call "high risk" pregnancies and that the combination of the disease state and the pregnancy would require special attention.

Q. Not one alone but a combination? A. Yes, a combination of the two. Well, I think certainly hypertension or diabetes in any person would. They are disease states.

Q. Doctor, referring back to your early testimony as to return to normal activities following delivery – is it a fact that the conditions of the female after delivery relative to normal activities are basically subjective conditions? A. I would have to say, I guess, the great part of this would be subjective conditions. We can measure the size of the uterus, the healing of the physiology perhaps in
927 terms of some muscle tone toward the pregnancy state.

Q. But medically are you able to measure the nature and extent of any backache? A. Well, this is very difficult to do.

Q. Or a headache? A. Virtually impossible. These are usually symptoms.

Q. And symptoms are subjective? A. Yes, they are or objective findings in an examination. Symptoms are the subjective interpretation.

Q. And in the medical diagnosis a physician must rely on subjective symptoms, such as hurt in the back? You cannot subjectively test these? A. In general, yes, we must rely on signs which are things we can see or feel or measure, and symptoms, which are the subjective interpretation of the condition by the patient.

Q. Turning now to another subject, Doctor, what are the most commonly used methods of contraception today? A. Well, two or three perhaps. First, are the birth con-

trol pills, then the intra-uterine devices and these are probably the most commonly utilized now. They still have the
928 other standard methods of the diaphragm, the vaginal diaphragm and the condom. This is usually used with some type of chemical preparation, cream or foam, foam alone, I would think, and then there is also rhythm, which again is not very satisfactory.

Q. Is the morning-after pill also available as a contraceptive device or is this technically not contraceptive?
A. I suppose it is. There are other things we can use to control pregnancy now but the morning-after pill has been accepted now by the FDA and most studies have shown it to be really quite effective if used properly.

Of course, now, you may know, we can use, at least in this state legally, abortion as a back-up for contraceptive measures – elective abortion.

Q. How much more, say, effective is abortion?
A. Well, it is quite effective. It is relatively safe if certain standards or safeguards are met. I think it is probably a very effective method of contraception.

We do not push this, I think no physician does. There are other methods for preventing pregnancy but once it has occurred this is a method of back-up, if you will, for other contraceptives.

929 Q. Are the contraceptives you described completely effective? A. I would say that in medicine nothing is a hundred per cent but the pill, if taken properly, is virtually a hundred per cent. The IUD, perhaps is a little less effective, although there are some new models of intra-uterine devices, some with copper, that seem to be more effective. However, these are very good methods of contraception.

I would say that we really have a pretty much unlimited method of contraception or virtually foolproof methods



of contraception if you use some type of contraceptive. Now, if you fail, wherein, for example, the diaphragm comes out or you do not use the foam at the time of ovulation, one can use the morning-after pill, if you will and then, if that fails, a sort of fail-safe would be the abortion. Also, in some people we can terminate pregnancy by using a small suction device which is even perhaps a little safer than performing an abortion later in pregnancy. This is relatively new and we do not have all the details on it yet.

Q. Is the latter technique sometimes referred to as "menstrual extraction"? A. Yes.

930 Q. Is it now available through the Midwest Population Center here in Chicago? A. I would think they would have anything that is available. They are a very aggressive population control group.

Q. Will you state for the record, please, the technique that is employed in the use of "menstrual extraction"?
A. Well, it is simply very much like the suction curetage that is used in later pregnancy, except that it uses a smaller instrument, a smaller cannula or tube being inserted into the uterus. It is so small that it doesn't require stretching or dilating of the cervix and so it is relatively painless. Suction is applied to this tube or cannula and the lining of the uterus is essentially sucked out, if you will.

Q. How is the suction applied? A. Maybe by machine or some apparatus can be used, simply a syringe, to create a negative pressure.

Q. And this is sometimes referred to as the "lunch hour treatment"? A. Yes, that is what it is commonly called – the "lunch hour treatment." It requires just a few moments.

We have been using this technique for getting samples of the endometrium for years but have not, of course, used it as a method of abortion, if you will, until recently.

Q. Are abortions performed at the Presbyterian-St. Luke's Medical Center? A. Yes. We do elective abortions.

MR. KAMMHOLZ: I have no further questions.

CROSS-EXAMINATION

BY MS. WEYAND:

Q. Doctor, I take it that this menstrual extraction which you were just talking about is not something performed by the individual themselves – it is performed by a physician? A. Yes.

Q. In a hospital or clinic of some sort? A. Yes, or a doctor's office.

Q. Presbyterian-St. Luke's Hospital has a policy of ninety days, if you will, paying sick leave for faculty members, does it not, when they are on disability? A. I would have to say I don't know the details of it.

Q. You don't know the details on it? A. No.

932 Q. They have a policy that picks up after ninety days for sixty percent of sickness and accident, an insurance policy? A. That sounds correct, I really don't know.

Q. You don't know the details? A. No.

Q. However, you know there is something of that sort? A. Yes.

Q. Are you aware of the issue that has come up with various female faculty members, of their right to be paid sick leave during the period of childbirth? A. Yes.

Q. It has come up, has it not? A. I understand that it has. I am not directly involved.

Q. You are not directly involved at all – you have been told it has? A. Yes, I have been told.

Q. Have the people taking a stand consulted you as



to whether you regarded the period of delivery as illness? A. No.

Q. They have not consulted you? None of those

933 women that I am aware of.

Q. Has the hospital administration talked to you about this? A. That is where I heard there was some interest in this, a definition from, I guess, John King, who was in charge of personnel.

Q. Did you discuss with them your view on whether childbirth was an illness when it came up? A. Yes, I did.

Q. You discussed it with him? A. Yes.

Q. You also discussed it with the Chairmen's Group, did you not, of the various chairmen of the obstetrics departments in the City of Chicago? A. Yes.

Q. And when you discussed it with this Chairmen's Group, you told them it had come up in relation to payment to employees of Presbyterian-St. Luke's Hospital, did you not? A. Yes, I said I heard there was some interest in nursing, I believe was the original thing that came up.

Q. And you told them that because of this interest it was important they consider the problem and take a position as to whether pregnancy was an illness, did you

934 not? A. Yes, I thought this was a problem we should deal with or at least be aware of what was going on.

Q. You were instrumental in the group taking this up – you were the moving person in the group taking this up? A. Yes.

Q. Could you tell me when that was taken up, at what meeting? Do you remember the date? A. I believe it was two meetings ago. It must have been six or eight weeks, I cannot recall the date. However, I

can look it up for you if it is important.

Q. Now, at this meeting was it mentioned that the EEOC charges and the Illinois FEP charges were pending against at least one of the hospitals by a chairman who was a member of the group? A. No, I do not recall.

Q. It wasn't mentioned? A. No.

Q. Otherwise, have you heard about these charges – that there were these charges pending against a certain hospital? A. No.

Q. You did not know about that? A. I was not
935 aware of that. You will have to explain to me the initials that you are using.

Q. I have been informed by the staff of the Equal Employment Opportunity Commission here in Chicago that charges have been filed against one of the hospital whose chairman was present at this meeting. The EEOC is our shorthand for Equal Employment Opportunity Commission, which is the commission that has ruled that it constitutes sex discrimination not to pay the same disability insurance payments as we paid for periods you are disabled for periods related to pregnancy, and there is an Illinois State Agency that does the same thing which is known as the Illinois FEP. It stands for State Fair Employment Practice Act and Illinois has an anti-discrimination statute that prohibits discrimination because of sex and when employees are not paid something that they think they should get on a non-discriminatory basis, then they can file charges with these agencies.

I just wondered if you had been informed about the state of those proceedings at all?

MR. KAMMHOLZ: Just a moment, before you answer, Doctor.

For the record I object to the form of question. It calls for a conclusion. It assumes facts not of record.



936 Indeed, it includes an erroneous legal conclusion when counsel characterizes what the EEOC has done as "ruled." For these reasons and for the further reason that the question is double or triple, I object to it.

BY MS. WEYAND:

Q. Doctor, maybe I should restate the matter. The EEOC has issued a decision holding that it so constitutes, and issued a guideline which is an interpretive rule and the question is – have you heard of any proceedings before the EEOC or the State FEP involving your hospital or any hospital in Chicago?

MR. KAMMHOLZ: Again, I object to the form of the question. Counsel has characterized "a decision of the EEOC" and, indeed, if there is such decision, a foundation should first be laid.

BY MS. WEYAND:

Q. I would like to ask the Doctor this, Have you heard about any proceeding before any of the agencies about employees getting paid sickness and accident pay for the time they are out? A. Well, as I say, I am supposed to be an expert witness about pregnancy. I can say we have had some general discussion with regard to this situation which you alluded to but I don't remember any decisions or anything that has been rendered. I did not even remember the initials of the group.

Q. You remember what was said? A. A lot was said. I don't recall the details of the discussion.

Q. However, you said that you raised the issue?
A. Right.

Q. What did you say when you raised the issue – can you tell me as best you can recall what you said when you raised the issue? A. I came up after I was with Mr. King and Mr. Kammholz – who asked me about this particular case – and I asked the group in

an informal manner the question, "How do you classify pregnancy – is it a disease or not?" That was the discussion.

Q. How did you happen to raise that? Do you remember what you told them? A. Well, I said, as best I recall, that there was a case pending whether a patient should be disabled, a woman should be disabled with pregnancy and the question was whether pregnancy was a disease or not. I think that was the gist of my discussion with them.

Q. Did you mention that the issue had come up with regard to employees of Chicago hospitals? A. Yes, I
938 did, I think, because Mr. King had mentioned there was a possible problem at Presbyterian-St. Luke's.

Q. And do you know whether Presbyterian-St. Luke's had made any commitments to its doctors, faculty members, during the period they were in the hospital having a baby? A. I do not.

Q. You don't know whether they paid them or not? A. I don't know whether they paid them or not.

Q. You don't know what position Presbyterian-St. Luke's Hospital has taken on this issue? A. I have not talked to Mr. King since that initial discussion.

Q. Did any of the other members from the group indicate an awareness that such a problem had arisen, as to any employees of their hospitals? A. No, I don't believe anyone mentioned that it was a problem at their hospital.

Q. At this meeting, was there a discussion as to whet whether the abnormalities of pregnancy, such as toxemia, was a disease – as to whether sickness or accident pay
939 should be paid for a period of disease related to pregnancy? A. I don't remember this particular question being discussed. I don't remember that.



Q. As far as you recall, the only issue was whether pregnancy constituted a disease, is that correct? A. Yes, that was the question I posed to the group.

Q. And, insofar as you recall, there was no discussion of complicated pregnancies? A. I am sure this must have come up at some time in that there was a difference from a normal pregnancy but I cannot recall really any specific issues.

Q. The complication of pregnancy is a disease, is it not? A. There are certain diseases that occur in pregnancy.

Q. Would you call the state that develops during pregnancy a complication of pregnancy which did not amount to a disease?

MR. KAMMHOLZ: Just a moment, Doctor, will you restate the question.

BY MS. WEYAND:

Q. Doctor, is there any condition of pregnancy which
940 the medical profession designates a complication of pregnancy which the medical profession would not also regard as a disease. A. I don't know, really, that I can answer that question.

Q. Maybe I should start over.

The medical profession uses the term "complication of pregnancy" to refer to abnormal complications in pregnancy, is that correct? A. Yes.

Q. When you use the term "complication of pregnancy" to refer to the abnormal state, is it also referring to a disease? A. I would say it may or may not refer to a disease.

Q. Would you state any complication of pregnancy which you do not regard as a disease? A. Yes, I think I know of one. We usually think of peurperal morbidity as a complication of pregnancy and many

times we find no cause for this and so I think that would not be classified as a disease.

Q. Will you explain what peurperal morbidity is? A. This is the elevation of temperature over a certain
941 degree for two days.

Q. What is that degree? A. 100.4 degrees.

Q. Do you administer treatment in case of peurperal morbidity? A. No treatment.

Q. Is a woman disabled by peurperal morbidity? A. I would say no more so than the patient who was without this for that particular day.

Q. It, itself is not a disabling state? A. No more than the normal postpartum state.

Q. This is a postpartum development entirely, is it? A. Yes, so defined.

Q. It does not occur prior to delivery? A. Right.

Q. Are headaches and backaches a usual incident to postpartum state? A. I would say "no."

Q. Does the medical literature indicate that these are among the symptoms which occur during a postpartum state? A. Would you repeat the question?

Q. Does the medical literature indicate that backache
942 and headache are symptoms which are found during the postpartum state? A. You can find most anything in the medical literature. I would say I am not aware of this.

Q. Is mal-development of the embryo a disease? A. It is an abnormal pregnancy.

Q. Is this a disease? A. I don't know that I would call it a disease.

Q. If it rises to the state of causing a premature termination of pregnancy, is it a disease? A. I would call it an abnormal state of development, which may be or may not be the result of a disease.



Q. I believe you stated that most common abnormality during the first trimester was usually related to the mal-development of the embryo, is that correct? A. Yes, I think that is what I said.

Q. And you said tht this abnormality arises due to the fact that the mal-development of the embryo gives rise to a premature determination of pregnancy, is that correct? A. Yes.

Q. And is this premature termination of pregnancy a
943 disease? A. It may be the result of natural causes or it may be the result of infection. The infection I would call a disease if it were a chromosomal abnormality not related to disease, I would not call it.

Q. Even if it results in premature termination of the pregnancy? A. Right. This would be an abnormal pregnancy and disabling for this period of time.

Q. And when this occurs, is hospitalization usually recommended by the doctor? A. Yes, usually.

Q. It is standard procedure, is it not? A. I would say, in general, depending somewhat on the state of pregnancy and length of pregnancy and number of other medical factors.

Q. What are the symptoms during the first trimester which result in mal-development of the embryo? A. Very early there are no difference in symptoms. Later it would be bleeding which would be the primary symptom.

Q. There you are talking about the first trimester? A. The first trimester.

944 Q. You have bleeding? A. Right.

Q. Does this bleeding on occasion reach a hemorrhaging state that may be injurious to the health of the mother? A. Yes, it does.

Q. When hemorrhaging of this extent occurs, do you regard this as a disease? A. This would be certainly a severe alteration of pregnancy or abnormality or pregnancy. I don't know that I would really classify it as a disease per se.

Q. There are women who die as a result of such hemorrhaging, are there not? A. Yes, that is true.

Q. In fact, it is a chief cause of death in the first trimester, is it not? A. I don't have the facts at hand on this but, certainly, I would say this is probably true – either hemorrhaging from abortion or from an ectopic pregnancy.

Q. Do you regard ectopic pregnancy as a disease? A. This is certainly an abnormal pregnancy. I would prefer to call it that.

Q. You would not call it a disease? A. No.

945 How did you define disease again? A. I defined disease as an abnormal state of health which is injurious to the individual.

Q. An ectopic pregnancy does not come within that definition of disease? A. Yes, I guess it could be so construed.

Q. Is there any reason why it would not be so construed? A. Another criteria that I usually would use for disease is that there is an act responsible for the disease.

Q. Is this accepted medical definition of disease – you must know the act responsible for it? A. Many times we don't know the act responsible for the disease.

Q. That is a disease if you don't know the act responsible, is that correct? A. Yes, in general, you can use this.

Q. Will you repeat what the act responsible has to do with the definition of disease? A. As I say, one of



my indications for disease is a condition which is due to some act, innocuous act, which results in abnormal alteration in body function.

Q. Now, an ectopic pregnancy, as I understand it,

946 consists of a fertilized ovum developing outside the uterus. Is that correct? A. That is correct.

Q. Would you add anything else to my definition or is that the complete definition of an ectopic pregnancy? A. We usually call it an extra-uterine pregnancy. That would be adequate.

Q. An extra-uterine and ectopic pregnancy are synonymous? A. Yes.

Q. You say you might not consider an extra-uterine pregnancy a disease because you do not know the agent which resulted in the ovum fertilized developing outside of the uterus – is this what you are telling me? A. Yes, that is what I said.

Q. Just because you do not know what agent was responsible for the fact that the ovum, when fertilized, did not reach the uterus and developed outside, you would say this is not a disease – is this what you are saying? A. I am saying, that at least in my classical definition of a disease, it did not have an agent that would result in the altered state.

Q. In fact, the ovum, when fertilized, developed outside of the uterus, gives rise to certain symptoms in

947 the pregnant female, does it not? A. Yes.

Q. And it is an agent that causes here a very serious disease, is it not? A. Yes, the pregnancy outside of the uterus does cause severe symptoms.

Q. Could you describe those symptoms? A. I can describe some symptoms of this.

Q. Would you describe the symptoms that the medical profession normally describes when it is talking about

the extra-uterine pregnancy? A. One of the terms we use insofar as symptoms of ectopic pregnancy is concerned is its inconsistency. There have been numerous quotations to this effect.

The classic symptom of ectopic pregnancy, the most common symptom is pain, abnormal bleeding. These would be the two.

Q. Does this always require surgical procedure?
A. It probably should, if recognized. It does not always.

Q. Is it not standard procedure for a physician to recommend surgical procedures when he diagnoses a pain and ectopic pregnancy? A. That is correct.

948 Q. No physician would think of diagnosing anything as ectopic pregnancy without recommending surgery to remove the fetus in its development, would he?
A. No.

Q. There is no other way of getting rid of it known but surgery? A. There is a condition under which, when a pregnancy is extruded from the tube and is not recognized, usually you may find evidence of this later on.

Q. However, the physician has no way of getting rid of it before operating, does he? A. That is correct.

Q. It is impossible for an ectopic pregnancy to go to term, is that correct? A. No, that is incorrect. There are occasional extra-uterine pregnancies which do go to term.

Q. Resulting in a normal baby? A. A normal baby, yes.

Q. Which develops where, in the fallopian tube?
A. Usually in the abdomen.

Q. In the abdomen but it is very rare? A. Very rare, yes.

Q. And a physician doesn't take a chance on that, if he finds an ectopic pregnancy, does he? A. Not early



949 we do not.

Q. Do you know of any other conditons that require surgery that you would not call a disease? A. Yes, I can think of a number of cosmetic surgical procedures that would be done for situations not a disease in plastic surgery.

Q. And if I told you that General Electric had stipulated that it pay sickness and accident for elective plastic surgery, you would say they were paying for something which was not a disease, would you not?

MR. KAMMHOLZ: Just a moment. This calls for a legal conclusion and I object to the question. It also assumes something that is not of record here and I would also object for that reason.

BY MS. WEYAND:

Q. On the first visit of a female who suspects she is pregnant to a doctor, the doctor engages in certain diagnostic procedures, does he not? A. Yes, in a general sense, I would say.

Q. What are those diagnostic procedures in which he engages? A. Our usual routine would be a history, a general physical examination, pelvic examination, a pap smear, if one had not been done recently, a blood count,
950 urinalysis and we are doing now Rubella titers.

Q. What is the name of the test that is used to determine pregnancy? A. There are a number of them. The Graph Index is one. The Prognosticolum, that is another. There is also the AUCG test.

Q. Can one normally observe by a pelvic examination whether the woman is pregnant or will you also have one if these other tests, laboratory tests made? A. I don't routinely do biological laboratory tests for pregnancy unless there is some question after my examination.

Q. Do you know what the medical profession normally does? A. I can really only speak for our own office.

Q. If you believe the woman pregnant through pelvic examination, then you rely on your judgment there and you have no laboratory tests performed, is that correct?
A. Most of the time, yes.

Q. Do you prescribe medication of any sort, any vitamins or anything for the pregnant woman to take as a
951 matter of routine? A. Yes, we utilize a pre-natal vitamin and an iron supplement.

Q. As a routine matter for all pregnant females?
A. Virtually all, yes.

Q. Between the time of the first examination and the time she goes into delivery, do you prescribe other drugs or other vitamins for her to take? A. No.

Q. Those are the only ones in a perfectly normal case?
A. Correct.

Q. How often do you recommend that a pregnant female visit the doctor? A. Usually once a month during the first seven months, two weeks during the eighth month and during the ninth month, every week.

Q. Is the toxemia of which you speak a peculiarity of pregnancy or does toxemia occur in non-pregnant persons?
A. Toxemia of pregnancy occurs only in pregnancy.

Q. However, there are other toxemias?
A. Yes, there are.

Q. How do they differ from the toxemia of pregnancy?
952 A. I usually prefer the term pre-ecilampsis rather than "toxemia" because "toxemia" is a rather broad general term in our hospital and in our technique we try to stay away from that type of term, using the term "eclampsia."

Q. You used the term "toxemia" during your testimony? A. Yes.



Q. What toxemias of non-pregnancy are similar in their characteristics and symptoms with those of eclampsia?
A. Well, I was asked to present as an expert in obstetrics and gynecology and not in general medicine. Right offhand, I do not have in my mind another term. that we would use as "toxemia" with the same symptoms.

Q. They involve the same symptoms involved by people who are not pregnant, is that correct?
A. Yes.

Q. And the toxemias of pregnancy, would you explain medically what this is caused by? A. We don't know what it is caused by.

Q. It is characterized by a building up of fluids in the
953 tissues, is that correct? A. Toxemia is defined with three findings – elevated blood pressure over the pre-pregnancy level, protein in the urine and edema.

Q. All three of those conditions occur in the non-pregnant individuals? A. Yes.

Q. They occur in males? A. Yes, they may occur.

Q. Is Bell's Palsy a disease of pregnancy? A. It occurs in pregnancy, yes.

Q. Would it occur in non-pregnant women?
A. Right.

Q. It occurs in males? A. Correct.

Q. And is there any known relationship between pregnancy and Bell's Palsy? A. It does occur in late pregnancy.

Q. Is there any great incident of pregnant females that have Bell's Palsy over non-pregnant individuals insofar as the medical literature indicates? A. I have not reviewed the literature in this regard.

Q. You don't know? A. I have seen women who have had it during pregnancy and who have not, who were not pregnant.

Q. Do you know medically where there is considered to be any relationship between pregnancy and Bell's Palsy? A. There is some indication there may be some swelling which may occur during pregnancy around the nerve roots. Bell's Palsy may occur.

Q. A tumor can cause Bell's Palsy? A. Yes.

Q. Other swelling can cause Beli's Palsy? A. Right.

Q. Except to the extent there may be a swelling as a result of pregnancy, there are no other known relationships between pregnancy and Bell's Palsy? A. That is my information, yes.

Q. A man who puts on a great deal of weight, becomes obese, and is discovered to be diabetic when he didn't know it, this can enhance the diabetic state, can it not, and make it worse? A. Yes, it can become manifest.

Q. Weight does aggravate diabetes, is that correct?
A. Yes.

Q. When a pregnant woman discovers she has diabetes,
955 which she did not know before, a pre-existing diabetic state, which becomes aggravated, is this due to any other reason than her gaining weight? A. Yes.

Q. It is due to another reason? A. Probably due also to the elevated cortisone that occurs in pregnancy.

Q. However, it may not be – it may be purely a weight result? A. It may be both.

Q. It may be both and maybe just weight?
A. Yes.

Q. On a thyroid condition, again, a man who either doesn't know he has thyroid or who has a pre-existing thyroid condition and puts on a large amount of weight, he will have this thyroid condition aggravated, is that not correct? A. I really don't know.

Q. You don't know? A. I don't know.



Q. Women in pregnancy do have thyroid problems at times – they discover they had this thyroid, they did not know it, it was aggravated by a pre-existing condition, is
956 that not correct? A. Yes, I would say so, a woman could discover this during pregnancy.

Q. Have you had experience with a thyroid problem in pregnant women? A. Yes, I have.

Q. Did she have it beforehand or did she discover the thyroid problem during pregnancy? A. A majority of them were discovered before pregnancy.

Q. You don't know about the weight effect on pregnancy, thyroid weight effect on this? A. I am not aware of that.

Q. If a woman has thyroid problems during pregnancy, would you regard this as a disease? A. Yes.

Q. The same as if she has Bell's Palsy, that is a disease, is it not, when caused by increase in weight, swelling or whatever caused it – but it is a disease?
A. Yes, I think we would consider that a disease, although it is really a finding.

Q. Tell me what happens in Bell's Palsy – what are the symptoms of Bell's Palsy? A. I can give you from the general medical position. I am not an expert in neurology.

It is due to a paralysis of the branches of the facial nerves. This has happened in at least one patient who developed this during late pregnancy.

Q. How many patients do you handle a year, a month? What kind of obstetrical practice, if you have one, do you have? I am just trying to get at whether you have one in connection with your department. A. I have been practicing obstetrics, I guess, since 1962, when I finished my training. I have had as many as sixty deliveries a month. Right now we are doing ten or twelve a month.

Q. Do you participate yourself or do you supervise your teaching staff – is that what you are? A. I do participate and I do deliveries. I participate in teaching.

Q. You see obstetrical patients? A. Yes.

Q. Do you see them from throughout the first interview up to delivery? A. Yes, I do.

Q. And how many patients have you had since your ten or eleven years in the field? A. That would be really difficult to say. I could give you some estimates.

For example, for two years, two of us did sixty deliv-
958 eries alone, roughly.

Q. And that was when? A. In 1962-1964.

Q. Now, Doctor, I am going to read you a question and an answer given by William C. Keettels, who is head of the Department of Obstetrics and Gynecology, University Hospitals, Iowa State University.

The question and answer I am going to read to you was given as a part of a deposition *Heinen v. Johnston Community School District* before the Iowa Civil Rights Commission, taken on October 9, 1972, by the Attorney General of the State of Iowa. The portion that I am going to read to you appears on page 21 of the deposition. Now, you have to go a little way back to get into the whole thing.

It reads as follows:

"It is kind of interesting about how people, how the medical profession changes. As you know, there was a time when women had to stay in bed for fourteen days after delivery and it took a long time before ambulation, and allowing them out of bed came about, and you can just see the transition that occurred, that many doctors
959 were so opposed to that, and all sorts of dire consequences would develop but this just took time before they accepted this. Now, everybody accepts ambulation within a few



hours after delivery as perfectly acceptable."

Now, we come to the question – "Would we be in a same kind of transition period perhaps with the pregnant female working up until time of delivery?"

The answer – "I think, yes. It has been a transition but I think we have made it now. The majority would accept that they could work up to term."

Now, Doctor, would you agree on that estimate of position taken by one of your medical profession? Would you agree with that statement? A. Yes, I would agree because, as I have stated earlier, insofar as our patients are concerned, they may work up until term.

Q. You agree the medical profession is in agreement today, the majority of them, following the same practice as far as you know? A. I can speak for those that I know.

Q. They do? A. Yes. I cannot, however, speak for the whole medical profession but I would agree with this. It is our practice in our own hospital.

960 Q. Are you acquainted with the religious convictions of various well-established religions which preclude their members from use of contraceptives without serious violation of religious beliefs? A. That is a broad statement. I would say I will have to answer "yes," I am generally aware of the Catholic situation – that they have regulations pertaining to this.

Q. With respect to such person, would it not require they lead a life of abstinence to avoid an unplanned pregnancy? In other words, would members who profess to this religious belief be precluded from the use of contraceptives – would it not require they lead a life of abstinence to avoid pregnancy? A. I would say "no." For example, rhythm can be used by certain couples very satisfactorily and this is, from my understanding, acceptable to their religion at least.

Q. Is the rhythm method considered an effective method of contraception? A. It is considered a method of contraception.

As I stated earlier, it is less effective than some other methods.

Q. A physician does not recommend it to any person who really wants to avoid pregnancy, does he?

961 A. My own feeling is that I give a patient a choice of contraceptive devices, etc., explaining to them what I know about each method and letting them choose them based on their own feelings.

Q. What do you state to them, about the effectiveness of rhythm? A. In general I would say there is a safe period, but the patient must have fairly regular menstrual periods and they must adhere very strictly to the abstinence during the fertile period.

Q. There are some with whom it would never work, is that not correct? A. I guess there are some women whom nothing would ever work on. There are certain persons who perhaps cannot use anything.

Q. There are certain women who are so irregular that there is no rhythm period available, is that correct?
A. No, I think you could calculate formulas. You can calculate a "safe" period.

Q. You have never seen one so irregular you could not calculate a "safe" period? A. If there is one that way, then we usually allow them to use birth control pills.

962 Q. That is your experience? A. That is my experience.

Q. It takes a woman with a considerable degree of intelligence who has irregular periods to calculate the cycle, does it not? A. Well, you see, she is going to have to know how to count.



Q. She has to keep track of them on calendars?
A. Yes

Q. Are there today doubts as to the complete safety for all persons of the pill? A. Yes.

Q. It involves a risk as far as the medical person is concerned, for certain individuals? A. There is data in the literature on both sides of the question as to the exact safety of the pill.

Q. There is respected medical opinion it does involve a risk? A. Yes.

Q. Are you acquainted with the type of risk described as involved, such as blood clots and serious things of that nature? A. Yes, in general I am familiar with them.

963 Q. What are those risks? A. I would say the most serious risk is thrombo-embolitic – a thrombo-embolitic phenomenon.

Q. Which is a blood clot? A. Yes.

Q. It can be fatal? A. It can be fatal, yes.

Q. Is this also true of the "after morning" pill and the birth control pill? In other words, my question is – may there not still be some risk involved in the morning-after pill? A. One might speculate this. I don't believe there is any data to support this.

Q. We don't know yet? A. We don't know yet.

Q. It is too new to know? A. Yes.

Q. That is a correct statement? A. Yes. I would say this, it is safe enough, inasmuch as they have released information for use in this manner.

Q. They released the birth control pill and the medical profession, certain parts of it, think there is real risk of fatality for certain individuals using it?

964 A. Right, but other groups do not.

Q. Can you name the complications of pregnancy which include the need for surgical procedure?
A. I could name some. I believe we have already discussed ectopic pregnancy, some early abortions. An incompetent cervix has been discussed in the mid-trimester. Certain complications of labor, which would require Caesarean secton. I think those would be the main ones.

Q. Suppose a woman had a previous Caesarean section, is it accepted practice to have her subsequent deliveries by Caesarean section? A. There are two schools of thought on this.

There are some who feel that the old adage "once a Caesarean, always a Caesarean." There are others who will allow the woman to deliver from below, deliver normally after Caesarean section. It depends on certain criteria.

Q. The risk of delivery of a woman who has had a Caesarean means rupture, is that correct, at the scar?
A. Yes.

Q. And she may hemorrhage if that occurs and a Caesarean would have to be performed? A. Yes.

965 Q. Do these surgical procedures differ in any way from surgical procedures used in non-pregnancy cases?
A. I will have to say "yes."

Q. In what respect? A. That these conditions do not occur without a pregnancy, complication pregnancy.

Q. Is the anesthesia used any different because it is a pregnancy-related surgery? A. When there is consideration of the fetus or the embryo, then we would have a severe Caesarean section and we would use a little different type of anesthesia.

Q. You generally use a different anesthesia? A. Not in general a different anesthesia but we would like it,



hopefully, administered with the necessity of understanding that the woman is pregnant and with due regard to the baby.

Q. You normally administer the same anesthesia as administered under occasions except for the anesthesiologist being aware there is a second life at stake? A. Yes, and there are some types you prefer during pregnancy over other types of anesthesia.

Q. Do you use those for other than pregnancy also, you do, do you not? A. Yes.

966 Q. Are the blood transfusions used in surgery arising out of pregnancy different from blood transfusion methods used in other surgical cases? A. No.

Q. The same blood transfusion procedures are used?
A. Yes.

Q. Does the wound which is inflicted by surgery related to pregnancy require different treatment than the wound inflicted by surgery that is non-pregnancy related?

MR. KAMMHOLZ: I object to the question. There is nothing of record to indicate that surgery inflicts a wound and I think the characterization is improper.

BY MS. WEYAND:

Q. Doctor, when you cut the woman open or cut somebody else open, what do you call that cut?
A. An incision. I believe that is the proper term.

Q. Is the incision which you make in surgery involving pregnancy any different from the incision you make

967 in a non-pregnancy related surgery? A. No. The surgical incision would be made appropriate to the type of surgery to be performed. In general, we would use something similar.

Q. Similar to what you would use in hemorrhaging ulcer or gall bladder? An incision that is similar?
A. They are not similar.

Q. Which ones would it be similar to? A. A Caesarean section would be similar for abdominal hysterectomy.

Q. It is different from an appendectomy incision?
A. Yes.

Q. How does it differ from an appendectomy?
A. An appendectomy is over McBurney's point, over the areas you are trying to remove, the appendix.

The incision for a Caesarean section is usually in the middle.

Q. It is a different position? Does this involve different surgical procedures? A. I would say "no." You make an incision appropriate to the thing you are going to be doing.

968 Q. Does recovery from the incision inflicted by surgery related to pregnancy involve any different aspects than recovery from an incision from other surgery? A. No, I would say not.

Q. How does a doctor close an incision after surgery?
A. With various types of sutures.

Q. Are the sutures in pregnancy any different from those you use in non-pregnancy surgery? A. In general not, I would say no.

Q. Does the effect of a woman of surgery from a surgical procedure related to pregnancy differ medically from the effect on a patient in relation to other surgery?
A. I would say "no."

Q. Does a pregnant patient's condition which is attributable to pregnancy, which requires surgery, have a disease? A. Now, I think we have been all through this.

Q. Are there some instances where surgery is required in pregnancy that would be classified as a disease?
A. Yes, if a woman has gallstones. This is a disease.



969 Q. Is that related to pregnancy? A. No.

Q. Does she have anything related to pregnancy that requires surgery that you would classify as a disease?
A. My concept, and what I have tried to develop, is that there are complications of pregnancy which are alterations in the normal state of pregnancy which I would not really relate as a disease. I can't think of one at the moment. We have gone through the ectopic pregnancy.

Q. Now, as I understand it, you cannot think of any complications of pregnancy which require surgery which you would regard as a disease? A. None that come to mind now.

Q. And you believe you are using the word "disease" in this regard in accepted medical sense of the word "disease"? A. Yes.

Q. Do you know whether this is a matter wherein there is a difference of medical opinion? A. There is a difference of medical opinion in everything. I suppose there must be. I said that I have gone from my own experience and sort of what I feel is accepted in this area by my colleagues.

970 Q. If a pregnant female suffers from a heart condition, do her disabilities differ medically from those of a male who has had a large gain in weight? A. No.

Q. Are you acquainted with the extent to which medical insurance is prevalent today, major medical and hospitalization covering maternity benefits, including prenatal care and delivery? A. I would say "no." This is really not my field.

Q. You have no idea what is generally included in medical policies? A. No, I really have no knowledge or valid information on that.

MS. WEYAND: I believe that is all the questions I am going to ask because I know the doctor has to get away.

MR. KAMMHOLZ: I am aware also of the Doctor's schedule and I appreciate your terminating your questions at this point. I have perhaps one or two more questions.

REDIRECT EXAMINATION

BY MR. KAMMHOLZ:

Q. Doctor, does the use of an IUD, diaphragm, a condom or foams, jellies, creams, involve any kind of health
971 risk to the female? A. You did start with IUD?

Q. Yes. A. I would say that would perhaps have some slight health risk. The other methods, relatively little if any serious problem.

Q. What would be the health risk involved in connection with the use of IUD? A. The main health risk is perforation of the uterus by the device.

Q. To your knowledge, does this occur frequently? A. Infrequently, but it does occur.

Q. You were interrogated on cross-examination with regard to malformed embryos. Is it not a fact that fertilization of the ovum is incomplete in perhaps ten to fifteen percent of the cases resulting in spontaneous abortion in those instances? A. Yes. In studies examining early abortions, spontaneous early abortions, there was some defect in the embryo or the germ plasma in roughly ninety percent of those examined.

Q. This is comparable perhaps to the imperfection in flowers and seeds in plant life, to use a lay term?
972 A. I would assume so. My own illustration I use when I am talking with a patient is that when, as it is understood, from two cells an embryo must be formed, a baby must be born, you wonder why it ever goes correctly. So I am sure this happens in nature or otherwise, other than the human.



MR. KAMMHOLZ: I have no further questions.
MR. WEYAND: No further questions.

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THE COURT: Ms. Weyand, gentlemen, I have the deposition and I find what appears to be a stipulation with some editorial comment on the side. I don't know whether you intended to leave that in there or not. If not, you can take it back.

The corrections that were made in the deposition, anyway, there is a sheet in there, give it to counsel.

MR. KAMMHOLZ: I think I know what it is, but it isn't necessary because the corrections have been noted in the stipulation.

* * * * *

973 THE COURT: Thank you.

* * * * *

Since there is no further evidence there is no surrebuttal and the case is closed.

* * * * *

GE EXHIBIT NO.1
(This is the same as Exhibit A-2 to answers of Defendent General Electric Company to Plaintiffs' Fourth Interrogation, printed at p. _____, *supra.*)

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GE EXHIBIT No. 2
Employee and Community Relations Instructions No. 906,
G.E. Salem, Virginia Plant, issued 11-10-71

**DRIVE SYSTEMS PRODUCT DEPARTMENT**
**SECTION: Employee & Community Rel.**

| SUPERSEDES | ISSUED | INSTRUCTION |
|---|---|---|
| 4-1-70 | 11-10-71 | No. 9.06 |

**SUBJECT:** PERSONAL ILLNESS - PREGNANCY

It is generally agreed by obstetricians that women may continue to work through the sixth month of pregnancy when the pregnancy is uncomplicated and may resume work at the end of the eight weeks following termination of pregnancy. Pregnant employees will be required to obtain written permission from their personal physician to work beyond the sixth month of pregnancy. Work beyond the sixth month of pregnancy will also require the approval of the Plant Physician. A pregnant employee may terminate active work any time before the sixth month if she so elects upon the advice of her personal physician.

It is the Supervisor's responsibility to refer the employee to the plant Dispensary when he learns that the employee is pregnant. The employee will be given a form to be completed by her personal physician indicating the expected termination date of pregnancy and granting permission for continued work, if desired.



After review by the Plant Physician, the nurse will prepare a letter addressed to the employee's Supervisor with a copy to the Personnel office giving the last day that the employee can work and noting any work restrictions.

Pregnant employees will be required to discontinue working and will be placed on "Pregnancy" status in cases where the personal physician or the plant physician determines it is unwise to continue at work because of medical reasons, when suitable work is no longer available, and when through inefficient performance, the employee demonstrates inability to perform work satisfactorily.

The employee's status is indicated as "personal illness" during such absence and is covered by the current rules relating to such absences.

The employee is not required to keep her supervisor advised as to her condition until eight weeks after termination of pregnancy. Failure to resume work after the eight-week period will terminate service unless there is lack of work, illness, complication from pregnancy or some other valid reason, in which the case the employee will be required to notify her supervisor once a month, and this reason will then become the reason for absence on employment and payroll records.

In the event the absence following termination of pregnancy exceeds eight weeks due to reasons of health, the employee must furnish upon her return to work a statement from her physician indicating the reason for the absence. This statement will be forwarded to the Dispensary for review and will be filed in the employee's personnel folder.

Employees returning to work in less than eight weeks after termination of pregnancy are required to obtain a statement from their personal physician permitting the return to work. Approval of the Plant Physician is also required.

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G.E. EXHIBIT No. 4
Par. 17, 304.43, CCH 'Employment Practices Guide,' 12-21-66.

Number 33–41
12-21-66 Decisions and Rulings 7413-21

**[¶17,304.43] Denial of Salary continuation during pregnancy**

Opinion letter of General Counsel, Equal Employment Opportunity Commission, October 17, 1966. Released December 9, 1966.

A company's group insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth does not violate Title VII, inasmuch as, according to EEOC policy, treatment of illness or injury should not be equated with treatment of maternity.

Back reference– ¶1213.

This is in reply to your inquiry regarding a company's "salary continuation policy". According to your letter, the policy permits employees who become disabled for



long periods to be paid a salary by the company for six months during the period of disability. Should the employee remain disabled following that six month period, the insurance carrier then assumes the responsibility of paying one-half of the disabled employee's salary for a given period of time, depending upon the employee's length of service.

You further state that there are three exclusions, namely that the disability must not be:

1. A disability caused or contributed to by pregnancy, childbirth, miscarriage, or abortion.
2. A disability due to intentionally self-inflicted injuries.
3. A disability resulting from the commission by the employee of, or attempt to commit, an assault, batter, or felony.

The Company's group insurance plan does, however, cover the delivery of children and the employee's immediate hospital expenses resulting therefrom.

You have requested our opinion whether the above exclusion of pregnancy and child-birth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.

In a recent opinion letter regarding pregnancy, we have stated, "The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees." Therefore, it is our opinion that according to the facts stated above, a company's group-insurance program which covers hospital

and medical expenses for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and child-birth would not be in violation of Title VII.

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GE EXHIBIT NO. 5 -
Par. 1219, CCH 'Employment Practices Guide,' 4-22-71.

.58 Discontinuation of Salary During Pregnancy.— Company's group insurance program which covers hospital and medical expenses for delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth does not violate Act, inasmuch as, according to EEOC policy, treatment of illness or injury should not be equated with treatment of maternity.

*GC Opinion,* October 17, 1966

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GE EXHIBIT NO. 7 -
G.E. Health Bulletin
re pregnancy leave,
issued 11/5/71

PREGNANCY

General

Pregnant employees at work must be considered in the same light as are all other employees, namely that they be physically and emotionally fit to efficiently



perform their assigned work without jeopardizing the health or safety of themselves or others.

Changes in Pregnancy

Certain changes occur in the physiologically normal pregnancy which may effect the capacity to work. The usual weight gain may at times lead to increased fatiguability. Clothing is often restricting and uncomfortable causing restlessness. The enlarging uterine mass compromises the return of lymph and blood from the lower extremities and, along with fluid retention, may cause swelling of the feet and ankles. Pressure on the bladder may lead to increased urinary frequency. The forward shift of the center of gravity can result in strain on the back muscles causing low back discomfort and further restlessness. Increased emotional lability is rather common. This may interfere with concentration at work.

Recommendations

The decision to permit pregnant employees to continue at work involves many considerations. These include; 1) the desire of the individual, 2) approval of the attending physician and concurrence by the General Electric physician, 3) maintenance of good health and well being, 4) appropriate and safe work assignment, and 5) continued efficient work performance. Because these factors vary from one employee to another, each case must be decided individually. Based upon the above considerations the following recommendations are made:

I. Employment Applicant

Pregnant applicants for employment will not be considered acceptable for work until after a reasonable period of convalescence following termination of pregnancy.

1. Pregnant employees must report the fact of pregnancy to the medical clinic (or to the supervisor in the absence of a medical facility) as soon as practical after the diagnosis is established. The employee should present a completed form (See Appendix 5.8) from the attending physician stating the expected date of delivery and granting permission for continued work, if desired.

2. The pregnant employee may elect to voluntarily discontinue working and have her status designated as "Illness-Pregnancy" which is treated the same as an absence due to illness for continuity of service purposes. During this period the employee will be covered by current rules and benefit plan provisions relating to such pregnancy absence. The employee will be expected to return to work within eight weeks following termination of pregnancy, unless she presents evidence that she is unable to return due to illness or complications from pregnancy. In this instance, "illness absence" would thereafter be come the reason for absence on employment and payroll records. If the child's condition necessitates the employee's continued presence at home, her service may be protected beyond eight weeks after termination of pregnancy only if a leave of absence is granted for such purpose.

3. Pregnant employees who elect to continue at work, and who have the approval of their attending physician, may do so providing the General Electric physician is satisfied (and so certifies) that the employee's health is satisfactory and that the job assignment requires no unusual physical demands or possesses no health hazards as a result of ex-



posure to toxic materials or harmful physical agents.

4. Pregnant employees who have elected to continue at work, and who have been certified, may thereafter elect at anytime to discontinue working and may be on "Illness-Pregnancy" status. Those pregnant employees who continue at work beyond the sixth month of pregnancy should have the approval of their attending physician and be followed closely by medical personnel to determine continued well being and job safety. Pregnant employees will of course be required to discontinue working and will be placed on "Pregnancy" status in cases where the attending or plant physician determines it is unwise to continue at work because of medical reasons, when suitable work is no longer available, and when through inefficient performance, the employee demonstrates inability to perform work satisfactorily. In any event, pregnant employees should discontinue working at least two weeks prior to the expected date of delivery so that the employee may prepare for her confinement and to avoid the complications of early delivery, precipitate labor or other events associated with childbirth.

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G.E. EXHIBIT NO. 8

G.E. Health Bulletin re
Pregnancy Leave issued
5-5-72

**CORPORATE MEDICAL OPERATION**
**NEW YORK, NEW YORK**

**HEALTH BULLETIN**

**Tab: 5**
**No.: 5.8**
**Issued: 5/5/72**
**Supersedes: 11/5/71**

# PREGNANCY

## General

Pregnant employees at work must be considered in the same light as are all other employees, namely that they be physically and emotionally fit to efficiently perform their assigned work without jeopardizing the health or safety of themselves or others.

## Changes in Pregnancy

Certain changes occur in the physiologically normal pregnancy which may effect the capacity to work. The usual weight gain may at times lead to increased fatiguability. Clothing is often restricting and uncomfortable causing restlessness. The enlarging uterine mass compromises the return of lymph and blood from the lower extremities and, along with fluid retention, may cause swelling of the feet and ankles. Pressure on the bladder may lead to increased urinary frequency. The forward shift of the center of gravity can result in strain on the back muscles causing low back discomfort and



further restlessness. Increased emotional liability is rather common. This may interfere with concentration at work.

## Recommendations

The decision to permit pregnant employees to continue at work involves many considerations. These include: 1) the desire of the employee, 2) approval of the attending physician and concurrence by the General Electric physician, 3) maintenance of good health and well being, 4) appropriate and safe work assignment, and 5) continued efficient work performance. Because these factors vary from one employee to another, each case must be decided individually. Based upon the above considerations the following recommendations are made:

1. Pregnant employees must report the fact of pregnancy to the medical clinic (or to the supervisor in the absence of a medical facility) as soon as practical after the diagnosis is established. The employee should present a completed form (See Appendix 5.8) from the attending physician stating the expected date of delivery and granting permission for continued work, if desired.

2. The pregnant employee may elect to voluntarily discontinue working and have her status designated as "Illness-Pregnancy" which is treated the same as an absence due to illness for continuity of service purposes. During this period the employee will be covered by current rules and benefit plan provisions relating to such pregnancy absence. The employee will be expected to return to work within eight weeks following termination of pregnancy, unless she presents evidence that she is unable to return due to illness or complications from pregnancy. In this instance,

"illness absence" would thereafter become the reason for absence on employment and payroll records. If the child's condition necessitates the employee's continued presence at home, her service may be protected beyond eight weeks after termination of pregnancy only if a leave of absence is granted for such purpose.

3. Pregnant employees who elect to continue at work, and who have the approval of their attending physician, may do so providing the General Electric physician is satisfied that the employee's health is satisfactory and that the job assignment requires no unusual physical demands or possesses no health hazards as a result of exposure to toxic materials or harmful physical agents.

4. Pregnant employees who have elected to continue at work, and who have been certified, may thereafter elect at anytime to discontinue working and may be on "Illness-Pregnancy" status. Those pregnant employees who continue at work beyond the sixth month of pregnancy should have the approval of their attending physician and be followed closely by medical personnel to determine continued well being and job safety. Pregnant employees will of course be required to discontinue working and will be placed on "Pregnancy" status in cases where the attending or plant physician determines it is unwise to continue at work because of medical reasons, when suitable work is no longer available, and when through inefficient performance, the employee demonstrates inability to perform work satisfactorily. In any event, pregnant employees should discontinue working at



least two weeks prior to the expected date of delivery so that the employee may prepare for her confinement and to avoid the complications of early delivery, precipitate labor or other events associated with childbirth.

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G.E. EXHIBIT NO. 10

Excerpt, Chapter IX, Broom and Selznick, "Sociology", (Harper & Row, 4th Edition).

**SOCIOLOGY**

**A Text with Adapted Readings**

**LEONARD BROOM PHILIP SELZNICK**



**THE CASE OF THE G.E. BABIES**

On January 14, 1953, General Electric announced that it would award five shares of its common stock to any employee who had a baby on October 15—the company's seventy-fifth anniversary. Originally the company said it expected about thirteen winners. It arrived at this figure by applying a daily U.S. birth rate to its own 226,000 employees. This computation actually yielded a prediction of fifteen births; but a G.E. public-relations man thought it might be nice to trim the figure to thirteen, the number of original G.E. investors. The mathematics suffered from more than public relations, however.

G.E. employees, since they include no children and no one over sixty-five, are obviously a much more fertile group than the population as a whole. When this fact sank in, a company statistician made a new assault on the problem. He estimated that the size of an average G.E. family was 4.2. This meant that the total number of people in the G.E. families was close to a million. Applying the crude annual birth rate to this group, and dividing by 365, he came up with a new prediction of seventy-two births on the big day.

As it turned out, there were not thirteen, fifteen, or seventy-two babies born to G.E. employees on October 15. There were 189.

Subtracting the company's highest expectation of seventy-two from 189 gives 117, "extra" babies. Where did G.E. go wrong? Well, among other things, the company made no allowance for the incentive provided by its own stock. This oversight, remarkable in a company that has had a lot to say about capitalist incentives, was apparently rectified by the employees. The latter not only enjoy having children, but it appears, they rather enjoy the idea of becoming capitalists. And they seem to have known a good thing. In a generally declining stock market, G.E. common stock rose during the pregnant months from 69 1/8 to 78 7/8.

Source: Reprinted from the January, 1954, issue of *Fortune* by Special Permission of the Editors; Copyright, Time, Inc.

* * *

WHERE DID G.E. GO WRONG?

They applied the wrong rate to the wrong group. They applied the crude birth rate to G.E. employees, assuming that only the *employees* would have babies. If the crude birth rate were to be used at all, it should have been applied to the



whole population of G.E. *families*, not just the workers but their wives, children, and other relatives. This is what they finally did when they included families in their calculations of the crude birth rate. But the crude birth rate requires a cross section of the total population, and they did not have one. Even the whole population of G.E. families is not representative of the whole population of the U.S. For instance, G.E. families contain an abnormally large proportion of individuals in the productive (and reproductive) years and few aged persons. The G.E. statistician also failed to consider: (1) the section of the country, (2) the size of the communities where the employees lived, (3) their income, (4) their education, and (5) their race, all of which affect the birth rate.

*Could G.E. have done better?* They could have made a closer approximation to the true number by applying age specific birth rates to the women of childbearing ages in G.E. employee families. This number could have been further refined by correcting for seasonal fluctuations in births. Corrections for the characteristics G.E. failed to consider would be far more difficult to make and, under the conditions noted below, pointless.

Because figures for the characteristics of the G.E. population are not available, a more refined estimate cannot be calculated. Probably, but not certainly (as *Fortune* assumes), the announcement of the award was an incentive. The influence of incentive could have been estimated and the quality of the prediction further improved by interviewing a sample of G.E. wives. Of course, G.E. could have eliminated the incentive factor entirely by announcing the award eight instead of ten months before October 15. As it was, the announcement may have been timed to create maximum motivation. And a number of births may have been induced hastened) by physicians.

There is at least one additional complication. Any estimate of a daily birth rate, even for a rather large population like the G.E. families, is subject to an additional source of error. Daily birth rates vary even more widely than seasonal or monthly birth rates. In 1950 U.S. registered crude birth rates ranged from 20.9 for the month of April to 25.5 for September. The shorter the time period, the greater the range of variation in birth rates (and the smaller the population, the greater the range of variation in birth rates). The changes of getting close to the mark on any particular day for any particular group are, therefore, not very good.

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G.E. EXHIBIT NO. 12

Opinion Letters, Charles Duncan, General Counsel, Equal Employment Opportunity Commission, dated November 10, 1966 and November 15, 1966, re EEOC position on maternity as illness or injury.

November 10, 1966

Gentlemen:

This is in reply to your letter inquiring whether a medical insurance plan and a disability benefit plan provided by a certain employer is in violation of Title VII of the Civil Rights Act of 1964.

You state under the employer's noncontributory medical insurance plan a maternity benefit is provided to cover the actual expenses (up to a stated maximum payment) incurred in cases of pregnancy of an employee's wife. The plan states



further that "maternity benefits are not available for female employees."

You call to our attention the opinion letter of June 29, 1966, of the Wage-Hour Administrator, which states, "The WHPC Divisions have determined that payments related to maternity which are made by an employer to an employee do not constitute remuneration for employment and are, therefore, beyond the scope of the Equal Pay Act." You also cite the last sentence of section 703(h) of Title VII, which provides:

> "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act]."

You ask if you are correct in concluding that, therefore, the maternity benefit provisions cited above do not violate Title VII.

We do not agree that the determination of the Wage-Hour Administrator is controlling on this issue. The basic principles governing the relationship between Title VII and the Equal Pay Act are set forth in section 1604.7(a) of the Commission's regulations, 29 C.F.R. 1604.7(a). There it is stated:

> "Title VII requires that its provisions be harmonized with the Equal Pay Act * * * in order to avoid conflicting interpretations or requirements with respect to *situations to which both statutes are applicable.* Accordingly, the Commission interprets section 703(h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act

for determining *what is unlawful discrimination in compensation* are applicable to Title VII. * * * (Emphasis added.)

Section 1604.7(b) states further that the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Wage-Hour Administrator. Section 1604.7, read as a whole, draws a clear distinction between those situations in which the Equal Pay Act is applicable and those in which it is inapplicable. The section expresses the Commission's intention to follow the Wage-Hour Administrator on questions of substance relevant to both statutes, but not on questions of jurisdiction which are peculiar to the Equal Pay Act. For example, an employee exempted from the coverage of the Equal Pay Act may nevertheless be entitled to the protection of Title VII against discrimination in compensation on account of sex. Consequently, an Administrator's opinion recognizing an exemption under the Equal Pay Act would not be applicable or relevant to Title VII. Similarly, where, as in the opinion you cite, the Administrator concludes that an asserted act of discrimination is not in violation of the Equal Pay Act because the discrimination is not with respect to compensation but with respect to other terms or conditions of employment, the opinion relates to a jurisdictional question peculiar to the Equal Pay Act. It is not relevant to the enforcement of Title VII because Title VII covers all terms and conditions of employment, including compensation. Consequently, section 1604.7(b) does not require that the opinion be adopted by the Commission.

It is our view that the maternity benefit provision you describe is in violation of Title VII. Where an employer pays maternity benefits for the wives of male employees he must pay such benefits for female employees.



Your second question is whether an employee disability benefit plan financed by both the employer and the employees may exclude from coverage disability resulting from the employee's pregnancy. You state that certain other forms of disability, e.g., disability arising in the course of employment, disability arising from the employee's misconduct, etc., are likewise excluded.

In a recent opinion letter regarding pregnancy we have stated, "The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees." Therefore, an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory. However, where a plan pays maternity benefits to the wives of male employees, it assumes the risks of pregnancy, and we would regard it as discriminatory to assume such risks for the families of male employees, but not for female employees.

This is an opinion letter issued pursuant to 29 C.F.R. 1601. 30.

Sincerely yours,

Charles T. Duncan
General Counsel

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**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Washington, D. C. 20506**

November 15, 1966

Gentlemen:

You state that under your collective bargaining agreement male and female employees are granted sick leave with pay. Female employees, however, are granted maternity leaves without pay; although their services are not terminated. You inquire whether this policy is in compliance with Title VII of the Civil Rights Act of 1964.

The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. Accordingly, we believe that to provide substantial equality of employment opportunity for both sexes, there must be special recognition for absence due to pregnancy, and for this reason we have stated that, generally speaking, a leave of absence should be granted for pregnancy whether or not it is granted for illness. On the other hand, we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness, and, consequently, it is our view that the policy you describe is not in violation of Title VII.

Sincerely yours,

Charles T. Duncan
General Counsel

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G.E. EXHIBIT NO. 13

Cost Estimates re
Pregnancy Benefits

**SHORT TERM DISABILITY BENEFITS AND MATERNITY COVERAGE U.S. GROUP INSURANCE COVERAGE AND SALARY CONTINUANCE**

**To provide all those employees covered for short term disability with maternity coverage on the same basis as any other disability:**

| Assuming the Average Duration of Maternity Benefits would be: | 20 weeks | 25 weeks | 30 weeks |
|---|---|---|---|
| Total Maternity Benefits to be provided per year | $1,230 million | $1,538 million | $1,845 million |
| Total Maternity Benefits now provided per year | 225 million | 225 million | 225 million |
| Increase in Total Benefits per year | 1,005 million | 1,313 million | 1,620 million |

Short Term Disability Benefits and Maternity Coverage

In developing the cost for maternity coverage on the same basis as any other disability, the following assumptions were used:

1. The annual number of births in the United States is approximately 3,250,000. (Source: U.S. Department of Health, Education, and Welfare, data published in the New York Times, March 2, 1973.)

2. About 40% of pregnant women are employed during pregnancy. (Source: U.S. Department of H.E.W., National Center for Health Statistics Report, Series 22, No. 7, September 1968, pg. 16.)

3. Approximately 63% of the employed civilian labor force has some form of employer-sponsored short term disability income protection. (Source: Health Insurance Institute, "Source Book of Health Insurance 1972-1973", pg. 25.)

4. The average short term disability benefit for covered women is about $75 per week.

5. It is estimated that of those women covered for short term disability benefits, 60% have maternity coverage with an average maximum duration of six weeks. (Source: Society of Actuaries Transactions 1972, No. 2, June 1972, pg. 190-202.)

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G.E. EXHIBIT NO. 16 - Federal Personnel Manual, Revised July 1969, Subchapter 13, Maternity Leave.

**Subchapter 13. Maternity Leave**

13–1. DEFINITION

Maternity leave is a period of approved absence for incapacitation related to pregnancy and confinement. It is chargeable to sick leave or any combination of sick leave, annual leave, and leave without pay.



13–2. REGULATORY PROVISION

The leave regulations published by the Civil Service Commission require that "sick leave shall be granted to an employee . . . when the employee is incapacitated for the performance of duties by . . . pregnancy and confinement. . . ."

* * *

13–4. GUIDES FOR GRANTING MATERNITY LEAVE

* * *

f. Advance of sick leave. Requests for advance of sick leave for reasons of pregnancy and confinement should usually be denied.

* * *

630-30 Chapter 630. Absence and Leave

(4) When an agency finds that the duties of the employee require activity or exposure which may be injurious to her health, it should make a reasonable effort to detail or temporarily reassign her to other available work for which she is qualified. If another assignment is not available, and a medical certificate of the employee's incapacitation for the duties of her regular position is received, she should be placed on leave immediately.



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G.E. EXHIBIT NO. 17 - Civil Service Commission Personnel Manual, June 1967

3–5. Granting Sick Leave in Advance of Accrual

a. In event of serious disability or ailment, and when the exigencies of the situation require it, a career or career-conditional employee may be granted sick leave in advance of its accrual up to a total of 30 days, under these conditions:

## SUBCHAPTER 4. MATERNITY LEAVE

4-1. Employee Requests

An employee who applies for maternity leave must submit her request in writing indicating whether or not she intends to return to duty after delivery. She should attach thereto her physician's or practitioner's written certificate stating that the employee is pregnant, approximating the date on which she will be incapacitated for performance of her duties because of pregnancy, and stating the expected delivery date.

4-2. Amounts Granted

a. The amount of leave approved for maternity purposes depends on whether the employee intends to terminate her employment or return to duty after delivery.

b. *Employees Who Do Not Intend To Return.* An employee who has indicated that she does not intend to return to duty after delivery will be granted the use of any sick leave to her credit during the periods before and immediately after the actual delivery which can be supported by her physician's certificate. She will submit her resignation at the time she begins her sick leave. When she has used the sick leave approved, she will be separated from the rolls. If, however, she



has any accrued annual leave for which lump-sum payment cannot be made, she will be permitted to use it before separation.

c. *Employees Who Intend To Return.* An employee who intends to return to duty will be expected to work before delivery until she cannot adequately perform the duties of her job, or it is no longer safe for her to do so. She will be expected to return to duty as soon as she is physically fit. Time off will generally be approved for the period of incapacitation certified by the employee's physician. Initial authorization of absence shall not extend in any case beyond the *eighth calendar week* following the expected delivery date. The employee will be permitted to select the kinds of leave she wants to use and the sequence in which she will use them.

d. As a general rule, absences beyond eight weeks after delivery will not be approved. In an exceptional case, however, additional absences may be approved. An employee who desires additional leave must submit a written request to her supervisor stating her reasons. In deciding whether to approve the additional leave, the official having authority to approve leave shall give primary consideration to the Commission's interests and administrative needs.

e. *No advance annual leave will be granted for maternity purposes.*

G.E. EXHIBIT NO. 18 - National Labor Relations Board, Administrative Policies and Procedure Manual, Title 8, Leave and Attendance, February 1967, Section 3580, "Advance of Sick Leave" and Section 3680-3684, "Maternity Leave".

**National Labor Relations Board**

**ADMINISTRATIVE POLICIES AND PROCEDURES MANUAL**

**Title 8**
**Leave and Attendance**

**NATIONAL LABOR RELATIONS BOARD**
**Washington, D. C. 20570**



3580 Advance of Sick leave

3580.1 *Policy.* Advance of sick leave is a privilege granted to employees after full consideration for protecting the interests of the Government. This must be balanced by the equity of assisting an employee who, because of circumstances beyond his control, needs advanced sick leave due to serious incapacity. For employees who have had a year or more of service with the Agency, consideration must also be given to whether or not that employee has utilized his sick leave prudently.



3580.2 *Maximum limitation on advance of sick leave:* Sick leave not to exceed 240 hours may be advanced in cases of serious incapacity, regardless of whether the employee has annual leave to his credit. Advance leave of less than 8 hours will not be granted.

* * *

3580.3 *Responsibility of supervisors in recommending grant of advance of sick leave:* The employee's supervisor is responsible for determining that the reasons for absence warrant a recommendation for advance of sick leave.





Prior to the initiation of the recommendation, the following items should be carefully considered:

a. Conformance with regulations and Agency policy and procedures. (See 3580.5 for procedures.)

b. The request is fully warranted by the leave and attendance record of the employee and is properly supported by a medical certificate.

c. There is reasonable assurance that the employee will return to duty and the sick leave will be subsequently earned.

3580.4 *Sick leave may not be advanced when:*

a. The request for advance of sick leave is for pregnancy or confinement.

b. The absence is due to exposure to a contagious disease or to care for a person afflicted with a contagious disease.

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f. It is known or considered likely that the employee will retire under provisions for age or optional retirement, or will be separated.

* * *

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3680-3688 Maternity Leave

3680 *Maternity Leave:* Maternity leave is a period of approved absence for *incapacitation* due to pregnancy and confinement.

3680.1 *Agency policy on maternity leave:*

a. Normally, leave for pregnancy and confinement will be granted for a period not to exceed 6 months. Physical incapacitation of the individual and the needs of the employing unit will be considered on any request for extension beyond the 6-month period. The total grant of leave will not exceed one year.



b. Request for maternity leave must be supported by a medical certificate giving anticipated date of delivery and estimated period of incapacitation.

c. Advanced sick leave will not be granted. (See 3580.4)

d. Maternity leave is chargeable to a combination of accumulated sick leave (14 weeks), annual and LWOP.

Sick leave will be approved only for the period of confinement, normally 6 weeks before the expected date of delivery and 8 weeks after delivery. When medical certificate (3682.1,b.) indicates a longer period, additional charge of sick leave may be proper. If there is any question, Personnel Branch may request the medical officer of the Agency in Washington to consult with the certifying physician on the employee's inability to perform her duties. In the field, the Regional Director or Officer in Charge may consult with the certifying physician. Sick leave will not be authorized for absence due solely to care of the infant.

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* * *

g. An employee who wishes to return to duty earlier than 8 weeks after delivery must furnish medical certificate attesting to the fact that she is physically able to perform her regular duties. (See 3570)

* * *

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3682.2 *Supervisor's responsibility:*

a. Upon either oral or written notification of pregnancy of an employee, the supervisor will review duties of the employee and assign tasks which would not be injurious to her health. Supervisor will alert authorizing official so that necessary staffing adjustments may be scheduled.

* * *

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G.E. EXHIBIT NO. 19
Equal Employment Opportunity Commission, Memorandum to Employees, dated 12/20/72, re: "Advanced Sick Leave"

**United States Government**

**MEMORANDUM**

To: All Employees Date: December 20, 1972

From: Ronald B. Krueger /s/ **In reply refer to:**
Personnel Officer

Subject: Advanced Sick Leave

In view of the increasing number of requests for advance sick leave, the Personnel Division is providing you with the guidelines used to determine whether the employee's request for advance sick leave should be approved.



U.S. Civil Service Commission regulations indicate that advance sick leave should be advanced in cases of serious disability only. A serious disability would, in most instances, require a period of hospital confinement. With the above in mind, requests for advance sick leave will be approved providing the following conditions are met:

(a) necessity for hospital confinement;

(b) reasonable expectation that the person will recover from the disability and return to full duty status;

(c) reasonable cause to believe the employee will remain with the Federal government for a sufficient period to repay the advanced sick leave; and

(d) recommending official deems the granting of the advance sick leave to be in the best interest of the Federal Government and thereby grants approval.

Requests for approval of the advance sick leave are to be forwarded to the Personnel Division with a doctor's certificate attached. Failure to adhere to the above will result in the request for advance sick leave being denied.

Requests for advance of sick leave for reasons of pregnancy and confinement will be denied except in cases of serious disability regarding the maternity aspect. This is in keeping with U.S. Civil Service regulations.

Approved for circulation:

/s/ YVETTE D. BUTLER
Director, Office of Management

/s/ THOMAS G. COOF
Executive Director

**BUY U.S. SAVINGS BONDS REGULARLY ON THE PAYROLL SAVINGS**

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G.E. EXHIBIT NO. 20

U.S. Department of Justice
Leave Policies and Regulations, March 8, 1963

Reprint includes:
Transmittal Sheet Nos. 1 thru 7

**U. S. Department of Justice**

**LEAVE**

**Policies and Regulations**

**MEMO NO. 344**

**March 8, 1963**

## IV. MATERNITY LEAVE

A. *Granting Sick Leave* - An employee shall be granted sick leave to her credit for maternity purposes upon presentation of a statement from her physician certifying that she is incapacitated for duty.

* * *

Generally, the period for which sick leave may be granted begins not later than six weeks before the expected date of delivery and extends eight weeks beyond the date of delivery.

* * *

D. *Granting Advanced Sick Leave* - Employees may be granted advanced sick leave in cases of serious disability



or ailment. Except for those serving probationary or trial periods, such leave may be advanced to employees irrespective of whether they have annual leave to their credit. Probationary and trial period employees will be required to exhaust their annual leave before sick leave may be advanced. In addition, advanced sick leave may not be granted (1) when an employee is absent because a member of his family has a contagious disease (see 23 Comp. Gen. 789), (2) for pregnancy and confinement, or (3) to an employee who has filed application for disability retirement or who has signified his intention to resign because of disability.

* * *

C. *Maximum Amount of Leave* - The total initial authorization of leave (sick, annual, and leave without pay) for maternity purposes shall not exceed six months. An additional period not to exceed six months may be granted where required for reasons of health and the employee demonstrates positive intentions of returning to duty. Leave for other purposes, such as care of the child, may be granted at the discretion of the approving officer, in accordance with other provisions of this memorandum.

D. *Beginning Date of Maternity Leave* - Maternity leave may be requested at any time during pregnancy. However, each employee eligible for maternity leave will be required to enter upon such leave not later than six weeks prior to the expected date of confinement. Decision to permit an employee to work up to less than six weeks before the expected date of delivery should be made only after consultation with the Health Unit serving the office or the physician in charge of the case. Annual leave may be granted prior to the date sick leave commences only as provided in Section II, F-3, page 9, of these instructions.

E. *Temporary Employees* - Temporary employees as defined in Section I, D-13, page 3, may be granted accrued sick and annual leave. They may not be granted advanced sick or annual leave or leave without pay for maternity reasons.

F. *Resignation of Employees* - Sick leave shall be granted to an employee who intends to resign, subject to meeting the requirements stated in Section IV, A, pages 16 and 17. The employee will be entitled to all leave accrued to the close of the date she was last present for duty, as well as leave accrued for the period she is carried on leave with pay prior to resignation.

G. *Detail to Other Work* - When an employee reports her pregnancy, a determination should be made as to whether her duties or work environment involve exposure to hazards which can be reduced or eliminated. If the duties of the employee require activity or exposure which may be injurious to her health, a reasonable effort should be made to deatil her temporarily to other work for which she is qualified. The objective should be to provide her with gainful employment and make use of her skills for as long as she is not incapacitated for duty. If another assignment is not available and a medical certificate of the employee's incapacity for the duties of her regular position is received, she should be placed immediately on maternity leave.

G.E. EXHIBIT NO. 21 - Dept. of Agriculture, Forest Service Manual – Title 6100, Personnel Management (Oct. 1971, Amendment No. 59)

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G.E. EXHIBIT NO. 21 - Dept. of Agriculture, Forest Service Manual – Title 6100, Personnel Management (Oct. 1971, Amendment No. 59)

6163.53 - *Maternity Leave.* Maternity leave is a period of approved absence for reasons related to pregnancy and confinement. It is chargeable to sick leave or any combination of sick leave, annual leave, and leave without pay.

* * *

1. *Usual Period of Maternity Leave.* The usual period of authorized maternity leave is approximately 14 weeks, beginning generally not later than 6 weeks before the expected date of delivery and extending 8 weeks beyond the date of delivery. Medical certification is required for sick leave.

* * *

3. *Advance of Sick Leave.* Requests for advance of sick leave for reason of pregnancy and confinement should usually be denied.

G.E. EXHIBIT NO. 22 – American Postal Workers Union Plan 1973 Brochure, BRI 41-206, U.S. Civil Service Commission.

As revised January 1, 1973

An Employee Organization Plan

# American Postal Workers Union Plan 1973

See back cover for cost and enrollment information

U.S. Civil Service Commission
Bureau of Retirement, Insurance, and Occupational Health
Washington, D.C. 20415

Sponsored and Administered by the American Postal Workers Union, AFL–CIO

BRI 41–206
Jan. 1973



## SUMMARY OF BENEFITS

***Do not rely on this chart alone.*** It merely summarizes the benefits payable. Read the entire brochure to find what benefits are payable for each specific kind of expense and what expenses are not covered. All benefits payable are subject to the definitions, limitations, and exclusions in this brochure.

| KINDS OF EXPENSES | HIGH OPTION PAYS | LOW OPTION PAYS |
|---|---|---|
| Room, Board, and Other Hospital Expenses | In full, for up to 365 days each calendar year | In full, for up to 120 days for each confinement *plus* 75% of additional expenses, up to a maximum additional payment by the Plan of $2,400 |
| Surgical | In full, for reasonable and customary charges | Actual charges, up to amounts specified in Surgical Fee Schedule beginning on page 14 |
| Other Medical | **For Doctors' Visits** Up to a total of $700 for *all* persons in a family enrollment, or up to $225 for a self only enrollment, each calendar year **For Emergency First Aid** Up to $75 for each accident per person **For Physical Therapy** 80% of charges **For Out-of-Hospital Diagnostic** Up to amounts specified in Schedule of Diagnostic Services **For Special Nursing Care** Up to $70 per day for up to 365 days for each confinement or illness, per person **For Drugs, Appliances, and Medical Equipment** 80% of charges, after first $30, each year, per person | **For Doctors' Visits** Up to a total of $400 for *all* persons in a family enrollment, or up to $150 for a self only enrollment, each calendar year **For Emergency First Aid** Up to $60 for each accident per person **For Out-of-Hospital Diagnostic** Up to $50 each calendar year per person, according to a fee schedule **For Drugs and Medicines** 80% of charges, after first $30, each year, per person |
| Maternity | Regular hospital benefits, plus up to $160 for delivery | Up to $250 for each pregnancy |
| Maximum Benefit | $100,000 per person, lifetime maximum | $50,000 per person, lifetime maximum |

## MATERNITY BENEFITS

| PLAN PAYS | |
|---|---|
| HIGH OPTION | LOW OPTION |
| Regular hospital benefits as shown on page 4, plus up to $160 for charges of doctor who delivers child | Up to $250 For actual charges of hospital, obstetrician, and anesthetist |

Subject to the definitions, exclusions, and limitations in this brochure, this Plan will pay Maternity Benefits, for actual reasonable and customary charges, up to the maximum shown above, due to each pregnancy which ends while the person is covered by this Plan, including childbirth, miscarriage, or abortion. These expenses include:

- Charges made by a hospital for care of the mother. Bassinet or nursery charges for days on which mother and child are both confined are considered maternity expenses of the mother and not expenses of the child
- Fees of the doctor who delivers the child, performs surgery for miscarriage, or treats the patient immediately following an abortion when surgery is not necessary
- Charges for the administration of anesthetics.

Maternity Benefits are paid *instead of* all other benefits.



### WHO IS COVERED

Female employees and wives of male employees under family enrollments are covered for maternity benefits.

### SEVERE COMPLICATIONS OF PREGNANCY

Severe complications of pregnancy are considered as illnesses and the Plan pays regular benefits, instead of Maternity Benefits, for such cases. For purposes of this benefit, complications of pregnancy include only the following:

- Operation for extrauterine pregnancy
- Intra-abdominal surgery after termination of pregnancy
- Pernicious vomiting
- Cesarean section
- Ectopic pregnancy
- Placenta previa
- Eclampsia and hypertensive toxemia
- Hepatitis, or acute yellow atrophy of pregnancy
- Pyelonephritis of pregnancy.
- Premature rupture of membranes

Miscarriages and abortions are not considered severe complications for purposes of this Plan.

***There is no waiting period for Maternity Benefits***

G.E. EXHIBIT NO. 23 - Administrative Instructions for the Office of Secretary of Defense, Joint Chiefs of Staff, Court of Military Appeals, Defense Security Assistance Agency, Number 67.

**OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE**

**Washington, D. C. 20301**

**ADMINISTRATION** 27 May 1969

ADMINISTRATIVE INSTRUCTION NO. 67 (Revised)

SUBJECT: Leave Administration

References: (a) Administrative Instruction No. 49 (Revised), "Time, Attendance and Pay Procedures for Civilian Employees", dated April 12, 1966
(b) Federal Personnel Manual Supplement 990-2, "Hours of Duty, Pay and Leave Annotated"
(c) DoD Instruction 1424.1, subject "Ceiling on Lump-Sum Payments for Annual Leave", dated September 21, 1954
(d) DoD Instruction 1424.2, subject: "Administrative Excusing of Employees", dated May 4, 1960
(e) Administrative Instruction No. 67, "Leave Administration" dated April 12, 1967 (hereby cancelled)

I. PURPOSE

The purpose of this instruction is to reflect the policies and procedures to be used in the administration of leave.



II. POLICY

A. Leave will be administered on a uniform and equitable basis within the scope of applicable laws and regulations.

B. Employees will be given the opportunity to take full advantage of all entitled leave.

C. Prior to separation or resignation, employees will be permitted to use all current accrued annual leave which is in excess of the maximum balance authorized by law for lump-sum payments.

D. Maternity leave will be granted to cover the period during which an employee is medically certified as incapacitated for duty prior to confinement, and not to exceed eight weeks following delivery.

* * *

VI. SICK LEAVE

A. *Accruals.* All full-time employees with a 40-hour basic work week, regardless of their length of service, earn sick leave at the rate of four hours for each full bi-weekly pay period.

* * *

C. *Use.*

1. Sick leave becomes available for use at the end of the pay period in which it is earned. An employee is not required to complete the 90-day continuous period of service before he is eligible to use sick leave.

2. Sick leave is a qualified right of the employee so long as it is used for absences for the following reasons:

* * *

(a) When incapacitated for performance of duties by sickness, injury, pregnancy and confinement, or illness resulting from immunization or vaccinations (whether or not required as a condition of employment).

* * *

## VII. MATERNITY LEAVE

Maternity leave is a period of approved absence because of pregnancy and confinement, and is chargeable to sick leave or a combination of sick leave, annual leave, and leave without pay.

A. *Approval.*

1. Sick leave requested earlier than six weeks before anticipated delivery date may be approved only if the employee is medically certified as incapacitated for duty. Annual leave or leave without pay to cover such earlier periods may be granted at the discretion of the supervisor.

2. In determining whether to grant additional leave beyond the end of the eighth week after delivery, consideration should be given to whether or not the employee still has sick leave to her credit and continues to be medically certified as incapacitated for duty. In the absence of medical certification, any approved leave beyond the end of the eighth week must be charged to annual leave or LWOP.

3. Sick leave ordinarily should not be advanced in maternity cases.

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G.E. EXHIBIT NO. 24 - Group Health Association 1973 Brochure, BRI 41-41, U.S. Civil Service Commission.

BRI 41-41
Jan. 1973

As revised January 1, 1973
Washington, D.C.

# Group Health Association

1973

A Comprehensive Group-Practice Plan

U.S. Civil Service Commission
Bureau of Retirement, Insurance, and Occupational Health
Washington, D.C. 20415

See back cover for cost and enrollment information

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## MATERNITY BENEFITS

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This Plan limits maternity benefits to persons covered under family enrollments.

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G.E. EXHIBIT NO. 25 - NALC Health Benefit Plan
1973 Brochure, BRI 41-51,
U.S. Civil Service Commission

BRI 41-51
Jan. 1973

As revised January 1, 1973

An Employee Organization Plan

# NALC Health Benefit Plan

# 1973

U.S. Civil Service Commission
Bureau of Retirement, Insurance, and
Occupational Health
Washington, D.C. 20415

Sponsored by the
National Association of
Letter Carriers—AFL-CIO

See back cover for cost and enrollment information

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## MATERNITY BENEFITS

Subject to the definitions, limitations, and exclusions in this brochure, this Plan will pay **Maternity Benefits**, as shown below and without a waiting period, for *all* expenses (including prenatal and post partum) due to pregnancy, but only for enrollees under *family enrollments* or enrollees' wives under *family enrollments*, and only for pregnancies which terminate while covered by the Plan:

• • •





G.E. EXHIBIT NO. 26 - AFGE Health Benefit Plan
1973 Brochure, BRI 41-26,
U.S. Civil Service Commission

BRI 41-26
Jan. 1973

As revised January 1, 1973

An Employee Organization Plan

# AFGE Health Benefit Plan

# 1973

U.S. Civil Service Commission
Bureau of Retirement, Insurance, and
Occupational Health
Washington, D.C. 20415

Sponsored by the
American Federation of
Government Employees

See back cover for cost and enrollment information

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## SUMMARY OF BENEFITS

***Do not rely on this chart alone.***—It merely summarizes the benefits payable. Read the entire brochure to find what benefits are payable for each specific kind of expense and what expenses are not covered. All benefits are subject to the definitions, limitations, and exclusions set forth in this brochure.

| KIND OF EXPENSES | HIGH OPTION PAYS | LOW OPTION PAYS |
|---|---|---|
| Hospital Inpatient | Each calendar year—<br>Room and Board—in full for the first 200 days, plus 80% thereafter<br>Other Hospital Charges—the first $350, plus 80% of charges thereafter | For up to 90 days per confinement—<br>Room and Board—actual charge up to $30 per day<br>Other Hospital Charges—the first $150, plus 75% of the balance |
| Hospital Outpatient | Actual charges up to $150 incurred within 48 hours after an accident or surgical operation | Actual charges up to $150 incurred within 48 hours after an accident or surgical operation |
| Surgical | 80% of necessary and reasonable charges over the $50 Deductible | Actual charges up to amount specified in surgical schedule and after you pay the next $100, Plan pays 75% of any additional necessary and reasonable charges |
| Other Medical | | 75% of necessary and reasonable charges over the $100 Deductible |
| Maternity | Same benefits as for an illness or injury | $250 for normal delivery<br>$500 for cesarean section<br>$500 for abdominal operation for extrauterine pregnancy<br>$125 for miscarriage |
| Maximum Benefits | $30,000 each person (automatic annual restoration of up to $1,000) | $10,000 each person (automatic annual restoration of up to $500) |

# MATERNITY BENEFITS

## HIGH OPTION

PLAN PAYS—same benefits as for illness or injury, for hospital, physician, and other medical expenses

## LOW OPTION

PLAN PAYS—$250 for normal delivery
$500 for cesarean section
$500 for abdominal operation for extrauterine pregnancy
$125 for miscarriage

The Plan pays actual charges up to the above amounts for all expenses (hospital, physician, anesthesia, and ambulance) incurred in connection with any one pregnancy, including complications

Bassinet or nursery charges on days on which mother and child are both confined are considered hospital room and board expenses of the mother and not expenses of the child. All other expenses of the newborn child will be considered his own and handled as a separate claim.

8

## WHO IS COVERED

Female employees under family enrollments, and employees' wives under family enrollments.

Under the ***High Option Only***, in cases of severe complications of pregnancy which involve a serious threat to the mother's health as determined by the Plan, benefits will be paid for the expenses of a female employee who is enrolled for self only, but the amount payable is reduced by $250.

Maternity benefits are payable only for pregnancies ending while covered by this Plan

Supreme Court, U. S.
FILED
NOV 24 1975
MICHAEL RODAK, JR., CLERK

APPENDIX - VOL. III

# Supreme Court of the United States

OCTOBER TERM, 1974

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**No. 74-1589**

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GENERAL ELECTRIC COMPANY,
*Petitioner,*

v.

MARTHA V. GILBERT,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, *et al.*,
*Respondents.*

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**No. 74-1590**

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MARTHA V. GILBERT,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,
*Petitioners,*

v.

GENERAL ELECTRIC COMPANY,
*Respondent.*

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**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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**PETITIONS FOR CERTIORARI FILED JUNE 17, 1975**
**CERTIORARI GRANTED OCTOBER 6, 1975**

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| EXHIBIT NO. YY to Pre-Trial Stipulation | 1059 |
| EXHIBIT NO. C to Pre-Trial Stipulation | 1060 |
| EXHIBIT NO. E to Pre-Trial Stipulation | 1073 |
| EXHIBIT NO. F to Pre-Trial Stipulation | 1077 |
| EXHIBIT NO. G to Pre-Trial Stipulation | 1080-A |
| EXHIBIT NO. H-1 to Pre-Trial Stipulation | 1084 |
| EXHIBIT NO. I to Pre-Trial Stipulation | 1092 |
| PLAINTIFFS' EXHIBIT NO. 22 | 1095 |




G.E. EXHIBIT NO. 27 - Memorandum of the Bell Companies received August 1, 1972 in the Matter of Petitions filed by the EEOC, et al., before the FCC, Docket No. 19143.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Petitions filed by the Equal Employment Opportunity Commission (EEOC), et al. | ) | Docket No. 19143 |

MEMORANDUM ACCOMPANYING THE
AUGUST 1, 1972
SUBMISSION OF THE BELL COMPANIES

## I. INTRODUCTION

The Bell companies are filing on this date with the Federal Communications Commission testimony documenting their commitment to equal employment opportunity and the steps they have taken to implement that commitment in all phases of the employment process. The testimony responds in detail to the allegations of discrimination which the Equal Employment Opportunity Commission (EEOC) has made against them.

This memorandum and the testimony it summarizes show: (1) the Bell companies are fully and firmly committed to the national goal of equal employment opportunity, and have been so committed as that policy has evolved over the years; (2) their commitment has produced results - good, substantial results; (3) these results are being produced by employment practices that are, contrary to the assertions of the EEOC,

progressive and lawful and nondiscriminatory; on an equal basis to male and female employees in the event of sickness, on-the-job accident or retirement. Also, in the event of death of an active or retired employee, a survivor annuity is payable to either a widow or widower. The Benefit Plans were revised during collective bargaining in 1971 and now make absolutely no distinctions among employees on the basis of sex.

2. *Maternity Leave*

While authoritative judicial interpretations have not as yet been given, we consider the maternity leave policies of the Bell companies fair and nondiscriminatory.[133] Leave policies, in general, as well as the features of maternity leaves in particular, are discussed in the testimony of Therese F. Pick, Secretary of the Employees' Benefit Committee.

The maternity leave policies of the companies permit any female employee, consistent with medical advice, to determine when she will take up to a year's leave. There is no fixed period for taking leave. Maternity leave is a personal _____, but carries substantially greater assurance of employment than in the case of other personal leaves.

The Employee Benefit Plans provide sickness disability benefits to any employee with six months' service, beginning the eighth day of an absence from work because of physical

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[133] In the only decision to date by a United States Court of Appeals, the Fifth Circuit held that a leave system requiring termination at a fixed date was reasonable and rationally related to a permissible purpose and did not violate the Civil Rights Act of 1871. Schattman v. Texas Employment Comm'n, _____ F.2d _____, 4 F.E.P. Cases 358 (5th Cir. 1972), *rehearing denied,* _____ F.2d _____, 4 F.E.P. Cases 543.



disability to work by reason of sickness. Since employees on leave are not "absent" from work within the meaning of the Plan, no employee on any category of leave, including maternity leave, is eligible for sickness disability benefits. Moreover, a normal pregnancy is not a "sickness" within the meaning of the Plan, or by common medical definition.[134] While EEOC by its latest guidelines seeks to characterize such an approach as discriminatory, this is a change of position by EEOC and it has not been judicially approved. The Bell companies' practices are consistent with initial EEOC interpretations that did not seek to compare an employer's treatment of maternity with his treatment of illness or injury.[135]

The estimated annual cost of providing disability benefits in all maternity cases ranges from $26 million, based on an average duration of eight weeks, to $58 million, consuming a 24-week duration. In relating this cost to service, it must be considered that a large number of women taking maternity leave do not return to work. A recent survey of 4,715 maternity leaves in six Bell companies showed that 38 percent did not wish to return.[136] Since Bell will employ women who are already pregnant, and in light of the relatively short service period required

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[134] See testimony of EEOC witnesses Hellegers and Barter (EEOC Exhibits 13, 26 and Tr. 1089 *et seq.*, 2017 *et seq.*).

[135] See G.C. Opinion 218-66 (June 23, 1966); G.C. Opinions dated Nov. 15, 1966, and Feb. 17, 1967, CCH Emp. Prac. Guide, ¶1219 (1969); and Dec. No. 70-360 (Dec. 16, 1969), CCH Emp. Prac. Guide, ¶6084.

[136] Pick Testimony, p. 8.

for sickness disability eligibility, there is considerable room for abuse if benefits were extended to cover pregnancy. Accordingly, the Bell companies could not be justified in asking our customers to assume this added cost.

## D. OPPORTUNITIES FOR ADVANCEMENT

The Bell companies have always emphasized the promotion of current employees to fill their higher positions. In part this is due to the unique nature of many telephone jobs, and in part to a recognition by the Bell companies of the desirability of providing meaningful and rewarding careers to their employees.

The EEOC has alleged that many Bell jobs, particularly those in which minorities and women have been employed.

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G.E. EXHIBIT NO. 28 - Testimony of Therese Pick, In the Matter of Petitions filed by the EEOC, et al., FCC Docket No. 19143, Bell Exhibit No. 5 of 8/1/72 and Official Transcript, Volume 47, pgs. 5455-5557.

## TESTIMONY OF THERESE PICK

Qualifications

My name is Therese F. Pick. I am secretary of the Employees' Benefit Committee of the American Telephone and Telegraph Company, at 195 Broadway, New York, New York. Before assuming my current responsibilities, I was an assistant secretary of the benefit committee at



AT&T for 8 years. Prior to that I had some 12 years of a variety of responsibilities in the Personnel Department at AT&T.

My present responsibilities include the design of pension, benefit and insurance programs for Bell Telephone companies, formulation of policies related to these programs, administration and interpretation of specific provisions of the programs and consultation on problem areas with the benefit secretaries of the several telephone companies.

Purpose

The purpose of my testimony is to provide an explanation and overview of the Bell System's "Plan for Employees' Pensions, Disability Benefits and Death Benefits" with particular emphasis on "Leaves of Absence" policies and our policies respecting pregnant applicants and employees.

The Benefit Plan

Each Bell System company's "Plan for Employees' Pensions, Disability Benefits and Death Benefits" provides coverage on an equal basis with the same eligibility requirements for male and female employees in the event of sickness, on-the-job accident, retirement or death. Also, in the event of death of an active or retired employee, a survivor annuity is payable to either a widow or widower under conditions that will be described later. Eligibility requirements are the same for all employees regardless of race, color, religion, sex or national origin.

* * *

-5- Leaves of Absence

The plans provide that any absence without pay, other

than a "leave of absence" shall be considered as a break in continuity of service. A leave of absence thus is the usual technique to prevent such a break, which is important since continuity of service determines length of vacation and eligibility to sickness benefits and group life and medical insurance and is the basis for pension credit.

* * *

*Personal Leaves*

These are granted by the committee at the request of the employee depending on the work needs of the department, the work record of the employee, the probability of his or her return, the duration of absence requested, the reason given for the leave requested, etc. Personal leaves generally carry service credit for the first month, elibibility to death benefits during the leave depending on the length of leave and expectancy of return. Employees on personal leave are not eligible for sickness disability

-6- benefits. However, where the employee is scheduled to return to work at the termination of the leave, but is prevented from doing so by a sickness disability, he or she may be eligible for benefits on the eighth day following termination of the leave. At the end of the leave the application for reinstatement is reviewed on the basis of jobs available and every effort is made to reinstate the employee interested in returning. No wage progression credit, i.e., service time upon which the employee's wage progression is based accompanies personal leaves. Generally the employee on personal leave continues to participate in the company's medical expense and group life insurance programs for a limited period, usually up to one year.



* * *

-7- *Maternity Leaves*

The Bell companies have for years granted pregnant employees leaves of absence for maternity reasons. These leaves have followed generally the pattern of personal leaves as outlined above. There was no uniformity as to all features among the companies. Most companies have personnel practices relating to this subject but some companies have the terms embodied in their union contracts.

With a view to achieving more uniformity, the labor relations staff of the American Company in April, 1971, in anticipation of that year's round of labor negotiations, distributed to the labor relations staffs of the Bell operating companies a list of principles relating to maternity leaves which it was suggested be incorporated in their contracts or practices as follows:

(1) Apply to all females whether married or not;

(2) No fixed date for going on leave. Each case to be decided upon individual basis considering such factors as employee's condition, requirements of her job, medical advice, etc;

(3) Upon application for reemployment, a like position should be provided unless conditions make it impossible, and no applicant should be refused without concurrence of appropriate Personnel Department representative;

-8- *Note* - Language on leave application form indicating no guarantee of reemployment should be deleted.

(4) Where the nature of the job precludes continued work but other less arduous work that the employee could safely perform is available, the employee should be given such work but 'red circled' at her former higher rate where the company practice is to treat other employees (men) in that fashion;

(5) The leave should carry eligibility to death benefits but not sickness disability benefits during the leave.

Several comments should be made about these principles. We recognize that, subject to medical advice, the time when a pregnant employee should stop working is largely an individual matter.

There is a strong commitment to reemploy as stated in item 3 above. This generally is not a written unconditional guarantee because the nature of some jobs, particularly in small operating locations, makes it impossible to replace the employee by another without assuring the new employee of permanency. Every effort is made, however, and usually successfully, to place the employee wishing to return after her leave in the same job she left or in a comparable job in the same or nearby location.

A recent survey was made of 4715 maternity leaves ending in the period July 1, 1971 - January 31, 1972 in four large Bell operating companies.* Only 2937 (62 percent) of those on leave returned to work, 97.1 percent of those not returning acted on their own volition. Jobs were not available for only 51 employees who wanted to return to work, or just a little under 1.1 percent of the leaves.

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*Illinois, Southwestern, four Chesapeake and Potomac companies and Southern Bell.



-9- I should also note that maternity leaves are ordinarily granted for a period of two to six months with extensions permitted up to a year.

* * *

Sickness Disability Benefits

I should now like to turn to the subject of sickness disability benefits. Under our benefit plans, sickness disability benefits are paid on the eighth day of absence "on account of physical disability to work by reason of sickness" (Section 6 (1) of the plan). Disability on account of injury other than that arising out of and in the course of employment constitutes "sickness" for this purpose. Sickness disability benefits are paid to employees having a minimum service period of 6 months at the rate of one half-pay for up to 52 weeks of sickness disability. The duration and rates of benefits increase with added service to 52 weeks at full pay after 25 years of service.

It will be noted that sickness disability benefits are paid for the *absence* resulting from sickness, and not merely for the sickness. An employee on leave is not on the active roll of employees scheduled or expected to work, and hence is not classified as "absent". Accordingly, sickness disability benefits are not paid to any employees on any class of leave. Furthermore, benefits are not paid for disability or inability to work as such—the disability or inability to work must be on account of sickness.

By the same token, we do pay sickness benefits when a pregnant employee is absent (*i.e.*, before going on a leave, the date of which is fixed not automatically but by

her individual situation, medical advice, etc.) due to sickness disability either unrelated to her pregnancy or arising out of it in the form of sickness complications or abnormalities, such as toxemia, hypertension, miscarriage, abortion, etc. And the benefits in such cases continue until the sickness disability ceases or up to one year as outlined above.

We believe our practices regarding maternity leaves are fair and do not discriminate. They carry the perquisites of leaves granted for personal reasons. In addition they carry even greater assurance of a return to work if the employee desires.

To pay sickness benefits for all maternity cases would be most costly, contrary to the "absence-sickness" intent of our plans. We have estimated the cost to range from about $26 million a year based on a duration of eight weeks, to about $58 million a year based on twenty-four weeks. These figures do not include the estimated $2 million to $6 million premium costs for Blue Cross-Blue Shield which would be incurred by the companies if we were required to pay sickness benefits for all maternity cases. This expense would be unwarranted even if all these people returned to work. But as indicated above, about 38 percent choose not to do so. Accordingly we do not believe our rate payers should bear this substantial, added cost.

EEOC Summary 3396 states that the Bell Companies' Extraordinary Medical Expense Plans in effect in 1971 exclude medical expenses for pregnancy, childbirth and related care. It should be noted that severe medical or surgical complications arising from pregnancy or the resulting childbirth are not excluded from coverage if they



otherwise qualify as covered medical expense. In addition,
-11- it should be noted that medical expenses for pregnancy, childbirth and related care are covered in the Bell Companies' Basic Medical Plan.

* * *

5455 Whereupon,

THERESE F. PICK

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEVY:

Q. Please state your name. A. My name is Therese Pick.

Q. What is your business address? A. I am at the American Telephone and Telegraph Company, 195 Broadway, New York, New York.

Q. What is your occupation? A. My occupation is Employees Benefit Secretary, the Benefit Committee of the AT&T Company.

Q. Do you have before you a copy of the document that has just been marked Bell Exhibit No. 5, "Testimony of Therese Pick"? A. Yes, I have.

Q. Did you prepare that document or was it prepared under your supervision and control? A. Yes, it was.

* * *

5456 A. On page 1 in the first line, first paragraph, change the comma to period after my name Pick.

On page 5, line 6 in the last paragraph, the comma should be deleted and the word "and" inserted.

JUDGE DENNISTON: That is between the words "month" and "eligibility"?

THE WITNESS: Yes, it is.

On that same page 5, line 8, in the last paragraph, delete "personal" in the second to the last line.

Page 8, line 2 of the last paragraph, the study period is July 1, 1971 to January 31, 1972.

BY MR. LEVY:

Q. Your correction then is to change "1970" to "1971"? A. That's right.

On page 10, lines 3 and 4 of the last paragraph to delete the four words "in the case of."

* * *

Q. Having read those corrections into the record, do you now adopt this testimony you have before you as your own and is it true and correct to the best of your knowledge, information and belief? A. Yes.

* * *

* * *

458 CROSS-EXAMINATION

BY MISS LONGO:

A. First, I would like to ask you a few questions about some items that appear on page 5.

On page 5, lines 4 through 6, you say that continuity of service determines the length of vacation and eligibility to sickness benefits, group life and medical insurance and is the basis for pension credit. Does continuity of service also determine wage progression credit? A. To my knowledge it does, yes.

* * *



5460 Q. Further on in the personal leave of one month or less and we have continuity of service, would there ever be any sickness disability granted? You have a statement here on page 5 which is a little confusing to me, that same statement that the personal leaves up to one month carry service credit and you indicated that that meant continuity of service is maintained and further up there
5461 in the page you said continuity of service determines length of vacations and eligibility to sickness benefits?

A. However, while a person is on a leave of absence, they are not scheduled to report to work so they are not absent. If they become ill while on that leave of absence, since they are not scheduled to come to work they would not become eligible for sickness benefits.

Q. So if somebody took a personal leave of absence, either the one-month leave or the longer one, they could never be eligible for sickness disability benefits? A. You are meaning during the period of the leave?

Q. Yes. A. If they became ill while on the leave of absence?

Q. Yes. A. They would not become eligible for sickness benefits.

Q. Never?

* * *

5480 Q. A little further down the page, I guess it is the second full paragraph, you state that the Labor Relations
5481 Staff of the American Company in April of 1971 distributed a list of principles relating to maternity leave and then you list five principles.

Can you indicate which companies as of today or in the recent past have adopted this policy in toto that you have listed on page 7 and page 8?

MR. LEVY: You are asking for a listing of the individual companies?

MISS LONGO: Yes, the individual companies that have adopted this set of principles that your Labor Relations Committee drew up.

THE WITNESS: I would not be able to make the statement about all five principles. I believe this can be ascertained fairly easily.

BY MISS LONGO:

Q. Are there companies that would have adopted only some of them and not others? A. You are wondering about right now as of this date?

Q. Yes. A. There are some companies that may not have adopted one of these as an example. That is why I am reluctant to make an overall statement because I think there might be a company that has not adopted one of these.

* * *

5513 Q. I would like to ask you a few questions about your sickness disability. Let's go over to page 9, lines 4, 5 and 6 of that first paragraph on sickness disability.

You state "Disability on account of injury other than that arising out of and in the course of employment constitute sickness for this purpose."

You used the phrase "disability on account of injury". Does "injury" include disease? A. In trying to distinguish between sickness which would include disease and injury, which might be an accident that happens off the job.

Q. But you are not answering my question. A. Injury does not refer to disease.

Q. Can there be sickness disability benefits for someone



5514 who is not injured but who is diseased? A. Yes.

JUDGE DENNISTON: I think the preceding sentence says that, doesn't it, Miss Longo?

BY MISS LONGO:

Q. Are there any illnesses that are not covered under the sickness disability benefits, any specific illnesses?

A. No, there are not.

Q. Any specific operations? A. Not if the operation requires absence from the job.

* * *

5515 Q. What happens, say, when an employee has an operation in the doctor's office or else it is a very simple operation and may require only one or two days of recuperative time and there are complications and instead of being absent two or three days they would be absent for ten days.

5516 Under which plan would they be covered? A. As soon as they reach the 8th day, they would be covered under the plan.

* * *

Q. I would like to ask you about a specific kind of operation that may be performed in a doctor's office.

Are abortions covered under those plans the same as other operations? A. Yes.

Q. There is some medical confusion or lay confusion about a spontaneous abortion as opposed to a medically-

5517 induced one. A. A spontaneous abortion would be covered – the absence for that.

Q. Would a medically-induced abortion be covered, a voluntary, intentional abortion? Would that be covered?

A. Yes, it would?

Q. For someone to collect sickness disability benefits, am I to understand that they cannot be on a leave to collect those benefits? A. That is correct.

Q. What is their absence called if they are not on a leave, if they are ill and away from the job? Do you call it anything? A. Sickness disability absence.

Q. During the duration of a sickness disability absence, is there any wage progression credit? A. Yes, there is.

Q. Is there any pension credit? A. Yes.

Q. Are they still covered – this is a silly question, but are they still covered by group life insurance and medical expense? A. Yes.

* * *

5533 Q. Thank you very much on that.

Let's turn to your testimony on maternity leave which I believe begins on page 7, and there is a list of the principles you have already discussed with Miss Longo on pages 7 and 8 and I have just a brief question on the fourth of these principles on page 8 where it states that the nature of the job precludes continued work but other less arduous work that the employee could perform is available, the employee should be given such work but red circled at her former higher rate where the company practice is to treat the other men employees in that fashion.

Is that correct? A. That is correct.

Q. I don't understand where the company practices to treat other employees, men, in that fashion, and could you give an example of that? A. There may be instances where an employee has had an illness and has returned to the job and is not quite capable of doing his

5534 regular job, where he is then put in a lower assigned job but at the red circled rate.



There may be instances where, again, he is just partially disabled. His usual job is to climb poles, he strained his wrist –

Q. Let's say if he had a heart attack he would be in a less arduous job but he would be circled? A. That could be a policy.

Q. If a company has that policy for males, it will have the same policy for females? A. Yes, this was the principle that was being offered.

Q. You said you were not sure which companies had adopted this principle? A. We understand from our labor relations staff that this is being generally and widely implemented. I would not be able to say the status of it company by company.

* * *

5536 Q. All employees are entitled, according to the plan, to sickness disability benefits when they are working and not on leave? A. That is correct. To be eligible, one needs six months' service to be covered by the full plan.

Q. But after that all employees are covered? A. Yes.

Q. A pregnant woman employee is covered until she begins that maternity leave? A. That is correct.

Q. Once she begins maternity leave, she is not covered by the sickness disability benefits? A. That is correct.

* * *

5537 Q. On these principles on maternity leave that you have on pages 7 to 8, what recourse does a woman have if she believes that those principles are not being followed? Let me give you an example in my own mind.

For example, if she applies for re-employment and she thinks there is a position open, that her old job is open

and they are just not giving it to her, what can she do? A. I think she could speak to higher levels of authority within her department.

I have to make the assumption here when she returns to her department and has gone to her immediate supervisor and the immediate supervisor demures to this employment provision, then her next recourse would be to go to higher levels and say, "I believe this is one of my rights."

Q. This is not a matter covered by any union grievance procedure? A. I don't believe so.

Q. And there is no formal sort of grievance procedure for these kinds of matters. It is merely an informal questioning of her supervisors and higher company officials? A. I believe that is the way it works.

MR. GARRISON: I have no more questions, Your Honor.

* * *

5545 Q. You said in the testimony that the 97.1 percent of the women not returning acted on their own volition. That means that they just were not refused a job; is that right?

JUDGE DENNISTON: What page are you referring to, Miss Gemma?

MISS GEMMA: Page 8.

THE WITNESS: Perhaps the best thing is to read it "97.1 of those not returning acted on their own volition. They did not want to return."

BY MISS GEMMA:

Q. They did not want to return or they were refused a job? A. They refused a job.

Q. How did you know they did not want to return? A. This is part of the procedure at the expiration of the leave.



Q. Do you mean you called them up and asked them whether or not they wanted to return? A. In the companies included in the survey they had evidence to show either these women volunteered this or took the initiative or upon contact indicated they were not interested in returning.

5546 Q. Say a woman returned back to work and she was offered a job that was not as high-paying as the one she had before she left because it was not open and she decided not to go back to work. Wouldn't she be returning on her own volition? A. She would make the decision not to return under those conditions.

Q. So this 97.1 could include any number of women who decided not to return to work because they were not offered a job as high paying as the one they had before? A. It could be, I don't know.

* * *

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G.E. EXHIBIT NO. 30 - Testimony of Robert H. Barter, EEOC Exhibit 26 and Official Report of Proceedings, pgs. 1088 through 1112, February 14, 1972, In the Matter of Petitions filed by the EEOC, et al., FCC Docket No. 19143.

* * *

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| | ) | DOCKET NO. 19143 |
| Petitions filed by the | ) | |
| EQUAL EMPLOYMENT | ) | |
| OPPORTUNITY COMMISSION, | ) | |
| et al. | ) | |

**FEDERAL COMMUNICATIONS COMMISSION**

**Docket No.: 19143 et al.** **Exhibit no.: 26**
**Presented by: EEOC**

| | | |
|---|---|---|
| | **Identified** | x |
| **Disposition** | **Received** | x |
| | **Rejected** | |

**Reporter: Short**
**Date: 3/2/72**

## TESTIMONY OF ROBERT HENRY BARTER

My name is Robert Henry Barter. I received my B.S. (1937) and M.D. (1940) from the University of Wisconsin. I then interned at Cleveland City Hospital and worked as a resident at both Chicago Lying-in-Hospital and at Wisconsin General Hospital. In 1949 I was certified by the American Board of Obstetrics and Gynecology.

I served in the U.S. Army Medical Corps for a period of four years after which I was Chief Medical Officer in Obstetrics and Gynecology at Gallinger Municipal Hospital in Washington, D. C. For the past thirteen years I have been Professor of Obstetrics and Gynecology at The George



Washington University School of Medicine. Between 1958 and 1967 I served as Chairman of the Department of Obstetrics and Gynecology. In addition, I am Consultant Emeritus in Obstetrics and Gynecology to the Surgeon General of the United States Air Force, Consultant to the National Institutes of Health, and Senior Consultant at Walter Reed Army Medical Center.

During the course of my career I have published over 30 articles in professional medical journals and produced six professional films concerning Obstetrics and Gynecology. In addition to being a member of eleven professional societies, I have served on the Executive Board of the American College of Obstetricians and Gynecologists, as President of the Southern Gynecological and Obstetrical Society and as Chairman of the Section on Obstetrics and Gynecology of the American Medical Association.

It is my impression, as a Professor of Obstetrics and Gynecology and a practicing Obstetrician and Gynecologist, that there is no reason why a patient who is pregnant should not be able to work as long as she feels capable of so doing.

In the early history of this country there is certainly nothing which would lead one to believe that women were not allowed to work as long as they wished. The rules and regulations which have prevented pregnant women from working have not had any basis in actual fact.

I am of the firm belief that many women who are pregnant do much better in those pregnancies if they are allowed to work. Such is particularly true of a woman who has worked all of her life and who, when unable to work, may develop anxiety and depression which she

would not have had if she had continued her regular place in the work-a-day world.

Therefore, I would like to go on record as saying that in the absence of any complications of pregnancy, there is no reason why any normally pregnant woman should not be allowed to work as long in her gestation as she may comfortably do so.

**PARTIAL TRANSCRIPT**

**March 2, 1972**
**Pages: 2018-2030**

2018 DIRECT EXAMINATION

BY MR. COPUS:

Q. What is your name, please? A. Robert Henry Barter.

Q. Dr. Barter, what is your business address? A. 2141 K Street, Northwest.

Q. Washington? A. Washington, D. C.

Q. What is your occupation, Dr. Barter? A. Physician.

Q. What kind of a physician? A. Obstetrician and gynecologist.

Q. What is your place of employment? A. Self-employed.

Q. Do you have in front of you a document which is entitled "Testimony of Robert Henry Barter" which has been marked for the record as EEOC-26? A. Yes.

Q. Was that document prepared by you or under your



your direction? A. Yes.

Q. Do you have any changes you want to make in it at this time? A. No, it is correct.

Q. Do you now adopt this testimony as your own
2019 testimony and is it true and correct to the best of your information, knowledge and belief? A. It is.

MR. COPUS: Mr. Examiner, we now offer Dr. Barter for voir dire and cross-examination.

PRESIDING EXAMINER: I assume the list of publications, 28, was a correct list of your writings?

THE WITNESS: Yes.

PRESIDING EXAMINER: Very well.

CROSS-EXAMINATION

BY MR. LEVY:

Q. Dr. Barter, have you practiced industrial medicine? A. Not as such.

Q. Are you familiar with the physical requirements of positions which pregnant women may hold in private industry generally? A. No, I don't keep any such women from my practice, if that is what you mean. I don't discriminate against anyone who happens to be working and who is also pregnant.

Q. I was asking, Doctor, whether you were familiar with the physical requirements and environment of jobs or positions in private industry which pregnant women might hold. A. Well, such as?

Q. Such as the range of jobs which pregnant women might hold, Doctor.

2020 Let me be more specific – ; A. A pregnant woman can hold any job a non-pregnant woman might hold.

Q. Are you familiar with the requirements of the positions which women may hold in the Bell companies?

A. No, not specifically.

Q. You are not familiar, then, with the physical requirements of the lineman job or the cable splicer job or the telephone operator job in the Bell System? A. No.

Q. Doctor, in the first paragraph on page 3 of your testimony you state, and I quote, "there is no reason why a patient who is pregnant should not be able to work as long as she feels capable of so doing." A. Yes, that is correct.

Q. And in the concluding paragraph at the bottom of page 3, carried over to page 4, you again state categorically, and I quote, "there is no reason why any normally pregnant woman should not be allowed to work as long in her gastation as she may comfortably do so." A. Yes, that is correct.

Q. Is it your feeling that the subjective feelings of the pregnant working women are controlling as to whether or not she may safely and efficiently continue to work at her job? A. Yes, I think that has a bearing. I think as long as she feels like working, I don't see any reason why she should not continue to work.

Q. Medically speaking, Doctor, can't it be subjectively comfortable, to use the word you used, for a normally pregnant woman to continue at her job and yet be unsafe for her to do so? A. Well, in the types of occupations of women who I see and who are "normally pregnant" the majority of women I see are doing jobs that there is no reason why they could not do safely. Certainly being a secretary you can do just as safely being pregnant as not being pregnant.

Q. Even though a woman is comfortable while working, Doctor, isn't it true that her pregnancy places certain stress on such organs as the kidney and the liver? A. Not in the normal patient, no.



Q. Might exposure to certain potentially toxic substances which would produce no harm to a normal nonpregnant women be harmful to a normally pregnant woman? A. Not to the patient herself, no.

Q. Would jobs involving exposure to various kinds of radiation and toxic matter be potentially harmful to the unborn child? A. Yes. It would also be harmful to the patient.

Q. They would be harmful to the patient? A.
2022 Yes, sure. There is not anything that is going to harm the fetus that does not have some adverse effect on the patient.

Q. Don't the physical limitations of normal pregnancy tend to increase the risk of accident in certain jobs as pregnancy progresses? A. I would not say so in the jobs with which I am familiar, which my patients occupy, which my patients hold.

Q. What about a woman in a job involving climbing up and down telephone poles or in and out of manholes or visiting and making installations on outside premises as pregnancy progresses, as weight increases, as normal agility is affected by the weight carried by the pregnant woman, is it likely that accident risk would be increased? A. Well, for the specific occupations that you mentioned I am sure that would be true, but I just don't happen to know any telephone pole climbers who are pregnant and I don't think you do, either.

Q. Well, those questions I asked you, Doctor, were from the medical viewpoint. Let me ask you from the perspective of industrial efficiency as to your comments that I previously quoted. Can't a women feel capable of working and yet be inadequate or inefficient in attempting to do so? A. I don't think any more than a nonpregnant patient. I think the pregnancy is not a factor.

2023 Q. Doctor, when your colleague, Dr. Hellegers was here, he made reference to an article by a Dr. R. W. Biddle in the January 1970 Journal of Medicine, entitled "Gravid Women at Work." Are you familiar with that
2024 article, Doctor? A. I am.

Q. Would you agree with the following statement from that article, Doctor, and I quote from the first page of the reprint which Mr. Copus made available to us: "Pregnancy may affect both the ability and capacity of gravid women to work efficiently; working may affect the pregnancy as well."

Would you agree with that statement, Doctor? A. Not entirely, no.

Q. To what extent do you disagree with that? A. Would you read it again? I remember having read that and thinking that was too broad a statement.

MRS. POTTER: Perhaps it would be helpful if the Doctor could look at the article.

MR. LEVY: Do you have a copy? My copy is marked up.

THE WITNESS: As a broad generalization, I guess you would have to say that that isn't incorrect. I think it is too broad a general statement.

BY MR. LEVY:

Q. At the top of the right-hand column of the second page of the reprint supplied by Mr. Copus is the following statement, Doctor, It is a separate paragraph, and I quote: "Hyperemesis gravidarium, urinary frequency,
2025 symptoms of pressure, constipation, excess vaginal discharge, and fetal activity might militate against efficiency at work."

Would you agree with that statement? A. No, I would not agree with that.

Q. What is your basis for your disagreement, Doctor?



A. The basis for my disagreement is that very few patients have any or all of those symptoms. I mean, every gal that gets pregnant does not get morning sickness which is what you read from hyperemesis.

Q. I thought that was a strain of gladiola. A. Some women wish that it were.

No, I was rather surprised at Dr. Biddle, whom I happen to know, let his name be put on that article. In fact, I think that he is an obstetrician and gynecologist in practice and to the best of my knowledge he is not an industrial, or I would say commercial obstetrician and I wondered where he got that and why he would make such a statement because I personally don't agree with it.

Now, I would agree that if someone had a severe morning sickness she obviously is not as efficient but I personally don't know of any patient who had quit her job because she had morning sickness.

The other things in the article, I mean constipation is not peculiar to pregnancy in the average female.

Q. Doctor, of course, the quote did not talk about these reasons for quitting work. The quote was framed
2026 in terms of these several factors listed, "may mitigate against efficiency at work."

Perhaps you misunderstood it when I read it. Would you agree that these are factors which if they obtain in a given pregnant woman may militate against her efficiency at work? A. In a very broad generalization, but it applies to very few women who are pregnant as individuals.

Q. The last quote from the article that I would like to read to you, Doctor, and ask your views on is the following, and it is from the bottom of the left-hand column, top of the right-hand column of the fifth page of the

reprint supplied by Mr. Copus: "In many pregnant women their capacity for work is affected by increased weight, change in posture and physiologic changes in the urinary tract and cardiovascular system. Fatigue may predispose to instability of the nervous system and to poor food intake leading to anemia. Complications of pregnancy are seldom affected by work itself unless the patient works with dust, certain kinds of chemicals or with laboratory viruses. On the contrary, pregnancy may decrease efficiency of concentration and alertness."

Would you agree with that statement, Doctor?

Perhaps you would like to see it. I know there were a number of thoughts in it. A. Well, again, that is a very broad generalization. On the other hand, I don't think there would be very many women who think that they are mentally less alert because they are pregnant. I
2027 doubt if you sampled any large number of women that they would agree with that. Women do not complain of that as a problem of pregnancy.

* * *

Q. Were you familiar with the work that farm women did years back? A. Yes.

Q. And still do, presumably. A. Yes.

Q. And were their tasks physically demanding? A. Yes, I would say that the average woman on a farm works pretty hard.

Q. And did they stop working hard when they were pregnant? A. Not to the best of my knowledge, no.

Q. Would not their tasks demand lifting and bending and stretching and many other types of physical strains? A. I think that the average farm woman today probably does pretty much the same type of work when she is



pregnant that she does when she is not pregnant. I am sure there is very little limitation of their ability to do things.

Q. All right. A. My whole philosphy is that a pregnant patient can to a great extent adjust her own life as to her ability to adapt to different situations, and I think that, if I may enlarge upon that, that telling somebody that when you are 28 weeks pregnant, for example, for in that article that Mr. Levy quoted one of the companies saying that women had to quit work when they were 12 weeks pregnant, first of all nobody knows it so that in itself is foolish. I think to tell any patient that when she is 28 weeks pregnant you automatically
2030 have to quit, say, teaching school or working in an office, or doing some secretary type of labor, there is no physiologic justification for it.

Q. Or even a physical type of labor, would you include that in it, too? We just discussed the farm woman. A. Well, physical to the point of within her own capacity.

Q. Well, then, I gather from your testimony what you are suggesting is that instead of a company trying to set down ground rules as to one woman must desist from physical activity that you think it is an adequate gauge to allow the woman herself to decide when she could not carry out certain tasks? A. I think the average woman does that. I don't have in mind – my principal concern through the years has been the school teachers because I just don't see any reason why a woman cannot teach school pregnant as well as she can teach school unpregnant and that has been the basis of my contention through the years.

Q. Do you think that many of the restrictions on pregnant women are just a reflection of our cultural

mores rather than physical necessity? A. Yes, I think that they are too arbitrary and again without physiologic background.

MR. JUNTILLA: All right. Thank you, Doctor.

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G.E. EXHIBIT NO. 31 - FCC Staff Exhibit 36 (list of questions to be asked of company witnesses) dated November 24, 1972, in the Matter of Petitions filed by the EEOC, et al., FCC Docket No. 19143

**FEDERAL COMMUNICATIONS COMMISSION**

**Docket No.: 19143** **Exhibit No.: 36**

**Presented by: FCC Staff**

| | | |
|---|---|---|
| **Disposition** | **Identified** | **x** |
| | **Received** | **x** |
| | **Rejected** | |

**Reporter: BRM**

**Date: 11-29-72**

Mr. Harold Levy, Esquire
AT&T
195 Broadway
New York, New York 10007

Dear Mr. Levy:

As promised, you will find herein a list of questions intended to be asked all company witnesses. The witnesses scheduled to appear November 27, 1972 through December 1, 1972 will be asked these questions orally. Company witnesses thereafter are requested to respond in writing if they can.



You will note that all the questions below are the same as those asked of Therese Pick, with the exception of questions regarding "the Bridge."

1. For non-management employees does continuity of service determine eligibility for:
   a. Pension credit?
   b. Wage progression credit?
   c. Sickness disability benefits?
2. For management employees does continuity of service determine eligibility for;
   a. Pension credit?
   b. Wage progression credit?
   c. Sickness disability benefits?
3. a. Are benefits accompanying personal leaves administered differently depending on the length of leave?
   b. Are personal leaves divided into categories by length? What are those categories (i.e., leaves of one month or less and leaves of more than one month)?

* * *

26. Are non-management employees on maternity leave eligible for sickness disability benefits? Answer the same question for management employees.

Mr. Harold Levy, Esquire

34. Specify whether your answers would be different for married and unmarried females in

questions 6-16, 16-21, 26, 28, 30, and, 31-33.

I apologize for the delay in sending you these questions.

Sincerely,

Giovanna H. Longo
Counsel

cc: Frederick W. Denniston, Administrative Law Judge
Federal Communications Commission
1919 H Street, N.W.
Washington, D. C. 20554

David A. Copus, Esquire
Equal Employment Opportunity Commission
1800 G Street, N.W.
Washington, D. C. 20506

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G.E. EXHIBIT NO. 32 - EEOC "Request for Statistics, Received 4/13/71, In Matter of Petitions filed by EEOC, et al., FCC Docket 19143.

211 East 35th Street
New York, New York 10016
April 8, 1971

Honorable Jacob K. Javits
United States Senate
Washington, D. C. 20510

Dear Senator Javits:



I have just reviewed the discovery request propounded by EEOC to AT&T which is now being considered in FCC Docket No. 19143. (Copy attached.) I am certain you will agree that providing the information requested by EEOC is a horrendous undertaking, and I would guess that just gathering this material will cost the Bell System somewhere in the area of $1,000,000.

I also happen to be a customer of New York Telephone which, as you know, has serious service problems. AT&T may not have a perfect record in satisfying the insatiable demands of EEOC, but I for one would much prefer that such funds be spent on plant and equipment leading to improved service.

EEOC is seeking enforcement powers similar to the NLRB. It is obvious from this demand and other EEOC activities that they are incapable of objectivity. I therefore urge that you deny them additional powers.

Very truly yours,

/s/ JAMES R. THOMPSON
James R. Thompson

JRT:tg

Attachment

cc: Mr. Ben F. Waple

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## REQUESTS FOR STATISTICS

For the thirty SMSA's designated by EEOC: give sex and ethnic composition as of December 31, 1970, by EEO-1 job categories, job titles and departments.

## REQUESTS FOR PRODUCTION OF DOCUMENTS

1. For each company: each collective bargaining agreement (including supplements) which was in effect January 1, 1960 and January 1, 1971.

2. For thirty cities: current job descriptions for all job classifications, including both management and non-management jobs.

3. For each current EEO-1 reporting unit, EEO-1 report as of December 31, 1970.

4. For thirty cities: for the thirteenth day of each month in the periods January 1968 - December 1968 and January 1970 - December 1970, copies of all classified ads, with specification of date, media, and column heading.

5. For each company: for the period July 1, 1964, to the present, copies of all internal memoranda relating to company policy conerning equal employment and advertising.

* * *

27. For each company: if a married woman takes maternity leave:
    (a) what is length of leave she may take?
    (b) does she have written reassurance of employment?



    (c) is she eligible for benefits during leave, under the Employees Pension Disability Benefits and Death Benefits plan?
    (d) is maternity leave compulsory as of any given time?

28. For each company: same as No. 27 for unmarried women who take maternity leave.

* * *

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G.E. EXHIBIT NO. 33 - Motion of EEOC to Terminate FCC Proceedings.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Petitions filed by the | ) | DOCKET NO. 19143 |
| EQUAL EMPLOYMENT | ) | |
| OPPORTUNITY COMMISSION | ) | |
| (EEOC) et al. | ) | |

### MOTION TO TERMINATE PROCEEDINGS
(To be Acted Upon by the Commission)

The Equal Employment Opportunity Commission (EEOC), respectfully requests that Docket No. 19143 be terminated and that its complaint therein dismissed. In support whereof it is stated as follows:

1. On December 10, 1970, the EEOC filed a "Petition

for Intervention" in Docket No. 19129 wherein it opposed proposed revisions in tariffs filed by AT&T providing for increases in rates for long distance message telephone service. In its Petitition, the EEOC alleged that AT&T and the Bell companies engaged in systemwide discrimination in employment against women, blacks, Spanish-surnamed Americans, and other minorities in violation of the Communications Act of 1934, the Commission's Rules and Regulations, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Equal Pay Act of 1963, Executive Order No. 11246, and the fair employment practices acts of numerous states and cities. The Commission in a Memorandum Opinion and Order released January 21, 1971, rejected the EEOC's request that these allegations be considered in the context of Docket No. 19129. However, it set the EEOC charges for separate hearing in Docket No. 19143 on the basis that "the filing by the EEOC clearly alleges 'a general pattern of disregard of equal employment practices' pursuant to [the Commission's] Rules." 27 F.C.C.2d 309, 311 (1971).

2. American Telephone and Telegraph Company (AT&T) and its associated operating telephone companies (Bell companies) denied the charges of the EEOC and the other complaining parties and presented testimony showing the progress that had been made in the Bell System in the hiring and promotion of women and minorities.

3. Since the institution of this proceeding, AT&T and the Bell companies have made a number of changes in their recruiting, hiring, job placement, promotion and transfer practices which should result in greater opportunities for women and minorities. Also AT&T and the



Bell companies have adopted new Affirmative Action Programs which contain specific goals and timetables for women and minorities in major job categories. These plans, in conjunction with new Upgrading and Transfer Plans which AT&T and the Bell companies have also adopted, should further accelerate the progress Bell is making in an effective utilization of women and minorities in all job categories and at all levels.

4. For the past several months extensive negotiations have been engaged in by the EEOC, the U.S. Department of Labor and AT&T, on behalf of itself and the Bell companies, for the purpose of resolving many of the remaining controversies between the parties. These negotiations have resulted in an Agreement signed by representatives of AT&T and the Bell companies, EEOC and the U.S. Department of Labor, a copy of which is attached hereto as Exhibit A. By the terms of this Agreement the Bell companies have agreed to establish and make a good faith effort to reach revised goals for job classifications within each establishment where underutilization is determined to exist. They have agreed to provide opportunities for transfer or advancement for female and minority employees in particular job classifications and to make pay adjustments both for the past and the future.

5. The EEOC and the U.S. Department of Labor have agreed that if AT&T and the Bell companies comply with the terms of the Agreement, they will be in full compliance with the laws and regulations governing equal employment opportunity and equal pay for equal work which are covered in the Agreement.

6. The Agreement further provides for securing the resolution, to the extent feasible, of all pending litigation,

including this proceeding, conerning compliance by AT&T and the Bell companies with all laws and regulations concerning equal employment opportunity and equal pay for equal work.

7. In view of the foregoing, Petitioner believes that the goals of equal employment opportunity and equal pay for equal work can best be achieved by the termination of this proceeding. To the extent that any issues of compliance of Bell companies with equal employment laws remain unresolved, they can be more effectively dealt with outside this proceeding.

WHEREFORE, EEOC requests that Docket No. 19143 be terminated and its complaint be dismissed.

Respectfully submitted,

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

/s/ DAVID COPUS
David Copus
Attorney

January 19, 1973

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## MEMORANDUM OF AGREEMENT

THIS AGREEMENT, made and entered into this 18th day of January, 1973, among the American Telephone and Telegraph Company, for itself and on behalf of its associated telephone companies (hereinafter collectively referred to as the Bell Companies),* the Equal Employment Opportunity Commission, and the U.S. Department of Labor,

WITNESSETH

WHEREAS there are certain currently outstanding equal employment opportunity and equal pay for equal work

* American Telephone and Telegraph Company
New England Telephone and Telegraph Company
The Southern New England Telephone Company
New York Telephone Company
New Jersey Bell Telephone Company
The Bell Telephone Company of Pennsylvania and The Diamond State Telephone Company
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
Southern Bell Telephone and Telegraph Company
South Central Bell Telephone Company
The Ohio Bell Telephone Company
Cincinnati Bell Inc.
Michigan Bell Telephone Company
Indiana Bell Telephone Company, Incorporated
Wisconsin Telephone Company
Illinois Bell Telephone Company
Northwestern Bell Telephone Company
Southwestern Bell Telephone Company
The Mountain States Telephone and Telegraph Company
Pacific Northwest Bell Telephone Company
The Pacific Telephone and Telegraph Company and Bell Telephone Company of Nevada

issues which are the subject of Equal Employment Opportunity Commission (EEOC) charges, government contract compliance reviews or pending litigation or investigations involving the Bell Companies, and

WHEREAS the Bell Companies deny that they have engaged in any discriminatory employment practices which constitute violations of federal laws, regulations or Executive Orders, and

WHEREAS the undersigned parties desire to resolve the aforesaid equal employment opportunity and equal pay for equal work issues and to assure the Bell Companies' compliance with applicable equal employment opportunity and equal pay for equal work laws and regulations with respect to such issues,

NOW THEREFORE, in consideration of the covenants herein expressed, it is mutually agreed as follows:

## PART A

### I. AFFIRMATIVE ACTION PROGRAMS

The Office of Federal Contract Compliance (OFCC) of the Department of Labor accepts, as consistent with the requirements of Revised Order No. 4, the American Telephone and Telegraph Company's (AT&T's) Model Affirmative Action Program, Upgrading and Transfer Plan, and Job Briefs and Qualifications, attached hereto as Exhibits A, B and C, respectively (said three exhibits being referred to herein as the "Model Programs"), subject to the clarifications and amplifications contained in this Agreement. The OFCC agrees that subject to the clarifications and amplifications contained herein, such Model Programs, if adopted and implemented without material deviation by individual Bell Companies for each of their respective establishments, shall be considered as complying with the requirements of Revised Order No. 4.



EEOC agrees that such Model Programs, as clarified and amplified herein, constitute a "bona fide seniority or merit system" within the meaning of Section 703(h) of Title VII and that employment decisions made in conformity with such Programs will comply with Title VII. Provided, however, that all individual Company programs embodying material deviations from such Model Programs and any material revisions of such programs resulting from the annual reviews thereof will be submitted to the OFCC and the EEOC prior to implementation by any Bell Company. Such programs shall be deemed accepted unless disapproved by the OFCC within 45 days from the date of submission, consistent with Section 718 of the Civil Rights Act of 1964 as amended.

### II. GOALS AND TIMETABLES

A utilization analysis of each of the fifteen (15) Affirmative Action Program Job Classifications as defined in Section IV of the Model AAP (Exhibit A hereto) within each establishment will be conducted pursuant to 41 C.F.R. §60-2.11. For those job classifications wherein there exists a substantial salary range, such analysis shall specifically include reference to the relative distribution of minorities and women within such salary range. Each factor in 41 C.F.R. §60-2.11(a)(1) and (2) for which accurate and relevant data are available shall be considered. A goal will be developed for each of the 15 AAP job classifications within each establishment where underutilization is determined to exist pursuant to 41 C.F.R. §60-2.12. In a good faith effort to meet such goals, each Bell Company will establish intermediate targets for one, two and three-year time frames. At the end of each intermediate three-year time frame, the goal for each classification for which a goal has been set will be re-evaluated to determine whether underutilization still

exists, and the goals for each job classification will be adjusted or eliminated as appropriate. All goals and all intermediate targets and time frames for each Company and each establishment must be individually approved by the OFCC, and shall be submitted for approval to the OFCC within 120 days from the date of this Agreement, together with the relevant utilization analysis, including worksheets. Such goals, intermediate targets and time frames shall be deemed approved unless disapproved by the OFCC within 90 days of their submission, notwithstanding Section 718 of the Civil Rights Act of 1964, as amended. Worksheets shall include that portion of the goal which each establishment will make a good faith effort to achieve as intermediate targets – within stated time frames.

The foregoing utilization analysis, goals, intermediate targets, and time frames shall also by developed for males in the operator and clerical classifications as part of each Bell Company's program.

All goals and all intermediate targets and time frames, as approved by the OFCC, and as adjusted at the end of each intermediate time frame will promptly be submitted by each Bell Company to the appropriate collective bargaining representative of its employees.

## III. TRANSFER, PROMOTION, LAYOFF AND RECALL

A. Each Bell Company agrees to offer each of its female and minority employees, in nonmanagement, noncraft jobs, who had four or more years of net credited service on July 1, 1971, and who expresses a desire for transfer as required by the appropriate upgrading and transfer plan or posting and bidding system to a job in AAP job classification 9 or 10, an opportunity to compete therefor with other employees on the basis of net



credited service and basic qualifications, as set forth in Exhibit C, if females or minorities currently are underutilized in such AAP job classification 9 or 10 and such employee is a member of the group which is underutilized. For purposes of this Agreement, "net credited service" shall mean total length of service with the operating company in which the vacancy occurs. Provided, however, that total length of service within the Bell System shall continue to be used for other purposes, including bridging rights, consistent with the provisions of the applicable Bell Company's collective bargaining agreement(s).

Provided further, each Bell Company and each collective bargaining representative of their employees shall be free to bargain to expand this definition of net credited service, for purposes of this Agreement, to mean total length of service with the Bell System.*

Where the term net credited service is presently defined in applicable collective bargaining agreements as length of service greater than that of the company into which the employee was last hired, definition of that term shall be unaffected by this paragraph.

B. In filling vacancies in AAP job classifications 6 and 7, candidates for promotion shall be evaluated on the basis of net credited service and best qualified, unless a lower standard of qualification is provided in a collective bargaining agreement or pursuant to Bell Company practices. However, if any Bell Company is unable to meet its intermediate targets within the stated time frames using these criteria, it will use only the criteria of net

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* Employees returning from maternity leave do not have their service broken (absence in excess of 30 days will be deducted from net credited service).

credited service and a basic qualified criterion and, if necessary, will seek new hires who meet at least the basic qualified criterion. Efforts to achieve intermediate targets should be substantially uniform throughout the appropriate time frame. Each Bell Company agrees to notify the appropriate collective bargaining representative of its employees prior to promoting or transferring persons into AAP job classifications 6 and 7 on the basic of net credited service and basic qualifications.

C. Net credited service shall be used for determining layoff and related force adjustments and recall to jobs where nonmanagement female and minority employees would otherwise be laid off, affected or not recalled. Collective bargaining agreements or Bell Company practices shall govern the confines of the group of employees being considered. Provided, however, vacancies created by layoff and related force adjustments shall not be considered vacancies for purposes of transfer and promotion under this Section.

D. Minimum residency (time in title) requirements shall not be greater than the following, in the major job titles noted below:

1. Clerical; six-twelve months time in title;
2. Operator, six-twelve months time in title;
3. Service Representative, fifteen-eighteen months time in title;
4. Lower and Middle Craft, fifteen-eighteen months time in title;
5. Top Craft (Switchman, PBX Installer, PBX Repairman, Toll Test man, etc.) twenty-four - thirty months time in title.

Collective bargaining agreements or company practices which provide lower minimum residency requirements than those outlined above shall continue in effect.



## IV. EMPLOYEE INFORMATION PROGRAM

A. Each Bell Company agrees to inform its employees who are affected by the provisions of this Agreement, and the appropriate collective bargaining representatives of its employees of the terms thereof in a manner approved by AT&T, EEOC and OFCC.

B. Each Bell Company will, with respect to each of its transfer bureaus, provide a quarterly notice to non-management employees served by such transfer bureau and to any collective bargaining representative representing such employees of the projected number of job opportunities by the major job titles (e.g., installer, lineman) set forth in the Job Briefs contained in Exhibit C hereto, in his or her transfer bureau for the balance of the calendar year and the number of jobs filled during the previous quarter by net credited service date, date of transfer, job title, EEO-1 minority designation, sex, and last previous job assignment.

## V. TESTING

Each Bell Company reserves the right to utilize test scores on validated tests along with other job-related considerations in assessing individual qualifications. However, each Bell Company agrees that it shall not rely upon the minimum scores required or preferred on its pre-employment aptitude test batteries as justification for its failure to meet its intermediate targets for any job classification.

## VI. PROMOTION PAY PLAN

Each employee promoted from one nonmanagement job to another with a higher basic maximum rate of pay, shall have his or her rate of pay in the higher rated job determined as follows:

The employee shall be placed on the step of the new wage table as determined by allowing the employee full wage experience credit, both in progression and at maximum, on the old wage table, but shortened in 1970 or 1971 collective bargaining, then the wage experience credit allowance shall be used.

4. Current promotion pay practices which provide more favorable treatment than the procedure outlined above shall continue in effect.
5. Modification of Plan for Promotion from Simple to Complex Line Assigning

Employees who have work experience in simple plant line assigning (not including clerks whose duties do not require that they use cable books to locate available cable pairs) and are promoted to complex line assigning (Top or Second Craft) will be treated as follows:

a. Those with over four years of wage experience credit or net credited service (as provided in note 3 above), at least one year of which is simple plant line assigning experience, upon promotion will receive wage experience credit on the new wage schedule equal to their wage experience credit or their net credited service (as provided in note 3 above).
b. Employees to whom paragraph (a) is not applicable will be accorded promotion pay under the basic promotion pay plan described above.



## VII. COLLEGE GRADUATE FEMALES HIRED DIRECTLY INTO MANAGEMENT

In each Bell Company (other than Cincinnati Bell Inc., which did not have an Initial Management Development Program (IMDP) at any time between July 2, 1965, and December 31, 1971, and The Bell Telephone Company of Pennsylvania, which has heretofore satisfactorily resolved issues respecting female college graduate management hires):

A. Four-year college graduate female employees hired directly into management other than IMDP between July 2, 1965, and December 31, 1971, with the exception of those thereafter placed in IMDP or who were offered placement in IMDP and declined, will be surveyed to determine their interest in promotion to District level (third level) and above management positions. Provided, however, that any Bell Company may during the thirty-day period following execution of this Agreement and entry of the decree provided for in Part C., Section I.A., present to the EEOC and OFCC data indicating that an IMDP program was not underutilizing women during any year or years between July 2, 1965, and December 31, 1971. Upon presenting such data, this Section VII shall be inapplicable to four-year college graduate women hired directly into management for those years during which underutilization did not exist in the IMPD program in question. For purposes of this paragraph only, an absence of underutilization shall mean 25% of all enrollees in an IMDP program. The parties agree that failing agreement as to whether an IMDP program or an individual should be excluded from the application of this Section such determination shall be submitted to the Court for final and binding adjudication under the decree.

B. Those employees who are found to be interested will be scheduled for a two-to-three day assessment at a management center to evaluate their potential for promotion to District level. This assessment will be conducted under procedures outlined by AT&T and will be completed to the extent possible within twelve months of the date of the execution of this Agreement. Those employees assessed as satisfactory and who are below second level will be candidates for promotion to second level as vacancies occur and will be added to the District level potential list. Those employees assessed as satisfactory and who are at second level at the date of assessment will be candidates for promotion to District level as vacancies occur. Prior to promotion, both these second level and below second level employees may be reassigned for further developmental experience preparatory to promotion.

C. AT&T agrees to provide the EEOC and OFCC with descriptions of the criteria employed in making such assessments and on request will provide data at reasonable intervals on the number of persons evaluated and rated satisfactory; provided, however, the foregoing assessment procedure may not be relied upon as a defense by any individual Bell Company for its failure to reach the intermediate targets for those job classifications for which such procedures are used.

D. Those employees evaluated under paragraphs A and B of this Section VII. who do not receive a satisfactory rating will return to their current assignments and their assessment rating will not be entered into their permanent personnel file.



## VIII. PAY ADJUSTMENTS

A. Nonmanagement Jobs.

Employees promoted prior to January 1, 1973, will have their rate of pay adjusted as of the first pay period after January 1, 1973, to the rate they would have achieved if the promotion pay plan described in Section VI above had been in effect at the time of their promotion.

B. Craft Jobs Only.

1. In recognition of alleged claims of possible discrimination in compensation:

a. Except for Switchroom Helpers at Michigan Bell Telephone Company (Michigan Bell), back wages shall be accorded those female employees who were resident in AAP job classifications 6, 7, 9 and 10 at any time during the period January 1, 1971, to December 31, 1972, as follows:

Each such employee shall be paid an amount equal to the difference between the amount which was paid to her under the promotion pay plan in effect at that time, and that which would have been paid to her during the period from January 1, 1971, to December 31, 1972, had the promotion pay plan described in Section VI above been in effect at the time of her promotion and for the period of time such employee was resident in a position in AAP job classifications 6, 7, 9 or 10.

b. In order to bring the minimum and maximum rate of pay of Switchroom Helpers at Michigan Bell into the range for the Frameman job in other Bell Companies, the rates for such job will be increased by means of the following formula to be

effective the beginning of the first pay period following January 1, 1973.

| | Present Minimum Rate | Present Minimum Rate | Proposed Minimum Rate | Proposed Minimum Rate |
|---|---|---|---|---|
| Zone 1 | $124.50 | $157.00 | $127.50 | $169.50 |
| Zone 2 | 117.00 | $153.50 | 119.00 | 166.00 |
| Zone 3 | 111.00 | 151.00 | 113.50 | 161.50 |
| Zone 4 | 109.00 | 149.50 | 111.50 | 159.00 |

Michigan Bell will establish new wage schedules similar to those in effect for the Frameman job in other Bell Companies to reflect these minimum and maximum rates of pay.

Michigan Bell will pay to Switchroom Helpers who were so classified during any part of the period from January 1, 1971, to December 31, 1972, the difference between what they earned had the wage schedule set forth in the columns "Present Maximum Rate" and "Present Minimum Rate" been in effect during the period January 1 1971, to December 31, 1972, and what they would have earned had the wage schedules been those set forth in the columns "Proposed Maximum Rate" and "Proposed Minimum Rate."

2. In recognition of alleged claims of possible delay in promotion in nonmanagement jobs because of discrimination, lump sum payments shall be made to each female and minority employee in each establishment where there exists in his or her respective job classification an underutilization of the group of which he or she is a member, who meets the following criteria:



a. had four or more years' net credited service on July 1, 1971;
b. has been or will be promoted from non-management, noncraft jobs into AAP job classifications 6, 7, 9 and 10 subsequent to June 30, 1971, and prior to July 1, 1974; and
c. remains in that job or another job in AAP job classifications 6, 7, 9 and 10 for a total of more than six months.

Those employees meeting the criteria listed in a), b) and c) will receive lump sum payments in accordance with the following schedule (it being understood that a female minority employee shall be entitled to receive only one lump sum payment).

| PROMOTION DATE | PAYMENT |
|---|---|
| 7/1/71 through 12/31/71 | $ 100 |
| 1/1/72 through 12/31/72 | 200 |
| 1/1/73 through 12/31/73 | 300 |
| 1/1/74 through 6/30/74 | 400 |

In the event that on July 1, 1974, at least ten thousand (10,000) employees have not received payments pursuant to this Section VIII.B.(2), the Bell Companies will extend the date until 10,000 employees have been paid. All payments after July 1, 1974, shall be at the rate of $400.

C. Management Jobs.

Those employees who are assessed as satisfactory pursuant to Section VII above will have their salary increased $100 per month as of their assessment date or September 1, 1973, whichever is earlier.

D. Limitation on Recovery

No individual who has received back pay and/or individual relief under a prior settlement agreement, conciliation, or consent decree shall be elibigle to receive back pay or individual relief with respect to the same claim of discrimination as a result of this Agreement.

## PART B

### I. PROCEDURE FOR RESOLVING EEOC CHARGES

A. It is the intent of the parties that, to the extent feasible, all charges of employment discrimination under Title VII will be resolved in a manner consistent with the principles set forth in this Agreement and the Decree provided for in Part C, Section I.A. To this end, upon the execution of this Agreement, the EEOC will:

1) Assert jurisdiction over all matters which have have been pending before state or local agencies designated as deferral agencies pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, as amended, for more than the minimum deferral period and which have been the subject of charges filed with the EEOC.

2) With respect to charges on which "notice of right to sue" letters have been issued within the 90 days immediately preceding the date of this Agreement, or may be issued subsequent thereto, contact the charging parties, through their attorneys or otherwise, and urge them to agree to a settlement consistent with the principles set forth in the Agreement and Decree.



B. In order to facilitate conciliation of charges filed with the EEOC during the life of the Decree provided for in Part C., Section I.A.:

1) Beginning within 60 days from the date of this Agreement and weekly thereafter, EEOC will provide AT&T with copies of all charges not yet served on Bell Companies and with separate lists for each Bell Company of all charges (a) pending, (b) settled, (c) administratively closed, and (d) in which notices of right to sue have been issued.

2) Beginning within 60 days from the date of this Agreement, AT&T or the Bell Company involved will supply EEOC with proposals for settling charges which any individual Bell Company is prepared to settle.

3) Beginning within 60 days after such proposal is submitted to EEOC, AT&T or the Bell Company involved and EEOC will seek to resolve through conciliation any charge for which a settlement has been proposed.

C. The EEOC and Department of Labor further agree:

1) That they will not, in any claim, action or proceeding (including rate cases), involving any of the Bell Companies, initiate encourage, fund, intervene in support of or advocate by *amicus* brief or otherwise, a position inconsistent with the Agreement or the Decree.

2) That EEOC will advise its Regional and District offices, as well as state and local agency grantees, and the Department of Labor will advise its Regional and District offices and contract compliance agencies, that the Decree will bring the Bell Companies into compliance with Title VII, the Equal Pay Act, an

Executive Order 11246 requirements as to the issues identified in the Decree and that, to the limit of EEOC's contractual power to insure such a result, such Companies shall not be the subject of enforcement programs funded by EEOC, as to the matters covered therein.

3) That any actions taken by EEOC Regional or District offices or Department of Labor Regional or District offices or OFCC field offices which any Bell Company believes to be inconsistent with the terms of the Agreement or Decree may be brought to the attention of the national headquarters of the EEOC, Department of Labor, or OFCC, as appropriate and such national headquarters shall become the party with whom such Bell Company may resolve such compliance issues.

## II. PROCEDURE FOR RESOLVING EQUAL PAY AND CONTRACT COMPLIANCE QUESTIONS

It is the intent of the parties that, to the extent feasible, all questions of the Bell Companies' further compliance with the Equal Pay Act of 1963 and Executive Order 11246 will be resolved without the need for administrative proceedings or litigation. The parties also agree that should the Department of Labor or the designated compliance agency conclude that a Bell Company is violating the Equal Pay Act or the Executive Order and that it is unable to resolve such matter with that Company it will inform AT&T and give the latter 30 days in which to seek a resolution of such matter.

## III. SETTLEMENT OF PENDING LITIGATION

It is the intent of the parties to secure the resolution, to the extent feasible, of all outstanding employment



discrimination cases involving each Bell Company's compliance with Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Acts of 1866 and 1871, and the Equal Pay Act of 1963, consistent with the principles set forth in this Agreement and the Decree.

A. The Michigan Bell case will be settled by a stipulation of dismissal. Michigan Bell will be a party to this agreement, provided that the statute of limitations cutoff date in that case shall be used for the calculation of back wages for Michigan Bell craftswomen.

B. In cooperation with the Department of Labor, AT &T will use its best efforts to achieve a settlement in the New England Telephone and Telegraph Company case.

C. Each Bell Company further agrees that within 90 days after the execution of this Agreement, it will advise the EEOC of those cases which it believes can be resolved in whole or in part consistent with the terms set forth in the Agreement and Decree. If requested by all parties to such a case, EEOC will offer conciliation services to facilitate such a resolution.

## PART C

## I. CONSENT DECREE

A. The provisions of this agreement shall not become effective until such time as they are embodied in the Consent Decree attached hereto to be entered simultaneously with the execution of this Agreement in a United States district court, designated by the parties, originating in an action brought by the EEOC pursuant to Sections 706(f) and 707(e) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*, by the Secretary of Labor under the Equal Pay Act of 1963, Section 6(d) of the Fair Labor Standards Act of 1938, as amended, 29

U.S.C. §206(d), and by the United States pursuant to Executive Order 11246, as amended.

Such Decree shall provide for the retention of jurisdiction by the Court to enter such orders as are necessary to effectuate the provisions of the Agreement and shall state that the life of the Decree shall be limited to six years, except that as to the issues in Part A, Sections VI, and VIII the Decree shall provide that the Bell Companies are permanently enjoined from violating the Equal Pay Act. Provided that AT&T and each Bell Company retains its right to move for dissolution or modification of the Decree as to such Company. Provided further, that should either opinion letter, provided for in Part C, Section II of this Agreement or any portion of such letters be withdrawn or overruled, the Bell Company affected by such withdrawal or overruling may move the Court to dissolve any portion of the Decree which involves the issue or issues with respect to which the opinion letter has been withdrawn or modified, and to strike any portion of the pleadings in this action relevant thereto, and such motion shall be granted.

B. By entering into this Agreement and accepting the Consent Decree referred to in Part C, Section I.A., the Bell Companies do not make any admission that they have engaged in any discriminatory employment practices or other practices which constitute violations of the Federal laws, regulations or Executive Orders set forth in Part C, Section I.A.

## II. OPINION LETTERS

Pursuant to this Agreement, and simultaneous with its execution, the Wage and Hour Administrator of the Department of Labor, in conformity with the requirements of 29 C.F.R. §§790.13 and 790.17, shall issue an opinion



letter dealing with the pay practices set forth in Part A, Sections VI and VII, as respects compliance with the provisions of the Equal Pay Act of 1963. In addition, the General Counsel of EEOC, in conformity with the requirements of Section 713(b) of the Civil Rights Act of 1964, as amended, and 29 C.F.R. §§ 1601.28-1601.30, shall issue an opinion letter dealing with the employment practices set forth in Part A, Sections III, IV, VI, and VIII, as respects compliance with the provisions of Title VII of the Civil Rights Act of 1964, as amended.

## III. DURATION OF AGREEMENT – DISMISSAL OF DOCKET NO. 19143

A. The provisions of this Agreement shall become effective upon the entry of the Decree provided for in Part C., Section I.A. and shall terminate as to each Bell Company at the time that such Decree shall terminate as to such Company.

B. It is the intent of the parties that this Agreement shall result in the dismissal of Docket No. 19143 which is presently pending before the Federal Communications Commission (FCC). Upon the execution of this Agreement, the EEOC will move for the dismissal of Docket No. 19143. The EEOC will undertake to secure the concurrence of all intervening parties, to such dismissal.

## IV. INDIVIDUAL RELIEF

A. The payments or adjustments for individual relief set forth in Part A, Section VIII of this Agreement, shall not be made until such time as the opinion letters referred to in Part C, Section I.C., have been issued, the Decree described in Part C, Section I.A. has been entered and Docket No. 19143 has been dismissed.

B. The Bell Companies may require that acceptance by any person of individual relief pursuant to the terms of Part A, Section VIII. shall constitute a waiver and release by such person of any claims for alleged violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§1981, 1983, Executive Order 11246, or any applicable state fair employment practice laws or regulations based upon occurrences prior to the date of this Agreement and the Decree, and such person shall sign a waiver of such claims as a condition to receipt of such individual relief.

## V. COMPLIANCE PROCEDURE

A. As to the issues identified in the Decree provided for in Part C., Section I.A., compliance with the terms thereof resolves all questions of the Bell Companies' compliance, for acts or practices occurring prior to the date of this Agreement, with the requirements of Title VII of the Civil Rights Act of 1964, as amended, the Equal Pay Act of 1963, and Executive Order 11246. Moreover, compliance with the terms of the Decree in the future will constitute compliance with such laws, orders, and regulations as respects those issues dealt with in the Decree.

B. The EEOC will make reasonable cause determinations of charges filed against Bell Companies within the life of the Decree and to the extent that they relate to issues identified therein on the basis of whether or not the practices complained of violate the terms of the Decree. In the event that the EEOC determines that there is reasonable cause to believe that the Decree is being violated, it shall follow the compliance procedure as set forth below.

C. The government plaintiffs shall endeavor to coordinate their efforts to assure compliance with the Decree



and shall develop such procedures as may be appropriate to this end.

D. The government will promptly notify the Bell Company involved and AT&T of any complaints of noncompliance. Such Company will be given 60 days to investigate the complaint and conciliate with the government regarding the appropriate corrective action to be taken. At the end of this period, the government, if not satisfied may seek an appropriate judicial resolution of the question.

E. Each Bell Company is to be responsible for its compliance with the terms of the Agreement or Decree. The responsibility of AT&T, apart from responsibility for the compliance of its own departments, shall be limited to: (1) in case of an irreconcilable conflict between the government and an individual Bell Company, to use its good offices to aid in achieving a resolution of such conflict; (2) the provision of advice to its associated telephone companies as to the meaning of the Agreement or Decree and procedures for compliance; (3) where appropriate, the coordination of reports required by the terms of the Agreement or Decree; and (4) the provision of assistance on the development of the management assessment procedure provided in Part A. Section VII.

## VI. REPORTING

A. EEOC and OFCC will each receive summaries of the information compiled pursuant to Part A, Section IV.B. by each Bell Company for each of the first two full calendar quarters following the execution of this Agreement and annually thereafter during the duration of the Decree provided for in Part C, Section I.A. These quarterly and annual compilations will be forwarded in duplicate within 45 days subsequent to the second

full calendar quarter following the execution of this Agreement and within 45 days after the close of each calendar year, respectively.

B. During the term of this Agreement or the Decree provided for in Part C, Section I.A., except for the requirements of 29 C.F.R. Part 516, the filing of EEO-1 reports and reports required pursuant to the equal employment rules of the Federal Communications Commission (FCC), 47 C.F.R. §§1.815, 21.307, and 23.49, or such other reports of general application which are hereafter promulgated by EEOC, FCC, or the Department of Labor, the reports required by Part C, Section VI.A. of the Agreement will be exclusive, and the Bell Companies shall not be required to file any additional reports or, except as noted below,* submit to any compliance reviews with respect to obligations under the laws listed in Part C., Section I.A.

## VII. COLLECTIVE BARGAINING AGREEMENTS

This Agreement shall not be interpreted as requiring or permitting the abandonment of any provision in any Bell Company's collective bargaining agreement(s) except as required to maintain compliance with Federal law, Executive Orders and regulations promulgated pursuant thereto pertaining to discrimination in employment. The government asserts that all of the Bell Companies' obligations in this Agreement are required for compliance with Federal law; provided, however, that nothing in this Agreement

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* The above provision concerning compliance reviews shall not apply to investigations of charges by the EEOC pursuant to Section 706(b) of Title VII and to investigations pursuant to Section 11(a) of the Fair Labor Standards Act.



is intended to restrict the right of the Bell Companies and the collective bargaining representatives of their employees to negotiate alternatives to the provisions of this Agreement which would also be in compliance with Federal law.

To the extent that any Bell Company has in effect, in connection with the promotion and transfer of employees, a posting and bidding system, or other system, said system shall continue to be used. Provided, however, that such system will be modified to the extent necessary to conform with PART A, Section III of the Agreement.

Each Bell Company agrees that it will notify all appropriate collective bargaining representatives of the terms of this Agreement and of its willingness to negotiate in good faith concerning these terms.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective representatives on the day and year first above written.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, for itself and on behalf of its associated telephone companies as set forth herein.

By /s/ David Easlick
David Easlick, Vice President

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

By /s/ William H. Brown III
William H. Brown III, Chairman

THE U.S. DEPARTMENT OF LABOR

By /s/ Richard F. Schubert
Richard F. Schubert, Solicitor of Labor

/s/ William Kilberg
William Kilberg, Associate
Solicitor of Labor

/s/ Carin Ann Clauss
Carin Ann Clauss, Associate
Solicitor of Labor

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G. E. EXHIBIT NO. 35

Complaint in Communication Workers of America, AFL-CIO, et al., v. Illinois Bell Telephone Company, filed 4-13-73, in the Northern District of Illinois, Eastern Division, Case No. 73C-9599.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMUNICATION WORKERS OF AMERICA, AFL-CIO; ROSE MARIE BYARD and JEWEL WHITE; individually and on behalf of all similarly situated female employees of Illinois Bell Telephone Company,

Plaintiffs,

—vs—

ILLINOIS BELL TELEPHONE COMPANY,
Defendant.

CIVIL ACTION
NO. 73C 959

COMPLAINT

Now come Plaintiffs by their attorneys and complain of Defendant as follows:

Count I

1. This is a class action authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42



U.S.C. §2000e et seq. as amended (hereinafter referred to as "The Act"). Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1343(4), 42 U.S.C. §2000e-5(f), 28 U.S.C. 2201 and 2202 and 42 U.S.C. §1981.

2. Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class which Plaintiffs represent is composed of females who are employed or who were employed since July 2, 1965, but are no longer employed, or who might be employed, by Defendant Illinois Bell Telephone Company, an Illinois corporation in their facilities or operations in Chicago, Illinois and in other locations in the State of Illinois, who have been, are, and who will or may be adversely affected by the practices complained of herein. There are common questions of law and fact affecting the rights of the members of this class who are and who continue to be limited, classified, and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees and union members because of sex. These persons are so numerous that joinder of all members is impracticable. A common relief is sought, except as to the amount of damages suffered by each individual member of the class. The claims of the representative parties are typical of the class; the interests of said class are adequately represented by Plaintiffs. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members. Defendant has acted or refused to act on grounds generally applicable to the class, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

3. This is a proceeding (a) for a declaratory judgment

as to the rights of the parties, (b) for a preliminary and permanent injunction, restraining and enjoining Defendant from maintaining a policy, practice, custom, or usage of discriminating against Plaintiffs and other female members of this class because of sex, including discrimination in the treatment of female employees who are unable to work or who are absent from work due to pregnancy or childbirth or complications resulting therefrom as compared to employees who are absent due to other forms of temporary disabilities, and such other forms of discrimination on account of sex which are in violation of the Act, with respect to compensation, terms, conditions, and privileges of employment and limiting, segregating, and classifying employees of the Defendant, who are members of the class described in paragraph 3 above in ways which deprive or tend to deprive the individual Plaintiffs and other female persons in this class of equal employment opportunities and otherwise adversely affect their status as employees because of sex, and (c) for monetary and other appropriate relief.

4. Plaintiffs Rose Marie Byard and Jewel White are female citizens of the United States and are residents of Chicago and other communities, in the State of Illinois. Plaintiffs are or have been employed by the Defendant at its various locations and operations in and around the City of Chicago and in many other areas in the State of Illinois

5. Defendant Illinois Bell Telephone Company does business in the City of Chicago, State of Illinois, and in many other locations in the State of Illinois. It is engaged in the installation, operation and maintenance of telephone equipment and related types of communications equipment and in the sale of various kinds of communications services, and is an employer within the meaning of 42 U.S.C. §2000e-(b) or (c) in that it is enaged in an industry affecting commerce and employs many thousands of persons.



6. Plaintiff, Communications Workers of America, AFL-CIO (hereinafter referred to as "C.W.A.") is a person within the meaning of 42 U.S.C. §2000e(a) and it is a labor organization within the meaning of 42 U.S.C. §2000e(d) and (e) in that it is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with employers, including the Defendant, concerning grievances, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of the employees of the Defendant at its plants and other facilities in and around the City of Chicago and elsewhere in the State of Illinois. Communications Workers of America, AFL-CIO, has many thousands of members, including many thousands of female members employed by the Defendant.

7. At all times since July 2, 1964, and continuing until the present time, the Defendant has promulgated and maintained a policy, practice, custom, and usage made unlawful by Title VII of the Civil Rights Act of 1964, as amended, of limiting the employment opportunity of female employees of the Defendant because of sex, in that the Defendant has since the passage of the Act consistently discriminated against females as a class, including the individual Plaintiffs, and the members of the class described in paragraph 2 above, by failing to provide equal benefits, rights and privileges to females under temporary disability due to pregnancy or childbirth or complications resulting therefrom as are made available by the Defendant to male employees under temporary disability. The discriminatory policy, practice, custom and usage involve the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payments under health or disability insurance or sick leave plans, and other terms

or conditions of employment, concerning which the Plaintiffs and the class they represent suffer discriminatory treatment by reason of their sex.

8. Each of the individual Plaintiffs, and each member of the class represented by them, has suffered and will continue to suffer irreparable harm by reason of the illegal conduct of the Defendant. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein unless this Court affords them the equitable relief prayed for.

9. On or about April 25, 1972, Plaintiff C.W.A. filed a charge with the Equal Employment Opportunity Commission (referred to as EEOC) alleging the aforesaid unfair employment practices. Said charge was also duly deferred to the Fair Employment Practices Commission of the State of Illinois in accordance with the provisions of the Act. On or about August 31, 1972 the Director of the Chicago District Office of the EEOC issued his "District Director's Findings of Fact" finding that the Defendant's policy does not afford female employees the same benefits for maternity or pregnancy as are provided for other temporary disabilities. On or about March 20, 1973 the EEOC notified the Plaintiffs that Defendant's compliance with the Act had not been accomplished within the period allowed to the EEOC by Title VII of the Act and that pursuant to the Act a civil action could be instituted in the appropriate United States District Court.

WHEREFORE, Plaintiffs respectfully pray that this Court advance this case on the docket, order a speedy hearing at the earliest practical date, and, upon such hearing,

(a) Declare the rights of the parties, finding that the aforesaid practice, policy, usage and conduct of the Defendant is violative of the Act;



(b) Grant Plaintiffs and the class they represent a preliminary and permanent injunction enjoining Defendant from conduct violative of the Act;

(c) Order Defendant by mandatory injunction to take such affirmative actions as are necessary to assure that the effects of said violations are eliminated and do not continue to adversely affect the employment rights of Plaintiffs and the class they represent;

(d) Order Defendant to provide monetary relief including backpay to any of the Plaintiffs or members of the class they represent for monetary losses sustained by them by reason of the violations of the Act by Defendant;

(e) Order Defendant to pay Plaintiffs' costs in this action;

(f) Order the Defendant to pay a reasonable attorneys' fee; and

(g) Order such other and additional relief as to the Court seems necessary or proper.

/s/ Irving M. Friedman
IRVING M. FRIEDMAN
HAROLD A. KATZ
CHARLES V. KOONS

KATZ & FRIEDMAN
7 South Dearborn Street
Chicago, Illinois 60603
312/263-6330

KANE & KOONS
1100 Seventeenth Street, N.W.
Washington, D.C. 20036
202/659-2044

Of Counsel

GE EXHIBIT NO. 36

LIBRARY OF CONGRESS REGULATIONS

dated 3/8/71 re: Sick Leave, LCR 2015-5.

Subject: Sick Leave

A. *Accrual of Sick Leave.* All staff members will earn 4 hours of sick leave for each bi-weekly pay period to be credited at the beginning of the pay period in which it is earned. There is no qualifying period for the use of sick leave.

B. *Grant of Sick Leave.* Sick leave shall be granted by designated supervisors when staff members are incapacitated for the performance of their duties by sickness, injury, pregnancy and confinement, or for medical, dental, or optical examination or treatment, or when a member of the immediate family of the staff member has a contagious disease (see LCR 2015-2, Section 2.E.) and requires the care and attendance of the staff member, or when, through exposure to contagious disease, the presence of the staff member at his post of duty would jeopardize the health of others.

C. *Application for Sick Leave.* Staff members who are sick shall be responsible for notifying their supervisors as soon as possible of their illness and the date they expect to return to duty. If it is impossible to estimate the date of return when reporting an absence covered by sick leave, it is the staff member's responsibility to provide such estimate without delay when a forecast is possible. Written application for sick leave shall be filed on the prescribed form when he returns



to duty. Requests for sick leave for medical, dental, or optical examinations shall be submitted for approval in advance.

D. *Supporting Evidence.* Where absence from duty exceeds three workdays, it must be supported by a medical certificate or a statement, signed by the staff member, stating the reasons why he did not have a physician, which must be filed within 5 days after return to duty. Applications for sick leave for a staff member to care for a member of his immediate family having a disease requiring isolation, quarantine, or restriction of movement, or when the staff member is required to be absent because of exposure to contagious disease, require a statement from the local health authorities or a physician indicating the period of isolation, quarantine, or restriction of movement of the patient. The division chief shall determine whether the statement of the staff member in lieu of a medical certificate shall be considered sufficient evidence to support the request for sick leave. Upon recommendation of the division chief, and with the approval of the Director of Personnel, staff members may be required to furnish medical certificates for absences of three workdays or less.

E. *Sickness During Annual Leave.* When sickness occurs while a staff member is on annual leave, the period of illness may be charged as sick leave, subject to the provisions of D. above. In such cases a medical certificate must be submitted. Dental, physical or optical examinations requiring a total of less than one day and occuring during a time when the staff member is on annual leave shall not be converted to sick leave, however.

(Supersedes May 3, 1962 issuance of page 1 of LCR 2015-5)

F. *Advance of Sick Leave.* In cases of serious disability or ailment, staff members with other than temporary status may be granted sick leave in advance of its accrual, up to a total of 30 days; in granting such advance sick leave the following facts shall be taken into consideration:

* * * * *

Sick leave shall not be advanced in maternity cases (see LCR 2015-13) or in instances in which a staff member is absent because a member of his family has a contagious disease.

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G.E. EXHIBIT NO. 37
Dept of Health, Education and Welfare
Employee Leave Benefits, dated 11/22/65,
Chapter IV, Guide 5, Supp. 1.

*Page 12* 13 *Advance of Sick Leave*

a. Sick leave up to 30 days may be advanced in case of serious disability or ailment, and when required by the exigencies of the situation. The leave-approving officer must determine that the illness is serious and that an exigency exists. Usually the approving official for advance sick

* * *

*Page 13*

b. Sick leave cannot be advanced for pregnancy or confinement, exposure or care for a person with a contagious



disease, or when it is likely the employee will retire, be separated or resign before the advance leave will be earned. There must be a reasonable expectation that the employee will return to duty.

* * *

*Page 24* 23. *Maternity Leave*

b. Normally the period of absence for maternity reasons is about 14 weeks—6 weeks before expected date of delivery, unless an operating agency head establishes by regulation that a longer period of incapacitation is normal in his agency for types of positions of a strenuous or physically exacting nature. This is referred to hereafter as the "usual presumed" period of incapacitation. It is Department policy not to continue the employee in duty status during the actual or "usual presumed" period of incapacitation. She may be permitted to work during

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G. E. EXHIBIT NO. 38

Petition of EEOC for Suspension, Hearing, Intervention and Declaration of Unlawfulness, filed with FCC in matter of AT & T, Revision of Tariff FCC No. 263,

* * * BEFORE THE * * *
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

* * *

PETITION FOR SUSPENSION, HEARING, INTERVENTION AND DECLARATION OF UNLAWFULNESS

The Equal Employment Opportunity Commission (EEOC) Files this Petition pursuant to 47 C.F.R. §§ 1.773, 23.49(e)(1)(iv) and 23.49 (e)(2).

The petitioner, EEOC, shows:

1) That EEOC is the federal agency charged with administering Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* The post office address of the EEOC is 1800 G Street, N.W., Office of the Chairman, Washington, D. C. 20506.

2) That American Telephone and Telegraph Company (hereafter, AT&T) is a holding corporation controlling twenty-four operating companies, which are communications common carriers providing telephone and telegraph services to the public under a government-sactioned monopoly. The post office address of AT&T is 32 Avenue of the Americas, New York, New York,



3) That AT&T, Long Lines Department, has filed changed tariff material, bearing Tariff FCC No. 263, proposing a rate increase for long-distance telephone calls, effective January 21, 1971, for the twenty-four operating companies controlled by AT&T. This rate increase is designed to produce additional annual net earnings of $250 million before income taxes.

4) That the proposed rate increase constitutes a rate established by the Commission and as such is unlawful in that it has been established without following the procedures required by 47 U.S.C. §205, 54 U.S.C. §§551(4)(5), 553(b), 556(d), 552(a)(1)(B), 552(a)(1)(E).

5) That no "good cause" has been shown why the proposed rate increase should be effective prior to 60 days notice as required by 47 U.S.C. §203(b) and 47 C.F.R. §61.58 and that no application for waiver or modification of the notice requirements has been made by AT&T as required by 47 C.F.R. §61.151.

6) That AT&T's operating companies engage in pervasive, system-wide, and blatantly unlawful discrimination in employment against women, blacks, Spanish-surnamed Americans, and other minorities. Such discrimination violates the following laws, regulations, and orders:

a. Sections 201(b), 202(a), 214, 501, and 502 of the Federal Communications Act of 1934, 47 U.S.C. §§201(b), 202(a), 214, 501, and 502;

b. 47 C.F.R. §§23.49(a), (b), and (c);

c. Sections 703(a) and 703(d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2(a) and 2000e-2(d);

d. The Equal Pay Act of 1963, 20 U.S.C. §206(d)(1);

e. Executive Order 11246, 30 F.R. 12,319 (1965), as amended by Executive Order 11375, 32 F.R. 14303 (1967);

f. The Civil Rights Act of 1866, 42 U.S.C. §1981;

g. The Fair employment practice acts of approximately 30 states and the District of Columbia;

h. The fair employment practice ordinances of numerous large cities; and

i. (illegible)

7) That because AT&T's Operating companies engage in pervasive and unlawful discrimination in employment against women, blacks, Spanish-surnamed Americans, and other minorities, any rate increase proposed and filed by AT&T with the Commission is unjust and unreasonable, in violation of 47 U.S.C. §§201(b) and 202(a). Pursuant to 47 U.S.C. §§154(i), 204, 205 and 47 C.F.R. §23.49(e)(2), the Commission is under a statutory obligation to find any proposed rate increase unjust and unreasonable, and to declare it unlawful.

8) That the AT&T system is a government-sanctioned monopoly, whose market and profits are quaranteed by the United States government and whose practices are otherwise extensively regulated by the government. Under these circumstances, approval by the Commission of any proposed rate increase constitutes a denial of due process of law under the Fifth Amendment to the United States Constitution to those women, blacks, Spanish-surnamed Americans, and other minorities who are subject to the discriminatory practices of AT&T's operating companies. Therefore, the Commission has a constitutional obligation to declare illegal any proposed rate increase.

9) That the EEOC incorporates herein by reference the entire Memorandum in Support of EEOC Petition to Intervene previously filed under Transmittal No. 10989.



10) That the EEOC incorporates by reference the entire Request For Further Relief previously filed by the EEOC in regard to Transmittal No. 10989.

11) That this Petition is *NOT* a formal complaint as allowed by 47 C.F.R. §1.721.

12) Then, as required by Rule 18 of the Federal Rules of Appellate Procedure, Petitioner hereby requests that, if this Petition is denied in whole or in part, the Commission stay its decision or order pending direct review in the appropriate United States Court of Appeals.

Wherefore, EEOC asks that the Commission require 60 days notice for any proposed rate increase, suspend the rate increase proposed by AT&T, conduct a hearing, permit the EEOC to participate at said hearing and to develop fully its view that AT&T's operating companies discriminate, and declare any proposed rate increase unlawful until AT&T has ceased such discrimination.

Dated at Washington, D.C., this 8th day of January, 1971.

WILLIAM H. BROWN,III
Chairman

Equal Employment Opportunity
Commission
1800 G Street, N.W.
Washington, D. C. 20506

G.E. EXHIBIT NO. 39

EEOC Memorandum to Employees,
dated 1/26/73 re "Advance Sick Leave".

1124

UNITED STATES GOVERNMENT
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Date: January 26, 1973

TO: All Employees
FROM: Ronald B. Krueger /s/
SUBJECT: Advance Sick Leave

It has been brought to our attention that there is some question as to why maternity cases were singled out as the only example in our Adfance Sick Leave memorandum dated December 20, 1972. Our reason for indicating maternity cases as a specific example was that GSA Payroll has, on a continuing basis, refused to honor our requests for advance sick leave for normal pregnancy purposes since it is in direct conflict with U.S. Civil Service Commission rules and regulations. It was our feeling that if all employees were made aware of this fact, it would, perhaps, stop the numerous requests from coming into the Personnel Division.

Our maternity leave policy still permits up to six months of leave – sick, annual, leave without pay, or any combination thereof. In some instances, the time period can be extended.

We hope the above clarifies our previous memorandum, concerning advance sick leave for pregnancy and confinement.

Approved for circulation:

/s/ * * * D. Butler
Director, Office of Management

/s/ Thomas G. * * *
Executive Director



G.E. EXHIBIT NO. 40

EEOC Manual Sec. 911–Excerpts of Pages 1-6
Dated 11-15-68 & 7-25-69

1125

Date: Nov. 15, 1968

Subject: Leave
Section: 911
Page: 1

## X. PURPOSE

the purpose of this Section is to state overall requirements of law, regulation, and Commission policy concerning leave of absence. Questions concerning leave policies or procedures not answered herein should be referred to the Office of Administration.

## XI. COVERAGE

All employees are subject to the leave provisions of this Section except:

the Chairman and Commissioners who are Presidential appointees,
Part-time or employees without a regular tour of duty, and
Employees without compensation or on a "fee" basis.

## XII. ANNUAL LEAVE

Annual leave is absence with pay for vacation or other personal reasons. It is normally planned in advance and is always subject to approval by the employee's immediate supervisor.

### A. Accrual

Full-time employees earn annual leave as follows:

1. One-half pay for each full payperiod for employees with less than three years service,

GENERAL COUNSEL'S EXHIBIT NO. 40

EEOC MANUAL

**Subject: Leave** **Date:** Nov. 15, 1968 **Section:** 911

* * *

**I. PURPOSE**

The purpose of this Section is to state overall requirements of law, regulation, and Commission policy concerning leave of absence. Questions concerning leave policies or procedures not answered herein should be referred to the Office of Administration.

**II. COVERAGE**

All employees are subject to the leave provisions of this Section except:

The Chairman and Commissioners who are Presidential appointees,
Part-time or WAE employees without a regular tour of duty, and
Employees without compensation or on a "fee" basis.

**III. ANNUAL LEAVE**

Annual leave is absence with pay for vacation or other personal reasons. It is normally planned in advance and is always subject to approval by the employee's immediate supervisor.

A. Accrual

Full-time employees earn annual leave as follows:

1. One-half day for each full payperiod for employees with less than three years' service,



2. Three-fourths day for each full payperiod (except one and one-fourth days for the last payperiod in the calendar year) for employees with * * *

* * *

EEOC MANUAL

**Page 4(R-1)** **Section:** 911 **Date:** July 25, 1969

* * *

**V. MATERNITY LEAVE**

* * *

Employees will begin maternity leave not later than four weeks prior to the expected date of delivery.

* * *

# G.E. EXHIBIT NO. 41A - 1972 Follow-Up Turnover Data

1972 Follow-up Turnover Data

| | Ashland | December | Evansville | Lawrenceburg | Owensboro | Portsmouth | Spruance | Total/ Weighted Average |
|---|---|---|---|---|---|---|---|---|
| Employment | | | | | | | | |
| Total | 1352 | 1358 | 1167 | 1167 | 3453 | 4962 | 1053 | 14162 |
| Males | 605 | 395 | 309 | 309 | 231 | 1349 | 649 | 3926 |
| Females | 229 | 959 | 858 | 858 | 3221 | 3613 | 404 | 10292 |
| 30 Terminations | | | | | | | | |
| Total | 198 | 405 | 401 | 401 | 403 | 1165 | 691 | 4265 |
| Males | 88 | 147 | 51 | 51 | 65 | 163 | 215 | 1929 |
| Females | 110 | 361 | 350 | 350 | 138 | 1002 | 404 | 3850 |
| 90 Quits | | | | | | | | |
| Total | 116 | 337 | 320 | 320 | 123 | 1167 | 370 | 4756 |
| Males | 58 | 47 | 96 | 96 | 53 | 1099 | 376 | 1825 |
| Females | 58 | 453 | 334 | 334 | 70 | 1345 | 69 | 4931 |

1972 Follow-up Turnover Data

| | Ashland | December | Evansville | Lawrenceburg | Owensboro | Portsmouth | Spruance | Weighted Average |
|---|---|---|---|---|---|---|---|---|
| Gross As % of Employment | | | | | | | | |
| Total | 14% | 32% | 34% | 11% | 6% | 24% | 5% | 12% |
| Males | 15% | 36% | 19% | 19% | 7% | 43% | 9% | 17% |
| Females | 11% | 32% | 41% | 11% | 6% | 28% | 9% | 23% |
| As % of Total Separations | | | | | | | | |
| Total | 6% | 32% | 33% | 11% | 9% | 24% | 5% | 13% |
| Males | 10% | 31% | 14% | 7% | 11% | 31% | 6% | 11% |
| Females | 9% | 38% | 38% | 11% | 5% | 28% | 8% | 18% |



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# 1972 FOLLOW-UP TURNOVER DATA

| | Seven Locations Total | Four Locations Total | Combined Total |
|---|---|---|---|
| Employment | | | |
| Total | 41 061 | 31 940 | 73 001 |
| Males | 26 172 | 26 791 | 52 917 |
| Females | 14 889 | 5 199 | 20 084 |
| 1972 Terminations | | | |
| Total | 6 736 | 3 213 | 10 149 |
| Males | 3 733 | 2 535 | 6 347 |
| Females | 3 214 | 688 | 3 902 |
| 1972 Quits | | | |
| Total | 5 427 | 2 214 | 7 643 |
| Males | 3 532 | 1 707 | 4 539 |
| Females | 2 667 | 507 | 3 174 |



# 1972 FOLLOW-UP TURNOVER DATA

| | Seven Locations Arithmetic Average | Four Locations Arithmetic Average | Seven Locations Weighted Average | Four Locations Weighted Average | Combined Arithmetic Average | Combined Weighted Average |
|---|---|---|---|---|---|---|
| Terminations As % of Total Employment | | | | | | |
| Total | 22% | 20% | 19% | 10% | 22% | 14% |
| Males | 23% | 21% | 14% | 9% | 22% | 13% |
| Females | 23% | 19% | 23% | 13% | 21% | 19% |
| Quits As % of Total Employment | | | | | | |
| Total | 18% | 14% | 13% | 7% | 17% | 10% |
| Males | 18% | 14% | 11% | 6% | 16% | 9% |
| Females | 18% | 12% | 18% | 10% | 16% | 16% |



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# G.E. EXHIBIT No. 41B - 1972 Turnover Data

1972 TURNOVER DATA

| | Salaried | Tyler | Trainees | Pt. Wayne | Total |
|---|---|---|---|---|---|
| Employment | | | | | |
| Total | 37 700 | 1 891 | 707 | 1 691 | 3/ 790 |
| Males | 23 700 | 1 528 | 523 | 970 | 26 721 |
| Females | 9 000 | 363 | 184 | 703 | 5 199 |
| 1972 Terminations | | | | | |
| Total | 3 870 | 705 | 350 | 188 | 3 313 |
| Males | 1 877 | 369 | 333 | 91 | 2 670 |
| Females | 993 | 91 | 97 | 107 | 488 |
| 972 Quits | | | | | |
| Total | 1 676 | 302 | 175 | 112 | 2 265 |
| Males | 1 030 | 226 | 149 | 52 | 1 457 |
| Females | 321 | 16 | 31 | 49 | 417 |



1972 FOLLOW-UP TURNOVER DATA

| | Salaried | Tyler | Trainees | Pt. Wayne | Weighted Arithmetic Average |
|---|---|---|---|---|---|
| Termination Rate % of Total Employment | | | | | |
| Total | 9% | 31% | 40% | 11% | 10% |
| Males | 8% | 32% | 41% | 7% | 9% |
| Females | 10% | 11% | 35% | 23% | 13% |
| Quits As % of Total Employment | | | | | |
| Total | 6% | 16% | 45% | 6% | 7% |
| Males | 5% | 12% | 34% | 5% | 6% |
| Females | 10% | 4% | 33% | 10% | 9% |

G.E. EXHIBIT NO. 42 - Cost Estimates Regarding Maternity Benefits. Statistical Study by Paul H. Jackson, Fellow, Society of Actuaries.

A. Privately Insured Short-term Disability Coverage

The cost for maternity coverage on the same basis as any other disability was developed on the following assumptions:

1. Annual births in United States among working mothers approximately 1,463,000 based on annual rate of birth by age of mother assumed equal to the 1968 live birth rates (latest published), Table 56, Statistical Abstract of the United States, discounted by a judgment factor of .9 to allow for a lower rate of birth among married women in the working population than among married women generally. See attached worksheet.

2. 40% of working employees under 65 are covered by group sickness and accident insurance. (Source Book of Health Insurance 1972-1973, page 25, and Special Labor Force Report 144, Bureau of Labor Statistics, Table B.)

3. Insurance company premiums for short-term disability approximately 123% of claim payments, Table 735, American Almanac–Source–U.S. Social Security Administration–S.S. Bulletin, April 1972.

4. Average benefit $1,276 based on 45% under 13 week plans with $60 average benefit, 50% under 26 week plans with $70 average benefit, 5% under 52 week plans with $80 average benefit. (Source Book of Health Insurance 1972-1973, 12th Annual Survey 1971, Health Insurance Institute and 1971 Reports Mortality and Morbidity



Experience, Society of Actuaries.) Utilization–13 weeks under 13 week plans, 23 weeks under 26 week plans and 30 weeks under 52 week plans. (Judgment item assuming modest claim abuse and malingering with maximum claim controls.)

5. Total Annual Cost - $918,460,000. (1,463,000 x 1.23 x $1,276 as per above.)

6. Present Annual Cost - $114,016,000 based on 40% of insured plans providing 6 week maternity benefit averaging $396. (Source – 1971 Reports.) (1,463,000 x .4 x .4 x 1.23 x 396.)

7. Added Annual Cost (5-6) - $804,000,000.

B. Sick Leave Program

Added cost under sick leave programs $406,000,000 based on annual sick leave payments projected to $1,070,000,000 in 1973 (Source – Research and Statistics Note 23, DHEW Pub. No. SSA 73-11701) and same ratio of increase as applicable to short-term disability (804/2121).

C. Long-term Disability Coverage

Added annual cost $143,000,000 based on 10% of workforce with LTD coverage (Source Book of Health Insurance, p. 25) and 5% of covered births (7315) claiming disability and collecting average benefit of $75 per week for 5 year average claim. The 7315 claims at 5% of total births is an estimate of uncontrollable claim abuse such as feigned disability based on claims of mental and nervous ailments, etc. that cannot be objectively disproven. (It was assumed that all claims presented under disability pension provisions could be denied.)

D. Total Estimated Annual Cost - $1,353,000,000.

Respectfully submitted,

/s/ PAUL H. JACKSON
Paul H. Jackson
Fellow, Society of Actuaries

July 17, 1973

- - - - - - - - -



**Estimated Annual Births**
**Working Population 1972**

| Central Age (1) | Birth Rate per 1,000 Population 1/ (2) | Total Female Population 1971 2/ (3) | Annual Births (2)x(3) (4) | Married Females Husband Present 2/ (5) | Married Female Workers Husband Present 2/ (6) | Estimated Annual Births Among Female Workers (4)x(6)÷(5) (7) |
|---|---|---|---|---|---|---|
| 17 | 66 | 7,547,000 | 498,102 | 866,000 | 320,000 | 184,056 |
| 22 | 167 | 8,754,000 | 1,461,918 | 4,842,000 | 2,276,000 | 687,180 |
| 27 | 140 | 7,051,000 | 987,140 | 5,466,000 | 2,102,000 | 379,614 |
| 32 | 75 | 5,903,000 | 442,725 | 4,831,000 | 2,004,000 | 183,652 |
| 37 | 36 | 5,825,000 3/ | 209,700 | 4,771,000 3/ | 2,270,000 3/ | 99,773 |
| 42 | 10 | 5,825,000 3/ | 58,250 | 4,771,000 3/ | 2,269,000 3/ | 27,703 |
| 47 | 1 | 6,089,000 3/ | 6,089 | 4,735,000 3/ | 2,317,000 3/ | 2,980 |
| Total | | 74,580,000 | 3,663,924 | 45,443,000 | 18,530,000 | 1,564,988 |

1/ Table 56 Statistical Abstract (Table 65, American Almanac)
2/ Table B Special Labor Force Report 144, Bureau of Labor Statistics, U.S. Department of Labor;
3/ Data available only for two central age groups as follows: Col.(3) 11,650 for 35-44, 12,177 for 45-54 and
Col.(5) 9,541 for 35-44 and 9,470 for 45-54, Col.(6) 4,539 for 35-44 and 4,634 for 45-54.

Married Woman (Husband Present) in Labor Force March 1972 = 19,249 (Table 7, p. 36, Mo. Labor Rev., April 1973).

Discount for Lower Birth Rate Working Mothers .9.

Estimated Annual Births $\frac{1,564,958 \times 19,249}{18,530} \times .9 = 1,463,113$

G.E. EXHIBIT NO. 47 - List of Published Writings of Paul Jackson, Actuary.

ACTUARIAL PAPERS

1. "Experience Rating", Transactions, Society of Actuaries, Vol. 5.

2. "Investment Risk for Pension Funds", The Proceedings, Conference of Actuaries in Public Practice, Vol. XX.

3. "The Senate Labor Subcommittee Study of Private Pension Plans - An Actuarial Appraisal", Proc. C.A., Vol. XXI.

   Co-authored with James A. Hamilton:

4. "The Valuation of the Equity Assets of Pension Funds", Transactions, 18th International Congress of Actuaries, Vol. II.

5. "The Valuation of Pension Fund Assets", T.S.A., Vol. XX.

BOOKS

1. Chapter 24, "Group Paid-up and Group Permanent Life Insurance", *Life and Health Insurance Handbook,* Edited by D. W. Gregg (Irwin, 1959).

2. Chapter 12, "Experience Rating in Group Life Insurance", *Group Insurance Handbook,* Edited by Robert Eilers and Robert Crowe (Irwin, 1965).

3. Chapter 5, "Income Replacement", *The Total Approach to Employee Benefits,* Edited by Deric, AMA, 1967.



4. Chapter 41, "Trust Fund Pension Plans", *Life and Health Insurance Handbook,* Edited by Gregg and Lucas (Irwin, 1972).

GENERAL PAPERS

1. "Self Insurance and Group Insurance", CLU Journal, Vol. XVI, No. 4.

2. "Planning and Developing a Sound Form of Employee Long-Term Disability Benefits", The Insurance Manager, 1963.

3. "Developments in Group Insurance", CLU Journal, Vol. XIX, No. 4.

4. "Disability Benefits in Pension Plans and Group Insurance Programs", PW News, April, 1966.

5. "How and When to Recognize Appreciation in Valuing Pension Assets", Summary of Proceedings, Third Annual Corporate Pension Conference, DLJ, 1966.

6. "Criticism of 'First Dollar' Health Insurance Coverage", PW News, July, 1966.

7. "New Rules on Social Security Integration", Proceedings, First Annual Conference on Employee Benefits, 1967.

8. "Current Considerations in the Selection of Actuarial Assumptions", PW News, January, 1968.

9. "Public Employee Retirement - The Future of Social Security Benefits and Their Impact on Integrated Pension Plans", Proceedings, 67th Annual Conference, Municipal Finance Officers Association of the United States and Canada.

10. "The Long Range Effect of New Integration Rules on Benefit Plans", Proceedings, 5th Annual Corporate Pension Conference, DLJ, 1968.

11. "The Dilemma of Social Security Integration", Retirement Plan Perspective, Manufacturers-Hanover, September-October, 1968.

12. "Survivor Benefits", PW News, January, 1970.

13. "Toward a Full Share in Abundance", Profit Sharing, Vol. 18, No. 4., April, 1970.

14. "Pensions, A Different Point of View", Private Pensions and the Public Interest, AEI, 1970.

15. "Investment Risks for Pension Funds", Proceedings, 4th Annual Conference on Employee Benefits, 1970.

16. "The Impact of Federal Law and Regulation on Benefit Design and Change", Proceedings, 5th Annual Conference on Employee Benefits, 1971.

17. "The Role of the Actuary in Collective Bargaining", TSA, Vol. XXIII, March, 1972.

18. "Early Retirement - U.S. Patterns and Problems", Benefits International, June, 1972.

19. "Investment Advice and Performance Analyses in the United States", IACA, 1972.

20. "Early Retirement", PW News, September-October, 1972.

21. "Effect of the New Higher Levels of Social Security Benefits", Risk Management, June-July, 1973.



## BOOK REVIEWS

*Measuring the Investment Performance of Pension Funds for the Purpose of Inter-Fund Comparison,* Cohen, Dean, Durand, Fama, Fisher, Lorie, Shapiro, TSA, April, 1969.

*Investment Practices, Performance and Management of Profit Sharing Trust Funds,* Metzger, Bert L., TSA, November, 1969.

*Pension Fund Investment Management,* C.P.A. Research Seminar (Esmond B. Gardner, Editor), TSA, April, 1970.

*Early Retirement - The Decision and the Experience,* Barfield, Richard, and Morgan, James, TSA, April, 1970.

*Early Retirement Benefits - Panacea, Purgatory or Palliative,* Blagden, Harry E., TSA, April, 1971.

*The Automobile Worker and Retirement: A Second Look,* Barfield, Richard E., TSA, April, 1971.

*Private Pensions and the Public Interest,* American Enterprise, Institute, TSA, April, 1971.

*Early Retirement: A Survey of Company Policies and Retirees' Experiences,* Greene, Mark R., Pyron, M. Charles, Manion, U. Vincent, Winklevoss, Howard, TSA, April, 1971.

*1970 Study of Industrial Retirement Plans,* Bankers Trust Company, TSA, April, 1971.

*Pensions and Severance Pay for Displaced Defense Workers,* Folk, Hugh and Hartman, Paul, TSA, March, 1972.

*Private Pension Scheme Finance,* Tutt, Leslie and Sylvia, TSA, March, 1972.

*The Fundamentals of Pension Mathematics,* Berin, TSA, September, 1972.

*Early Retirement Programs,* Myer and Fox, TSA, September, 1972.

*Analysis of the Cost of Vesting in Pension Plans,* Winklevoss, TSA, March, 1973.

*Income - Background and Issues,* 1971 White House Conference on Aging, TSA, March, 1973.

*Protecting Purchasing Power in Retirement,* Mackin, TSA, March, 1973.

*Flexibility of Retirement Age,* OECD, TSA, June, 1973.

*Canadian Handbook on Pension and Welfare Plans,* Mercer and Coward, TSA, June, 1973.

*You and Your Pension* - Nader and Blackwell, PW News, May, 1973.

## WRITTEN DISCUSSION OF PAPERS

| Transactions Society of Actuaries Volume and Page | | Topic |
|---|---|---|
| 1963 | 439-445 | "Collective Risk Theory" |
| 1966 | 76-79 | "Concepts of Adequacy in Pension Plan Funding" |
| 1966 | 459-461 | "Excess Ratio Distribution in Risk Theory" |
| 1969 | 219-221 | "Empirical Approach to Credibility Factors" |
| 1970 | 483-485 | "Asset Values under Equity Based Products" |
| 1972 | 133-139 | "Frequency of Pension Plan Actuarial Valuation" |



## PUBLISHED DISCUSSIONS

| Transactions Society of Actuaries Volume and Pages | | Topic |
|---|---|---|
| 1957 | 65-66 | Group Insurance |
| 1959 | 482 | Employee Benefit Plans |
| 1964 | 249 | Optional Accident Insurance |
| 1964 | 275-277 | "New Money" Interest Rates |
| 1965 | 100-103 | Long Term Disability Benefits |
| 1969 | 362 | Utility Theory |
| 1972 | 386-390 | Principles and Practices for Pension Plans |

## OFFICIAL STUDY NOTES–Society of Actuaries

| | |
|---|---|
| 1961 | Experience Rating |
| 1963 | Long Term Disability Insurance |
| 1964 | Group Permanent Life Insurance |

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G.E. EXHIBIT NO. 48 - Sex Discrimination Guidelines for Government Contractors, United States Office of Federal Contract Compliance, CCH Employment Practices, pages 2169 to 2169-3, 10-5-72

*Office of Federal Contract Compliance*

### SEX DISCRIMINATION GUIDELINES for GOVERNMENT CONTRACTORS

¶ 4340

The following Sex Discrimination Guidelines, amending Chapter 60 of Title 41 of the Code of Federal Regulations by adding a new Part 60-20, were published in the Federal Register of June 9, 1970 (35 F. R. 8888).[1] The

[1] Authority.–Issued under Section 201, Executive Order 11246 (30 F. R. 12819), and Executive Order 11375 (32 F.R. 14303).

Guidelines constitute interpretations as to the requirements with respect to sex discrimination imposed upon government contractors and subcontractors and upon federally-assisted construction contractors and subcontractors by Executive Order 11246 as amended by Executive Order 11375. The Guidelines became effective June 9, 1970.

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| 60-20.2 | Recruitment and Advertisement | 4340.02 |
| 60-20.3 | Job Policies and Practices | 4340.03 |
| 60-20.4 | Seniority Systems | 4340.04 |
| 60-20.5 | Discriminatory Wages | 4340.05 |
| 60-20.6 | Affirmative Action | 4340.06 |


[¶4340.01]

Section 60-20.1. Title and Purpose.—The purpose of the provisions in this part is to set forth the interpretations and guidelines of the Office of Federal Contract Compliance regarding the implementation of Executive Order 11375 for the promotion and insuring of equal opportunity for all persons employed or seeking employment with Government contractors and subcontractors or with contractors and subcontractors performing under federally-assisted construction contracts, without regard to sex. Experience has indicated that special problems related to the implementation of Executive Order 11375 require a definitive treatment beyond the terms of the order itself. These interpretations are to be read in connection with existing regulations, set forth in Part 60-1 of this chapter.

[¶4340.02]

Sec. 60-20.2. Recruitment and Advertisement.—(a) Employers engaged in recruiting activity must recruit



employees of both sexes for all jobs unless sex is a bona fide occupational qualification.

(b) Advertisement in newspapers and other media for employment must not express a sex preference unless sex is a bona fide occupational qualification for the job. The placement of an advertisement in columns headed "Male" or "Female" will be considered an expression of a preference limitation, specification or discrimination, based on sex.

[¶4340.03]

Sec. 60-20.3. Job Policies and Practices.—(a) Written personnel policies relating to this subject area must expressly indicate that there shall be no discrimination against employees on account of sex. If the employer deals with a bargaining representative for his employees and there is a written agreement on conditions of employment, such agreement shall not be inconsistent with these guidelines.

(b) Employees of both sexes shall have an equal opportunity to any available job that he or she is qualified to perform, unless sex is a bona fide occupational qualification.

> Note: In most Government contract work there are only limited instances where valid reasons can be expected to exist which would justify the exclusion of all men or all women from any given job.

(c) The employer must not make any distinction based upon sex in employment opportunities, wages, hours, or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar "fringe benefits" the employer will not be considered to have violated these guidelines if his contri-

butions are the same for men and women or if the resulting benefits are equal.

(d) Any distinction between married and unmarried persons of one sex that is not made between married and unmarried persons of the opposite sex will be considered to be a distinction made on the basis of sex. Similarly, an employer must not deny employment to women with young children unless it has the same exclusionary policies for men; or terminate an employee of one sex in a particular job classification upon reaching a certain age unless the same rule is applicable to members of the opposite sex.

(e) The employer's policies and practices must assure appropriate physical facilities to both sexes. The employer may not refuse to hire men or women, or deny men or women a particular job because there are no restroom or associated facilities, unless the employer is able to show that the construction of the facilities would be unreasonable for such reasons as excessive expense or lack of space.

(f) (1) An employer must not deny a female employee the right to any job that she is qualified to perform in reliance upon a State "protective" law. For example, such laws include those which prohibit women from performing in certain types of occupations (e.g., a bartender or a core-maker); from working at jobs requiring more than a certain number of hours; and from working at jobs that require lifting or carrying more than designated weights.

(2) Such legislation was intended to be beneficial, but, instead, has been found to result in restricting employment



opportunities for men and/or women. Accordingly, it cannot be used as a basis for denying employment or for establishing sex as a bona fide occupational qualification for the job.

(g) (1) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female employee meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. The conditions applicable to her leave (other than the length thereof) and to her return to employment, shall be in accordance with the employer's leave policy.

(2) If the employer has no leave policy, childbearing must be considered by the employer to be a justification for a leave of absence for a female employee for a reasonable period of time. Following childbirth, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her original job or to a position of like status and pay, without loss of service credits.

(h) The employer must not specify andy differences for male and female employees on the basis of sex in either mandatory or optional retirement age.

(i) Nothing in these guidelines shall be interpreted to mean that differences in capabilities for job assignments do not exist among individuals and that such distinctions

may not be recognized by the employer in making specific assignments. The purpose of these guidelines is to insure that such distinctions are not based upon sex.

[¶4340.04]

Sec. 60-20.4. Seniority Systems.—Where they exist, seniority lines and lists must not be based solely upon sex. Where such a separation has existed, the employer must eliminate this distinction.

[¶4340.05]

Sec. 60-20.5. Discriminatory Wages.—(a) The employer's wages schedules must not be related to or based on the sex of the employees.

> Note: The more obvious cases of discrimination exist where employees of different sexes are paid different wages on jobs which require substantially equal skill, effort and responsibility and are performed under similar working conditions.

(b) The employer may not discriminatorily restrict one sex to certain job classifications. In such a situation, the employer must take steps to make jobs available to all qualified employees in all classifications without regard to sex. (Example: An electrical manufacturing company may have a production division with three functional units: One (assembly) all female; another (wiring), all male; and a third (circuit boards), also all male. The highest wage attainable in the assembly unit is considerably less than that in the circuit board and wiring units. In such a case the employer

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G.E. EXHIBIT NO. 49 - Equal Employment Opportunity Commission, "Guidelines on Discrimination Because of Sex"—Pre-1972 Version (29 CFR Par. 1604, as revised as of Jan. 1, 1972).

## PART 1604—GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

Sec.
1604.1 Sex as a bona fide occupational qualification.

1604.2 Separate lines of progression and seniority systems.

Sec.
1604.3 Discrimination against married women.

1604.4 Job opportunities advertising.

1604.5 Employment agencies.

1604.6 Pre-employment inquiries as to sex.

1604.7 Relationship of Title VII to the Equal Pay Act.

1604.31 Pension and retirement plans.

AUTHORITY: The provisions of this Part 1604 are issued pursuant to Sec. 713(b), 78 Stat. 265; 43 U.S.C. 2000e-12.

SOURCE: The provisions of this Part 1604 appear at 30 F.R. 14927, Dec. 2, 1965, unless otherwise noted.

§ 1604.1 Sex as a bona fide occupational qualification.

(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels——"Men's jobs" and "Women's

jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characreristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

(iv) The fact that the employer may have to provide separate facilities for a person of the opposite sex will not justify discrimination under the bona fide occupational qualification exception unless the expense would be clearly unreasonable.

(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

(b)(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit



or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.

(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commision has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

[30 F.R. 14927, Dec. 2, 1965, as amended at 34 F.R. 13368, Aug. 19, 1969]

§ 1604.2 Separate lines of progression and seniority systems;

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male", or for a job in a "male" line of progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

(b) A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

§ 1604.3 Discrimination against married women.

(a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

(b) It may be that under certain circumstances, such a rule could be justified within the meaning of Section 703(e)(1) of Title VII. We express no opinion on this question at this time except to point out that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work.

§ 1604.4 Job opportunities advertising.

It is a violation of Title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed "Male" or "Female," will be considered an expression of a preference, limitation, specification, or discrimination based on sex.

[33 F.R. 11539, Aug. 14, 1968]



§ 1604.5 Employment agencies.

(a) Section 703(b) of the Civil Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. The Commission has determined that private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

(b) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupations qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

(c) It is the responsibility of employment agencies to keep informed of opinions and decisions of the Commission on sex discrimination.

§ 1604.6 Pre-employment inquiries as to sex.

A pre-employment inquiry may ask "Male _____, Female_____", or "Mr. Mrs., Miss," provided that the inquiry is made in good faith for a non-discriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

§ 1604.7 Relationship of Title VII to the Equal Pay Act.

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938 (section 29, U.S.C. 206(d) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800.-119–800.163. Relevant opinions of the Administrator interpreting "the equal pay for equal work standard" will also be adopted by the Commission.



(c) The Commission will consult with the Administrator before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

§ 1604.31 Pension and retirement plans.

(a) A difference in optional or compulsory retirement ages based on sex violates Title VII.

(b) Other differences based on sex such as differences in benefits for survivors, will be decided by the Commission by the issuance of Commission decisions in cases raising such issues. [33 F.R.3344, Feb. 24, 1968]

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G.E. EXHIBIT NO. 50 - G.E. Health Information, Termination of Active Work During Pregnancy, July 7, 1964

The Medical Advisory Council has discussed and reconsidered the Advice on "Termination of Active Work During Pregnancy" issued March 10, 1961 as Health Information Letter, H61-2. The following revises and supplements that recommendation.

Introduction

A perennially difficult problem in different parts of the Company centers about the point-of-time during a period of pregnancy when the employer should insist that a pregnant employee terminate active work. The answer to the problem is necessarily a variable one depending upon such factors as (a) the general health of the employee involved, (b) the nature of the work to which the employee is assigned, (c) the general nature of working conditions and safety factors in the area or plant in which the employee works, and (d) State laws. It is generally agreed that pregnant women may continue to work through the sixth month of pregnancy and

beyond when the pregnancy is uncomplicated, and may resume work at the end of eight weeks following termination of pregnancy, but it is generally agreed that women should terminate employment at the end of the sixth month and this is the recommendation of the Medical Advisory Council. However, it is recognized by the Council that an employee may—under certain circumstances—be permitted to continue to work up to one month before the expected delivery date, with the concurrence of her obstetrician and the plant physician. The foregoing considerations should be kept in mind in establishing local practices in this general area. It is appreciated that in some cases it may not be possible for the employee to continue working until the end of the sixth month, and that it may be necessary for her to be absent from work longer than the eight week period, when health or other circumstances so indicate.

Illness-Pregnancy

Upon leaving due to pregnancy, an employee's status is indicated as "illness-pregnancy" during the absence and is covered by the current rules relating to such absence. Thus, she is under no obligation to keep her supervisor notified as to her condition until eight weeks after termination of pregnancy. Failure to resume work after the eight week period would be expected to terminate service unless there was lack of work, illness, complications from pregnancy or some other valid reason, which should thereafter become the reason for absence on employment and payroll records.

Suggested Forms

The following information from the attending and/or plant physician should be given the supervisor of the woman leaving due to pregnancy in the normal case:



Dear Doctor:

It is the policy of the General Electric Company to request women who are pregnant to leave their work at the conclusion of the second trimester. In certain exceptional cases the employee may continue beyond this time, up to four weeks before the expected delivery date, with the approval of her private physician and the concurrence of the General Electric physician.

Would you kindly certify to the following statement:

As near as can be determined, Mrs. _____ will be delivered on _____ (date). I recommend that she work until _____ (date).

Signed _____ M.D.

Place _____

Date _____

In the event the absence following termination of pregnancy exceeds eight weeks, due to reasons of health, the employee should furnish to management a medical statement in essentially the following form:

Dear Sir:

The pregnancy of Mrs. _____ terminated on ----------(date). Health considerations will not permit her to resume work until approximately ----------(date).

Signed _____ M.D.

When circumstances warrant, it is permissible to reinstate a woman who has been out due to pregnancy before the lapse of eight weeks under the explicit direction of the attending physician and with the knowledge of the plant physician and in compliance with any state law that may be applicable.

A woman may elect, of course, to stop work at any time during her pregnancy. Also, the plant physician should not hesitate to exercise his prerogative of advising a cessation of work when he has good reason to do so.

John V. Grimaldi, Consultant
Health, Safety & Plant Protection

Distribution: 50ABGH Employee Relations Managers
51J Doctors serving the Company

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G.E. EXHIBIT NO. 53 - G.E. Employee Handbook,
Daytona Beach Plant

## WELCOME TO GENERAL ELECTRIC AT DAYTONA BEACH

We have written this booklet for you, whether you are a new employee or a veteran employee.

Here you'll find useful information about your job and the Company . . . about our policies, practices, and routines. You'll see what an outstanding "package" a General Electric job offers you and how we continually try to make General Electric jobs even better.



This booklet cannot, of course, cover everything, so if you have a question that we haven't answered, please discuss it with your supervisor or foreman. He is experienced and competent and interested in helping you, and if he doesn't know the answer, he'll get it for you.

We try to make this a friendly as well as a productive and good place to work, Just as you received equal consideration when you were employed, you are assured equal consideration for promotional and all other opportunities to develop your skills, to progress, and to enhance your value to your family, to your community, and to the Company without regard to race, creed, sex, or age.

G. T. Smiley
General Manager

A wide variety of in-house Company courses is available to employees who are interested in pursuing other developmental activities. Listings of these courses and start dates are publicized in the Astronote

### Leave of Absence

A leave of absence, without pay, may be granted to an employee to protect his continuity of service during a temporary absence from work. For the period of the leave of absence you may continue all insurance coverage (except Weekly Sickness and Accident benefits) by payments of regular contribution monthly in advance, as long as you maintain continuity of service. Of course, reemployment upon return from a leave of absence is subject to business conditions at that time.

Educational Leave of Absence

Leave may be granted to employees to pursue undergraduate or graduate studies. Employee must have a minimum of two year's service to apply. The course work to be pursued must lead to either an undergraduate or graduate degree related to the employee's work.

Maternity Absence

Employees who are pregnant may work through the end of their sixth month, or through the eighth month if they have permission from their personal doctor and the Company physician.

An absence for pregnancy is treated as an absence for illness, except that no weekly sickness and accident payment is made. Unless there are verified medical complications, employees returning to work must report back no later than eight weeks after the delivery date. It may be possible to return earlier if you have the written consent of your doctor and the approval of the Company physician.

Military Service

While you are on military leave of absence, you do not break your Company service. You continue to build service credits for up to four years. When you are honorably discharged, you are entitled to be re-employed on your former job or on a job having the same status, pay, and seniority if you are still able to do the work.

If you enter U.S. military service for active duty after one year of continuous service with GE, you are eligible for a military duty allowance equal to one month's straight time pay. Effective January 1, 1971, continuous service requirement will be reduced to 30 days.



If you are called into service for a reason other than active military duty (summer encampment, emergency duty or training, for instance), you are eligible for military pay differential for the first 17 days of military service in a calendar year, based on the number of working days included in such 17 days. Effective January 1, 1971, military pay differential will be increased

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G.E. EXHIBIT NO. 54 - G.E. Employee Handbook, Brockport Plant

## YOU AND YOUR JOB

### INTRODUCTION

In this booklet you will find answers to many of the questions which may arise on your job. It sets forth those practices and policies of Brockport General Electric which are of utmost importance to each of us.

This booklet has been designed as a brief guide for each of us in our daily working relationships. More detailed explanations of our policies, practices and benefits are available. If questions come to mind which are not specifically mentioned in this handbook, see your Supervisor or Foreman. (For the purposes of this booklet, the term "Supervisor" will be used throughout, meaning your immediate superior whether he be Foreman, Supervisor or Manager.) He is eager and able to help you. In the event he does not have an immediate answer to your question, he will know where to get the answer for you.

This booklet will be revised from time to time in order

to keep it up to date, and in agreement with current plant policies and proceduress. However, until you are notified of changes (either by new pages to insert in this book or through a written publication) the various rules and procedures in this employee handbook will remain in effect, and both employees and the plant management will be bound by them.

It will be very helpful if you read this booklet carefully and then keep it for future reference.

MATERNITY ABSENCE

A female employee is not required to begin a maternity leave at any specific time during her pregnancy. She may work as long as her doctor and the Plant Physician consider it safe.

If you leave on Maternity Absence, your service with the Company will be automatically protected for 8 weeks after the birth of your child or termination of pregnancy.

In order to be considered for reinstatement there are several notifications to E & CR and medical releases required. Before you go on Maternity Absence be sure you discuss these with E & CR so you know exactly what your responsibilities are.

REPORTING FOR WORK AFTER ILLNESS

Any employee who returns to work following an illness or injury must obtain clearance from the plant dispensary before going back on the job – if he has been hospitalized, or if he has been absent for five or more consecutive working days. Normally, presentation of a note from your physician stating that he feels you are capable of returning to work on a given day is sufficient.



Examinations by the Plant Physician are required, before returning to work, if:

1) It appears necessary to match your job with your health capabilities.
2) You have been away from work two weeks or more, for any reason.
3) You have been injured in an accident.

Appointments with the Plant Physician may be made through the dispensary.

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G.E. EXHIBIT NO. 55 - APPLIANCE PARK - EAST COLUMBIA, MARYLAND
EMPLOYEE HANDBOOK ISSUED SINCE 1972

(Not reprinted here as this is the same as Exhibit A-3 to answers by Defendant GE to Plaintiffs Fourth Interrogations printed at p. _____, *supra.*)

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G.E. EXHIBIT NO. 56 - "Switchgear High Lights", Thursday, February 10, 1972, Vol. XII, No. 12. (Not reprinted here as this is the same as Exhibit A-9 to Answers by Defendant G.E. to Plaintiff's Fourth Interrogatories printed at p. _____, *supra.*)

G.E. EXHIBIT NO. 57 - Employee Information. G.E. Insulator Products Department, Baltimore, Maryland. (Not reprinted here as this is the same as Exhibit A-7 to Answers of Defendant G.E. to Plaintiffs' Fourth Interrogatories printed at p._____, *supra.*)

G.E. EXHIBIT NO. 58 - Murfreesboro News Digest, February 15, 1973. (This is the same as G.E. Exhibit No. 1 and Exhibit A-2 to Answers of Defendant G.E. to Plaintiffs' Fourth Interrogatories printed at p. _____, *supra.*)

G.E. EXHIBIT NO. 59 - Management Newsletter. G.E. Lighting Systems Business Dept., Hendersonville, N. C., No. 73-5, March 22, 1973. (Not printed here as this is the same as Exhibit A-1 to Answers of Defendant G.E. to Plaintiffs' Fourth Interrogatories, printed at p. _____, *supra.*)

G.E. EXHIBIT NO. 60 - G.E., Booklet, "RESD People", 8/25/72, Vol. 2, No. 18. (Not printed here as this is the same as Exhibit A-8 to Answers of Defendant G.E. to Plaintiffs' Fourth Interrogatories printed at p._____, *supra.*)



PLAINTIFFS' EXHIBIT NO. 2B - Determination of EEOC in *Gilbert, et al. v. GE,* Case No. YDC-3-093, issued May 18, 1973. (omitted in printing since this exhibit is printed in full at pp. 47a-49a of Joint Petition for a Writ of Certiorari).

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EXHIBIT NO. J-1 to Pre-Trial Stipulation of Facts. "GE Minutes of IUE National Level Meeting on September 13, 1966"

| Company | Union |
|---|---|
| P. Moore | J. Callahan |
| M. D'Arcangelo | I. Abramson |
| A. Graves | W. Blackburn |
| T. Hilbert | A. Brewin |
| E. Kneeland | G. Brunner |
| A. Nunn | D. D'Ambrosio |
| J. Reid | G. DiPalazzo |
| D. Sorenson | R. Evans |
| R. Zook | F. Fulk |
| E. Ritter | R. Heggen |
| N. Herrmann | L. Jandreau |
| | L. Johnson |
| | D. Lasser |
| | J. Lawalin |
| | L. Lesser |
| | P. Menger |
| | H. McKinnell |
| | H. McManus |
| | J. Ogden |
| | J. Regan |
| | D. Rock |
| | J. Stagman |
| | J. Stanley |
| | J. Shambo |

(Asterisks indicate action to be taken.)

Meeting started at 10:11 a.m.

Moore — Before we start today I have an opening statement to make and after that we can discuss the procedures to be followed for the balance of the day.

* * *

Callahan — Are you going to make an offer today?

Moore — No. It was my expectations that we would have subcommittee reports today and after them review any other issues that you wish to bring up and from there we'll see how the balance of our discussions go for the week.

* * *

Willis — In the area of weekly sickness and accident benefits we discussed the possibility of higher benefits and of longer duration, say from 39 to 52 weeks, but we analyzed this and found that there are far more companies that have lower benefits in this area, and that, again, we're very much in line. If we extend beyond the six month period in this area, we get involved with the Social Security Program, and before we do this we'll have to give it additional serious study, as the Social Security provisions have been liberalized over the years and at the present moment provides for retroactive payments back to the end of our six months coverage. As far as the half-pay concept goes, we think our provision is adequate. We did have some discussions on the extension of sickness and accident benefits for pregnancy, but inasmuch as most of these folks don't return to our payroll, we felt that there would be better uses for the money in our overall plan. The union did point out that our maternity coverage was less than that of a large number of companies, but we were able to show a large number that provided considerably less in the area of maternity benefits. So I guess it was a stand-off. But we do recognize that the cost of maternity expenses are going up and do present a serious problem. The IUE suggested that these expenses be handled like other illnesses. In the area of pensioners' medical coverage, we pointed-out that with the current Medicare taxes, we have doubled our costs from what they were before. We noted that the General Electric Company was the first to have a provision for medical benefits for its pensioners (i.e., 1948). In those portions of our plan where we have integrated with Medicare it has resulted in a particularly difficult concept for the pensioner to understand. As you know, many of them are in Florida or California and we just can't call them in to a benefits office to explain the administration of this plan to them. This has made it difficult and we are looking for ways to simplify our operations in this area. After our discussions in this area, we weren't able to discern any areas of any particular priority. We did go on to discuss dependent coverage of

the husband's wife who may not be covered by a plan, and a variety of problems in this area. We also discussed the importance of meeting dental costs, and again we're concerned with this, yet the costs in this area are exhorbitant.

* * *

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EXHIBIT NO. K-1 to Pre-Trial. Stipulation of Facts: G.E. Minutes of IUE - G.E. Negotiating Committee Meeting September 18, 1965.

Company: Baldwin, Sorenson, Ritter, Willis, Hilbert, Nunn, Powers, Highton, Hindle, Kneeland, Beekman, Menzies, Grebey, Zook, Telford, Reid, Delaney, Ryan, Tsorvas, Willis, Bauer, Weatherbee

Union: Shambo, Jandreau, Friedman, Fitzmaurice, Fiorillo, Enz, Scanlon, Pinto, Turner, Brewin, Morgenstern, Rock, Foley, Litano, Evans, Mangino, Stanley, Speranzo, Tirey, Price, Mills, O'Donnell, Blackburn, Aders, Angle, Kline, Rupee, Levine

Time: 10:15 a.m.

* * *

Company (Willis) continued: In sickness and accident, we feel the 50% feature is appropriate and pretty well standard. Some plans are higher and those companies are experiencing difficulty. With respect to 52 rather than 26 weeks, we feel we get to the area of long-term disability. We



are trying now to develop a long-term disability plan for hourly employees. Present studies indicate it might be more expensive for hourly rather than salaried people because of the experience.

There is a six weeks accident and disability request for pregnancy. We don't believe it's a disability as such and it should not be included.

In the early retirement area, we are more liberal than most companies.

In the insurance benefits for pensioners, we had tried to integrate with medicare but we got into a confusing and hopeless backlog. Last time around, therefore, we went to a flat daily rate. This has been working effectively. We get money to the pensioners much more quickly and they understand the benefit.

The union demand is to continue insurance during strikes. We do have a provision to continue monthly and we have. We do not require people to contribute during the strike as there are all kinds of problems so when the employee comes back to work we double up on deductions. If an employee feels that's too much, he can re-sign based on his being able to pass a physical.

EXHIBIT NO. K-2 to Pre-Trial Stipulation of Facts
(PLAINTIFFS' EXHIBIT NO. 42A)
"IUE Minutes of IUE-GE Negotiating Committee Meeting September 18, 1969.

WILLIS: S&A - 52 Weeks 2/3 Pay
Company position is 50% is the proper level of benefits. This is pretty well standard. SUB plans pay 72%. There are some that go above this. We have explored the problem and feel that our level of benefits is correct. 52 weeks is a long term disability. We expect to provide long term disability benefits for hourly employees. We are working on it now. We have a plan now for salaried employees who make $7,000 per year or up. This would be an employee-pay-all. It indicates it will be a little more expensive for hourly than for salaried employees. This would pick up after 6 months.

Six Weeks for Pregnancy
We don't feel any obligation to pay for pregnancy as it is a long planning type situation.

Non Contributory Life Insurance for Early Retirees
We are more liberal than others.

Retirees Full Insurance Coverage
We did this originally and got into a hopeless backlog of claims. The last negotiations we changed to the fast moving plan to make up for other expenses after medicare. This has been working well and this is sound for pensioners. If we went back we would have lots of problems.

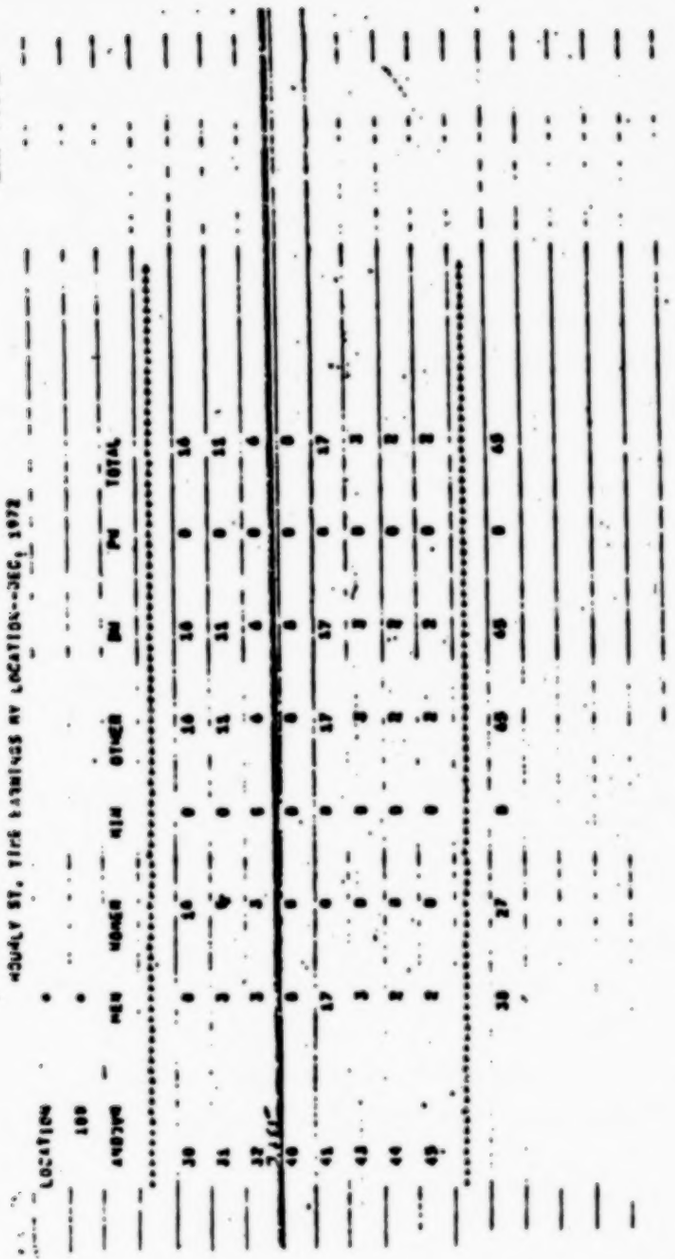
Insurance - Strike Coverage
We do continue our insurance on a month to month



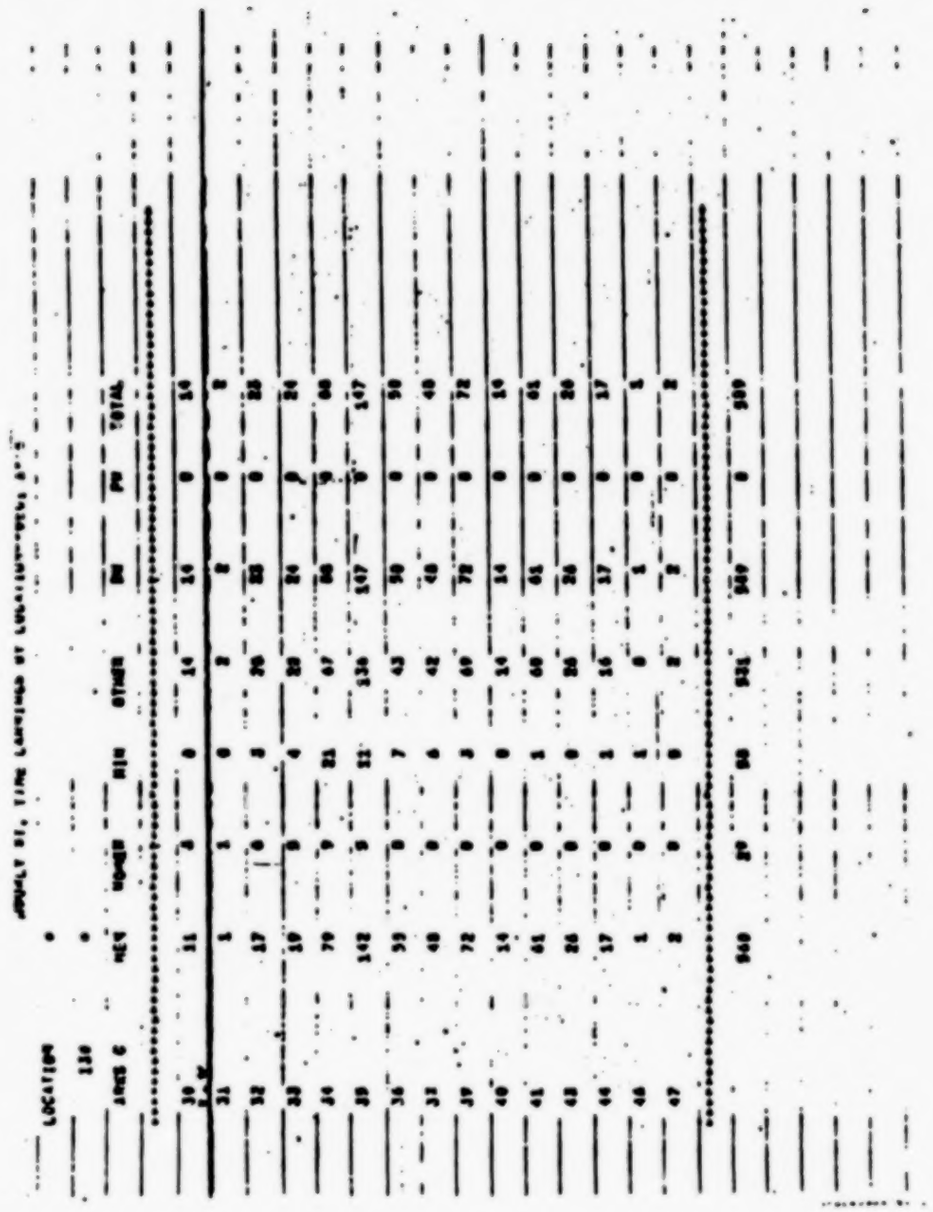
basis. Except for the S & A benefit which ends after 30 days. We don't collect during the strike. We continue the insurance and then collect double after the strike. An employee can refuse double payments by signing up new again for the insurance plan, and giving health proof for himself and all his dependents.

(PLAINTIFFS' EXHIBITS NO. 43)
"GE records on Hourly Straight Time Earnings of Employees at Plants Represented by IUE in 1972.

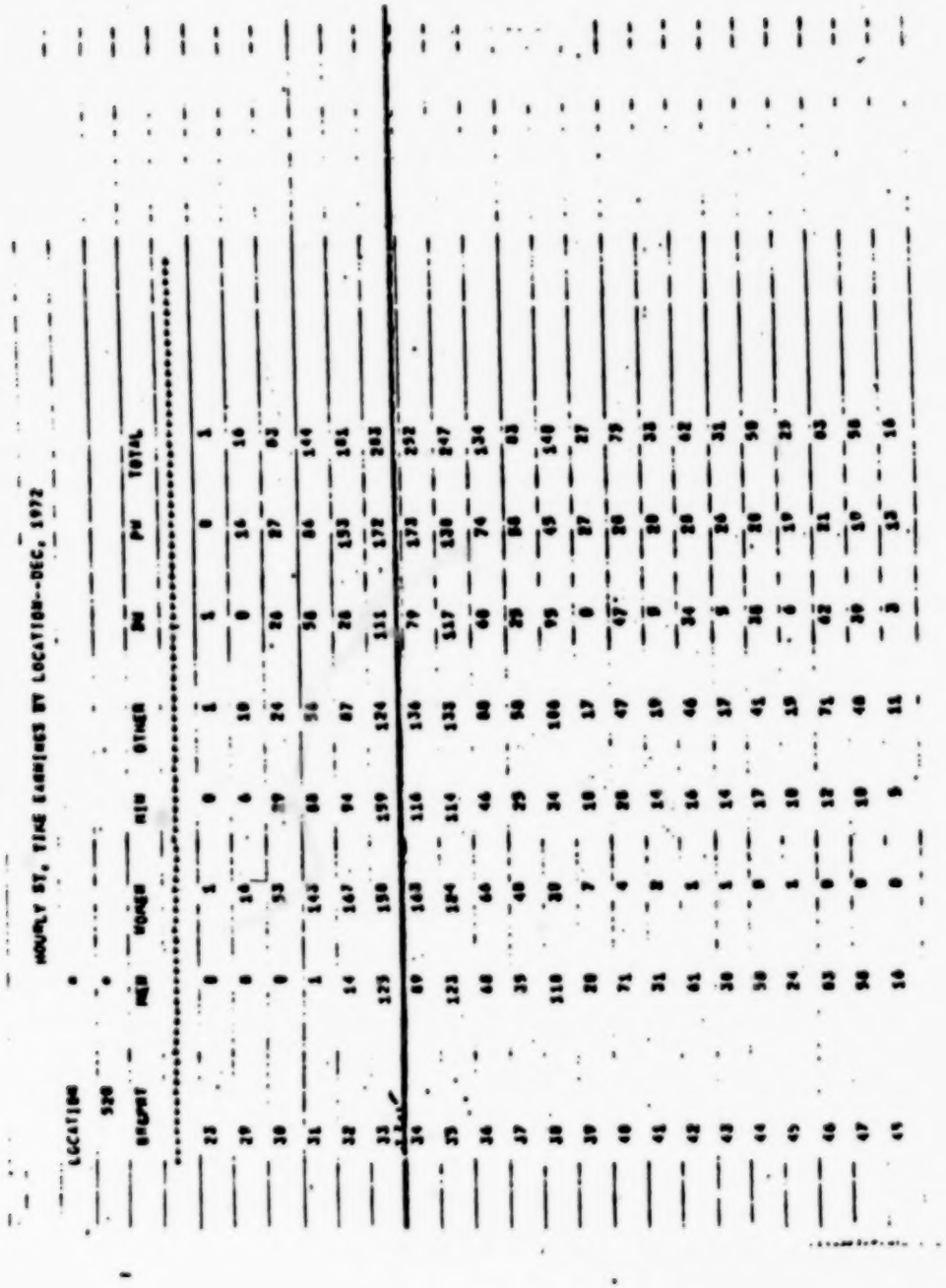
EXHIBIT NOS. L–1 to L–70 to Pre-Trial Stipulation of Facts

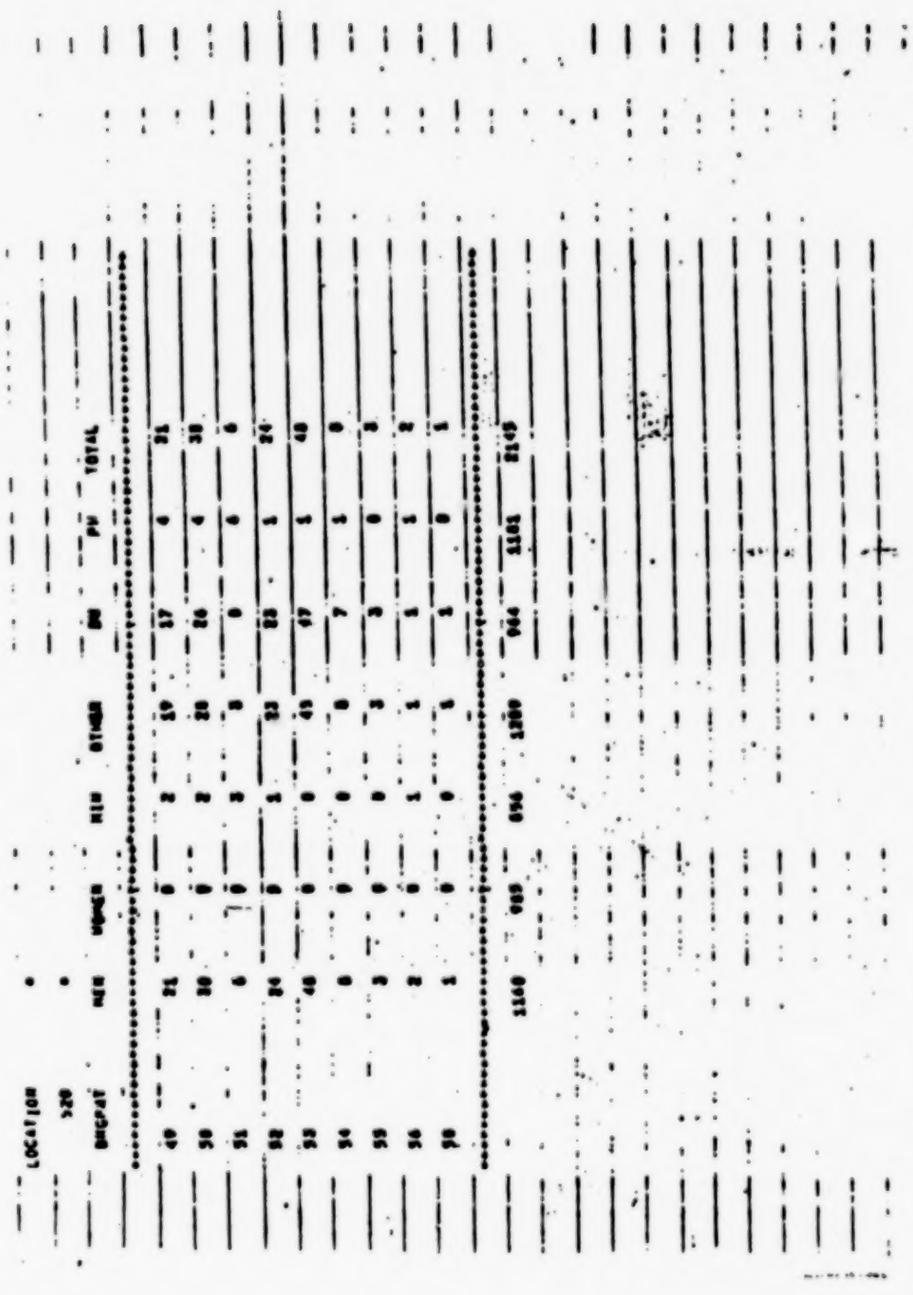




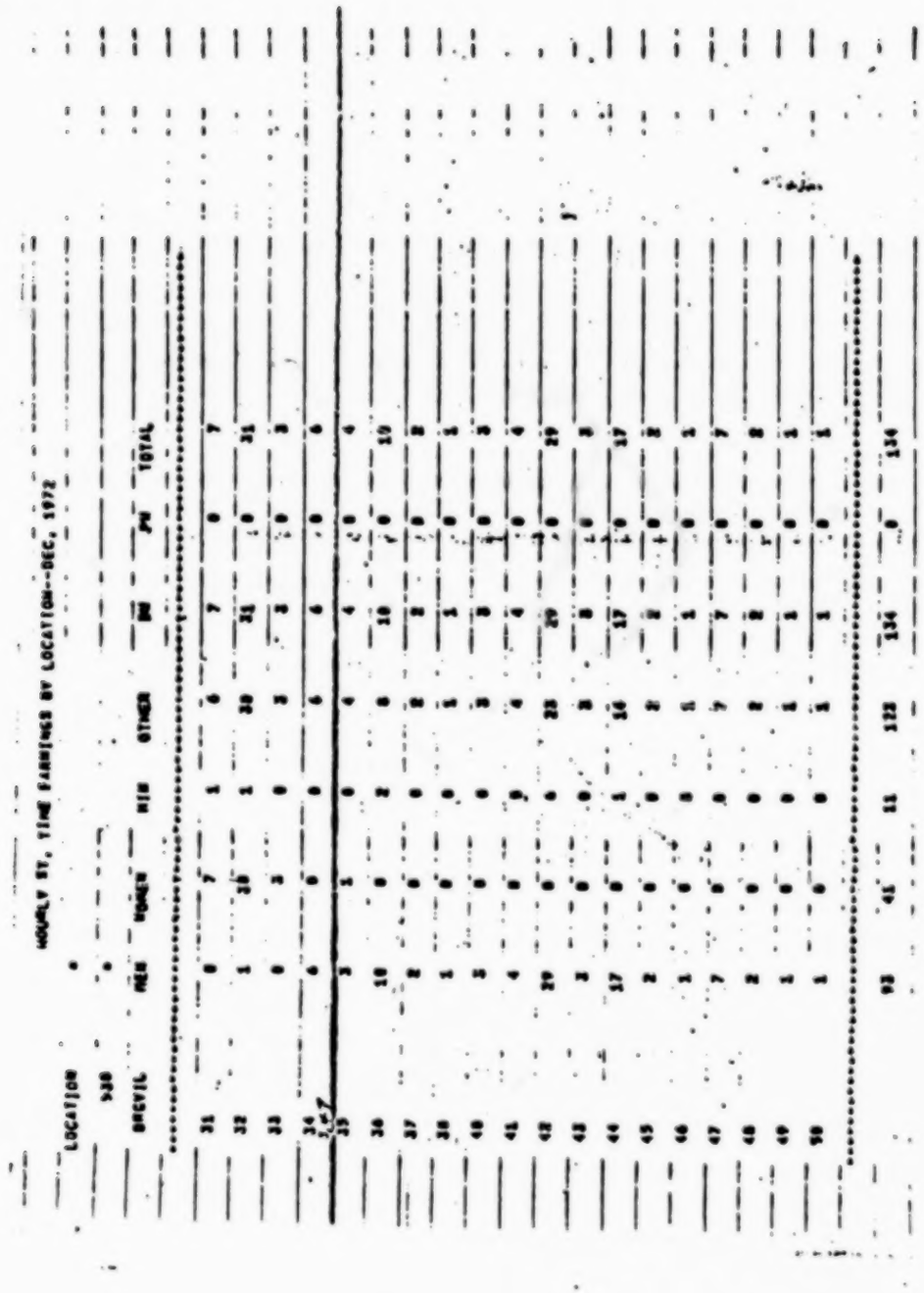


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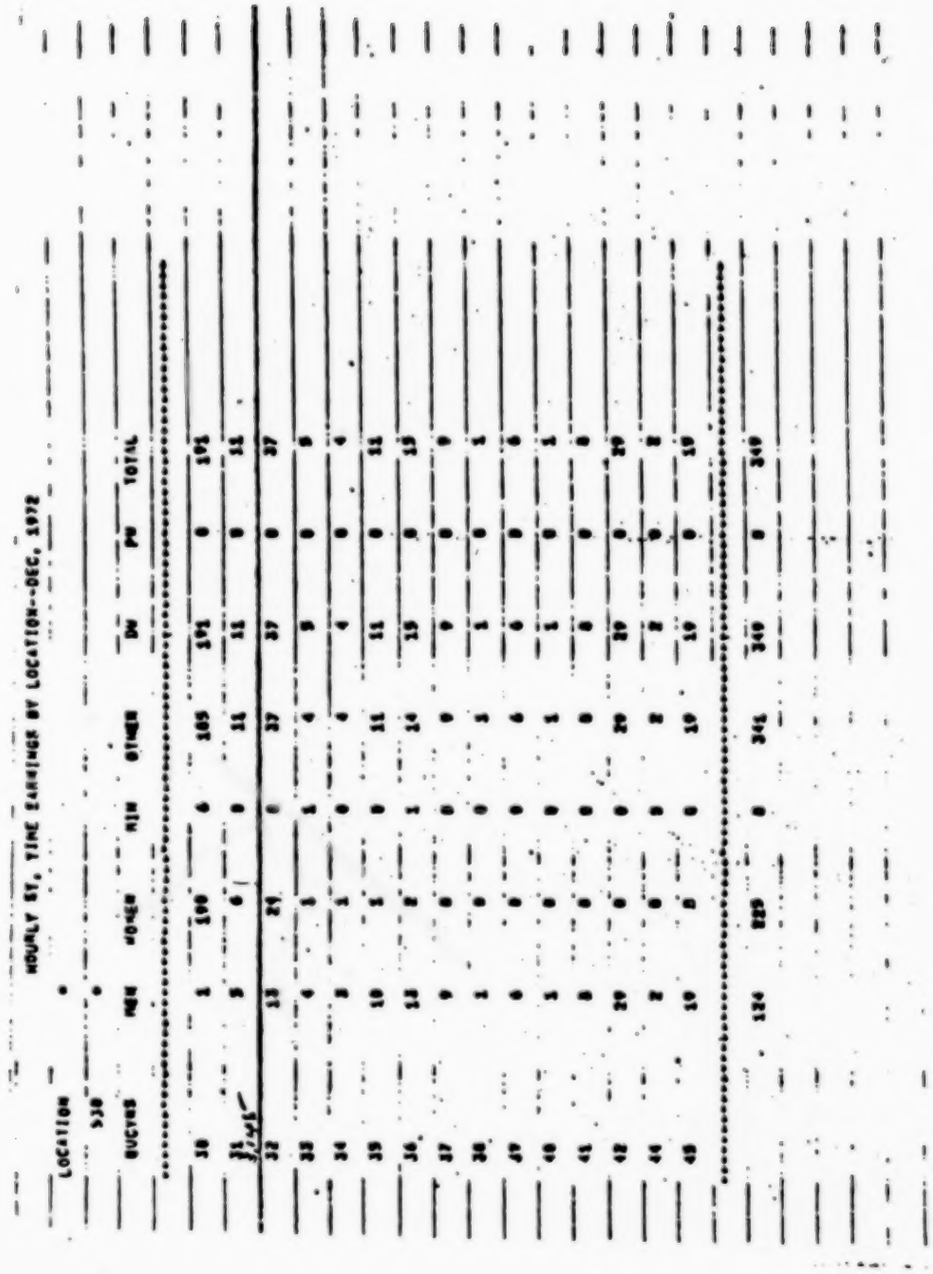




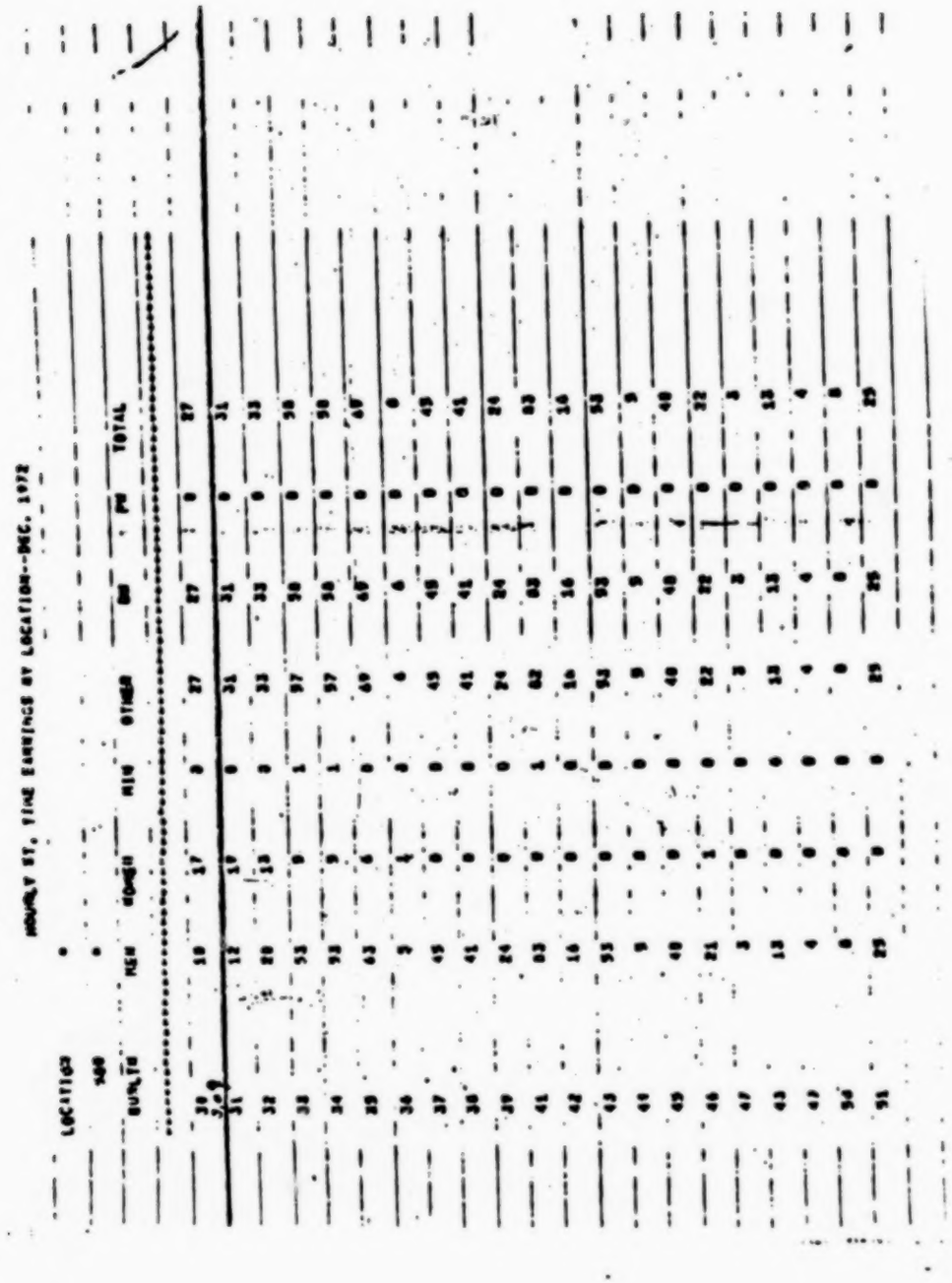
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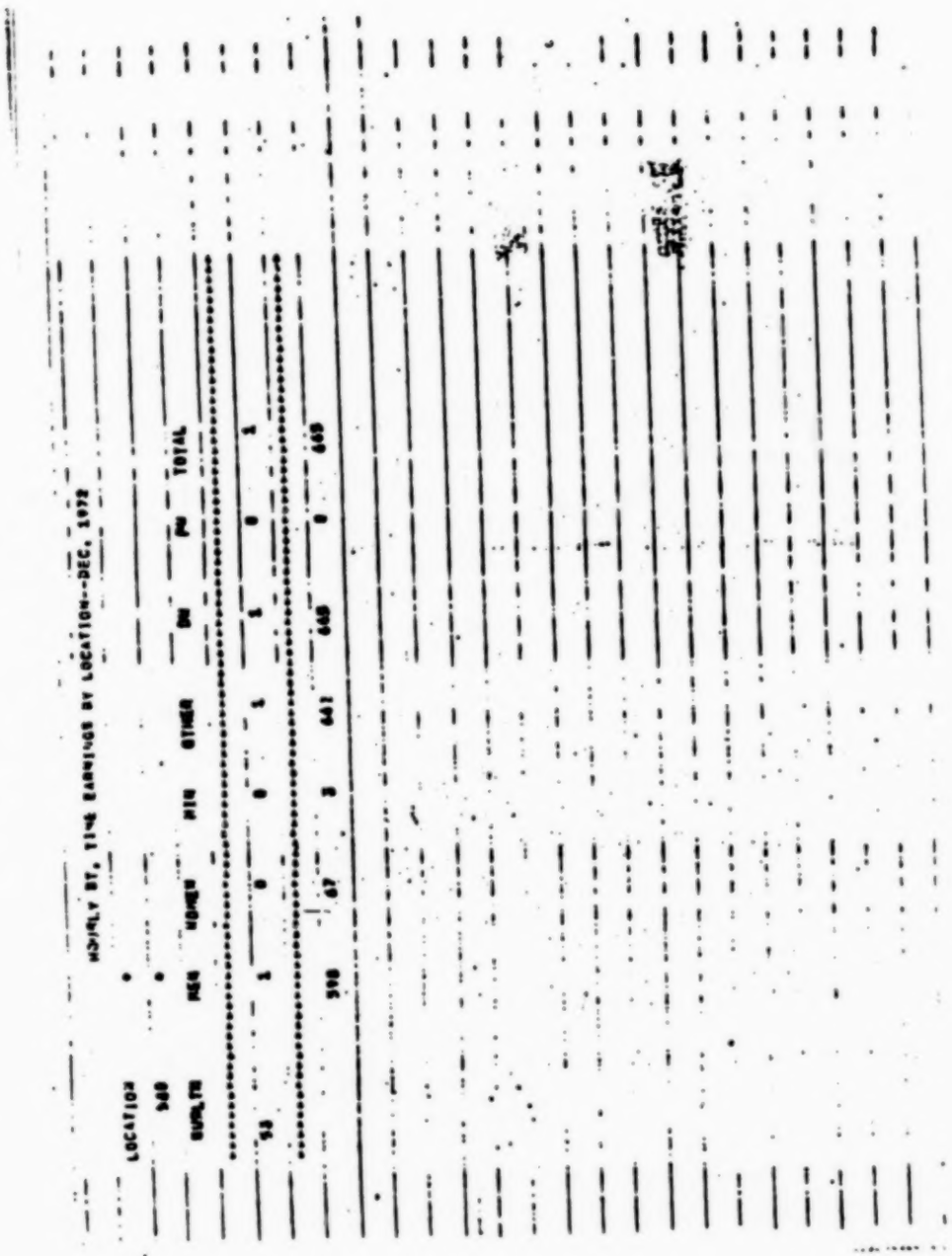




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HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
898

| CLEVEL | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 27 | 1 | 0 | 1 | 0 | 1 | 0 | 1 |
| 30 | 0 | 1 | 0 | 1 | 1 | 0 | 1 |
| 31 | 0 | 3 | 1 | 2 | 3 | 0 | 3 |
| 32 | 7 | 77 | 9 | 75 | 74 | 10 | 84 |
| 33 | 3 | 187 | 89 | 101 | 189 | 1 | 190 |
| 34 | 38 | 92 | 35 | 95 | 129 | 1 | 130 |
| 35 | 35 | 69 | 23 | 81 | 102 | 2 | 104 |
| 36 | 39 | 52 | 21 | 46 | 86 | 1 | 87 |
| 37 | 23 | 31 | 30 | 24 | 91 | 3 | 94 |
| 38 | 38 | 2 | 20 | 20 | 40 | 0 | 40 |
| 39 | 11 | 1 | 3 | 9 | 11 | 1 | 12 |
| 40 | 48 | 9 | 16 | 33 | 49 | 0 | 49 |
| 41 | 23 | 0 | 3 | 20 | 23 | 0 | 23 |
| 42 | 73 | 3 | 17 | 59 | 74 | 2 | 76 |
| 43 | 33 | 1 | 6 | 28 | 34 | 0 | 34 |
| 44 | 106 | 3 | 24 | 85 | 108 | 1 | 109 |
| 45 | 79 | 0 | 11 | 68 | 79 | 0 | 79 |
| 46 | 28 | 0 | 1 | 27 | 28 | 0 | 28 |
| 47 | 82 | 0 | 6 | 76 | 82 | 0 | 82 |
| 48 | 106 | 0 | 1 | 105 | 106 | 0 | 106 |
| 49 | 39 | 0 | 0 | 39 | 39 | 0 | 39 |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
898

| CLEVEL | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 50 | 110 | 0 | 3 | 107 | 110 | 0 | 110 |
| 51 | 52 | 0 | 2 | 50 | 52 | 0 | 52 |
| 52 | 19 | 0 | 0 | 19 | 19 | 0 | 19 |
| 53 | 43 | 0 | 0 | 43 | 43 | 0 | 43 |
| 54 | 19 | 0 | 0 | 19 | 19 | 0 | 19 |
| 55 | 6 | 0 | 0 | 6 | 6 | 0 | 6 |
| 56 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| | 1051 | 527 | 316 | 1262 | 1556 | 22 | 1578 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
1190

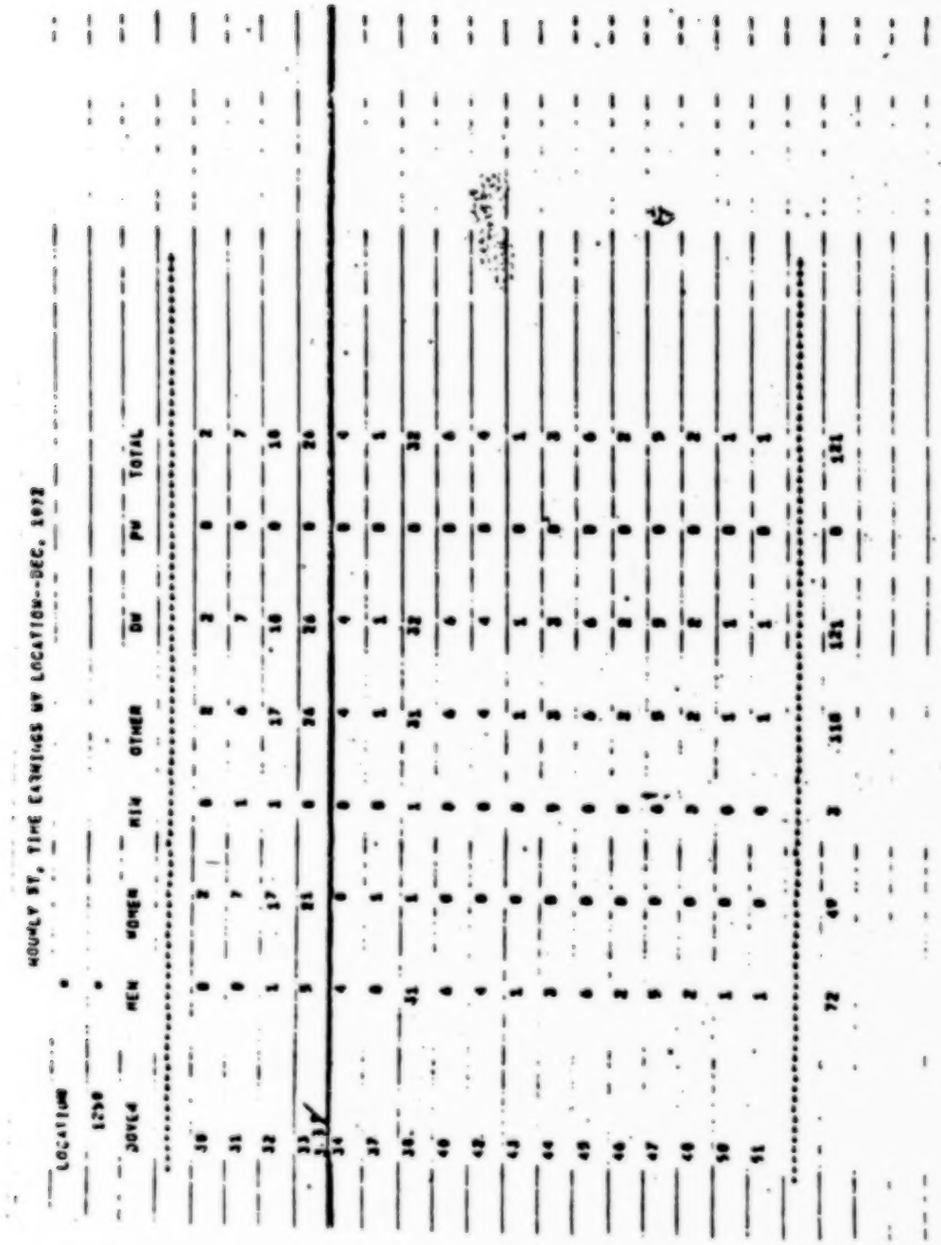
| DECATUR | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 29 | 0 | 1 | 0 | 1 | 0 | 1 | 1 |
| 30 | 6 | 21 | 3 | 24 | 22 | 5 | 27 |
| 31 | 3 | 23 | 1 | 25 | 22 | 4 | 26 |
| 32 | 14 | 17 | 4 | 29 | 25 | 6 | 31 |
| 33 | 69 | 46 | 11 | 104 | 105 | 10 | 115 |
| 34 | 20 | 13 | 0 | 33 | 22 | 11 | 33 |
| 35 | 10 | 11 | 0 | 21 | 11 | 10 | 21 |
| 36 | 6 | 15 | 1 | 20 | 11 | 10 | 21 |
| 37 | 12 | 12 | 1 | 22 | 10 | 14 | 24 |
| 38 | 1 | 12 | 0 | 17 | 0 | 17 | 17 |
| 39 | 10 | 16 | 0 | 26 | 15 | 11 | 26 |
| 40 | 9 | 10 | 1 | 18 | 0 | 19 | 19 |
| 41 | 15 | 12 | 2 | 25 | 12 | 15 | 27 |
| 42 | 10 | 19 | 1 | 24 | 10 | 19 | 29 |
| 43 | 7 | 12 | 1 | 18 | 0 | 19 | 19 |
| 44 | 17 | 8 | 0 | 25 | 8 | 17 | 25 |
| 45 | 13 | 8 | 0 | 21 | 10 | 11 | 21 |
| 46 | 6 | 7 | 2 | 11 | 0 | 13 | 13 |
| 47 | 9 | 7 | 0 | 16 | 1 | 11 | 12 |
| 48 | 15 | 2 | 0 | 17 | 0 | 17 | 17 |
| 49 | 10 | 5 | 0 | 15 | 0 | 15 | 15 |



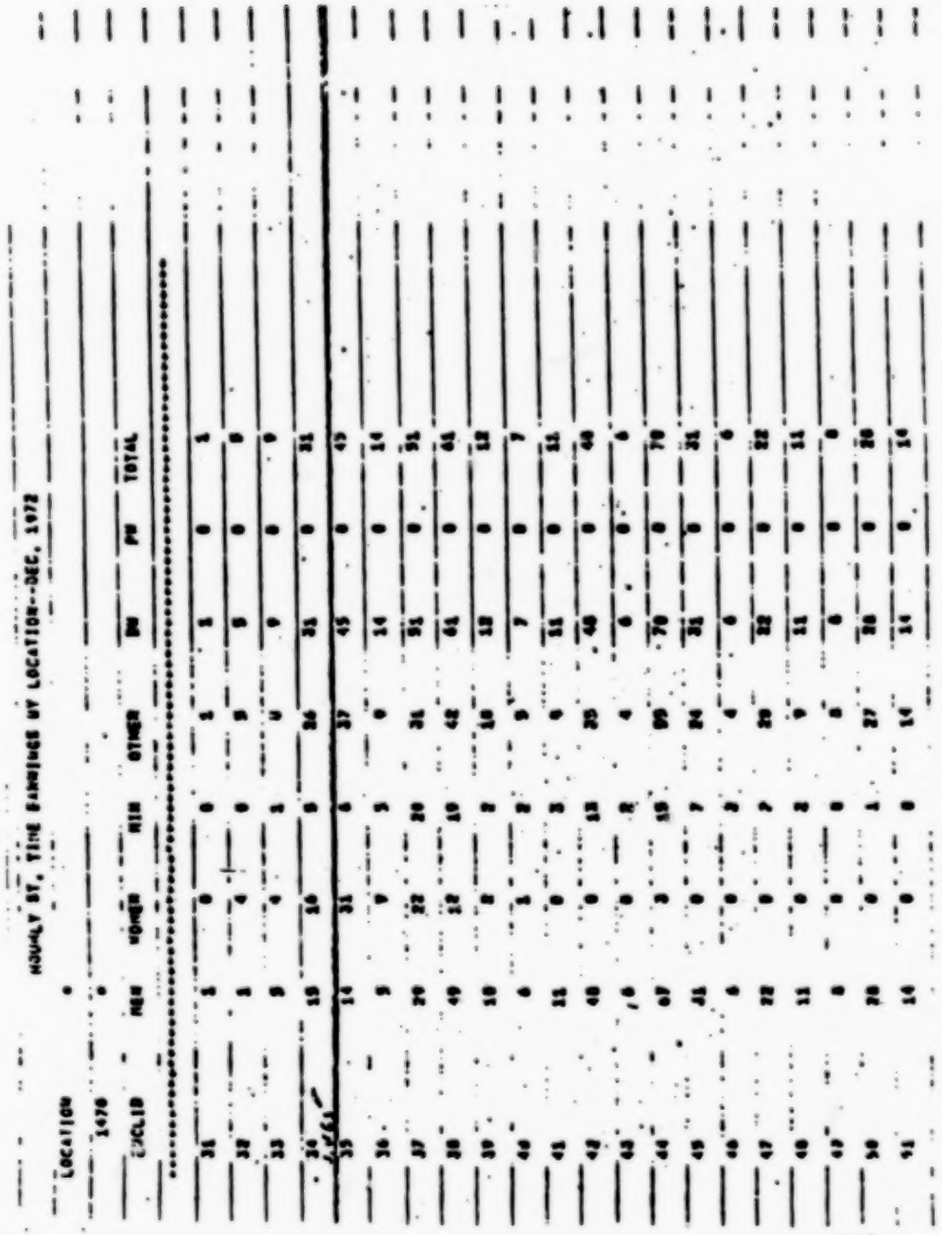
HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
1190

| DECATUR | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 50 | 0 | 1 | 1 | 0 | 0 | 10 | 10 |
| 51 | 3 | 0 | 0 | 3 | 0 | 3 | 3 |
| 52 | 1 | 3 | 1 | 3 | 0 | 4 | 4 |
| 53 | 1 | 3 | 0 | 4 | 0 | 4 | 4 |
| 54 | 3 | 1 | 0 | 4 | 0 | 4 | 4 |
| 55 | 7 | 0 | 0 | 7 | 0 | 7 | 7 |
| 56 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 57 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 60 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| | 289 | 279 | 33 | 536 | 284 | 284 | 568 |







BEST COPY AVAILABLE

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

| LOCATION | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 1428 | | | | | | | | | |
| EMPLTT | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL | | |
| 32 | 9 | 0 | 2 | 3 | 9 | 0 | 9 | | |
| 33 | 11 | 2 | 2 | 11 | 11 | 2 | 13 | | |
| 34 | 13 | 1 | 4 | 12 | 12 | 4 | 16 | | |
| 35 | 1 | 1 | 1 | 1 | 2 | 0 | 2 | | |
| 36 | 22 | 6 | 9 | 23 | 11 | 17 | 28 | | |
| 37 | 23 | 0 | 4 | 19 | 7 | 16 | 23 | | |
| 38 | 31 | 1 | 4 | 28 | 27 | 5 | 32 | | |
| 39 | 19 | 1 | 2 | 18 | 0 | 20 | 20 | | |
| 40 | 28 | 1 | 4 | 26 | 11 | 18 | 29 | | |
| 41 | 6 | 4 | 1 | 9 | 6 | 4 | 10 | | |
| 42 | 62 | 10 | 2 | 70 | 54 | 18 | 72 | | |
| 43 | 4 | 7 | 1 | 10 | 2 | 9 | 11 | | |
| 44 | 12 | 5 | 3 | 17 | 9 | 8 | 17 | | |
| 45 | 12 | 9 | 1 | 16 | 12 | 5 | 17 | | |
| 46 | 58 | 1 | 3 | 46 | 47 | 4 | 51 | | |
| 47 | 13 | 0 | 1 | 11 | 4 | 8 | 12 | | |
| 48 | 14 | 0 | 0 | 14 | 12 | 2 | 14 | | |
| 49 | 69 | 1 | 1 | 59 | 36 | 10 | 46 | | |
| 50 | 45 | 0 | 1 | 34 | 26 | 9 | 35 | | |
| 51 | 19 | 0 | 3 | 16 | 0 | 19 | 19 | | |
| 52 | 49 | 1 | 1 | 46 | 25 | 24 | 49 | | |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

| LOCATION | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 1470 | | | | | | | | | |
| LOCATE | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL | | |
| 52 | 3 | 0 | 0 | 3 | 3 | 0 | 3 | | |
| 53 | 1 | 0 | 0 | 1 | 1 | 0 | 1 | | |
| 54 | 1 | 0 | 0 | 1 | 1 | 0 | 1 | | |
| 302 | 104 | 103 | 307 | 496 | 0 | 496 | | | |

BEST COPY AVAILABLE

HOURLY ST. TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION *
1>10 *

| EVENTS | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 53 | 47 | 0 | 1 | 46 | 24 | 23 | 47 |
| 54 | 38 | 5 | 2 | 33 | 0 | 35 | 35 |
| 55 | 38 | 0 | 4 | 26 | 0 | 30 | 30 |
| 56 | 31 | 0 | 2 | 29 | 0 | 31 | 31 |
| 57 | 47 | 0 | 2 | 45 | 0 | 47 | 47 |
| 58 | 78 | 0 | 2 | 76 | 0 | 78 | 78 |
| 59 | 83 | 0 | 4 | 79 | 0 | 83 | 83 |
| 60 | 47 | 0 | 0 | 47 | 0 | 47 | 47 |
| 61 | 48 | 0 | 2 | 46 | 0 | 48 | 48 |
| 62 | 41 | 1 | 0 | 42 | 0 | 42 | 42 |
| 63 | 35 | 1 | 0 | 36 | 0 | 36 | 36 |
| 64 | 38 | 0 | 2 | 28 | 0 | 38 | 38 |
| 65 | 13 | 0 | 0 | 13 | 0 | 13 | 13 |
| 66 | 13 | 0 | 0 | 13 | 0 | 13 | 13 |
| 67 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 68 | 3 | 0 | 0 | 3 | 0 | 3 | 3 |
| 69 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| | 1059 | 55 | 63 | 1049 | 357 | 755 | 1112 |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION *
1>60 *

| FITCHS | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 31 | 6 | 0 | 1 | 5 | 6 | 0 | 6 |
| 32 | 8 | 0 | 1 | 7 | 8 | 0 | 8 |
| 33 | 22 | 0 | 4 | 18 | 22 | 0 | 22 |
| 34 | 5 | 1 | 2 | 4 | 6 | 0 | 6 |
| 35 | 9 | 0 | 1 | 8 | 9 | 0 | 9 |
| 36 | 17 | 1 | 1 | 17 | 18 | 0 | 18 |
| 37 | 61 | 0 | 2 | 59 | 61 | 0 | 61 |
| 38 | 2 | 0 | 0 | 2 | 0 | 2 | 2 |
| 39 | 39 | 3 | 2 | 40 | 41 | 1 | 42 |
| 40 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 41 | 24 | 0 | 0 | 24 | 24 | 0 | 24 |
| 42 | 19 | 0 | 0 | 19 | 18 | 1 | 19 |
| 43 | 123 | 1 | 0 | 124 | 123 | 1 | 124 |
| 44 | 29 | 0 | 0 | 29 | 29 | 0 | 29 |
| 45 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 46 | 13 | 0 | 0 | 13 | 11 | 2 | 13 |
| 47 | 29 | 0 | 0 | 29 | 28 | 1 | 29 |
| 48 | 6 | 0 | 0 | 6 | 4 | 2 | 6 |
| 49 | 11 | 0 | 0 | 11 | 9 | 2 | 11 |
| 50 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| 51 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
1980

| FITCHB | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 52 | 4 | 0 | 0 | 4 | 4 | 0 | 4 |
| 53 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| 54 | 3 | 0 | 0 | 3 | 1 | 2 | 3 |
| 55 | 6 | 0 | 0 | 6 | 5 | 1 | 6 |
| 56 | 10 | 0 | 0 | 10 | 8 | 2 | 10 |
| 57 | 4 | 0 | 0 | 4 | 2 | 2 | 4 |
| 58 | 2 | 0 | 0 | 2 | 0 | 2 | 2 |
| 60 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 61 | 3 | 0 | 1 | 2 | 0 | 3 | 3 |
| 62 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 64 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 65 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 69 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 70 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| | 472 | 6 | 15 | 463 | 448 | 30 | 478 |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
1980

| FT SYM | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 24 | 0 | 1 | 0 | 1 | 1 | 0 | 1 |
| 25 | 0 | 1 | 0 | 1 | 1 | 0 | 1 |
| 28 | 1 | 1 | 1 | 1 | 1 | 1 | 2 |
| 29 | 2 | 109 | 31 | 80 | 0 | 111 | 111 |
| 30 | 0 | 73 | 25 | 48 | 0 | 73 | 73 |
| 31 | 0 | 58 | 11 | 47 | 7 | 51 | 58 |
| 32 | 6 | 162 | 41 | 127 | 47 | 121 | 168 |
| 33 | 37 | 310 | 61 | 286 | 261 | 86 | 347 |
| 34 | 29 | 155 | 23 | 161 | 105 | 79 | 184 |
| 35 | 111 | 128 | 51 | 188 | 150 | 89 | 239 |
| 36 | 105 | 184 | 49 | 310 | 255 | 124 | 379 |
| 37 | 141 | 153 | 54 | 260 | 172 | 142 | 314 |
| 38 | 271 | 162 | 52 | 381 | 281 | 152 | 433 |
| 39 | 29 | 103 | 14 | 114 | 25 | 103 | 128 |
| 40 | 149 | 120 | 35 | 234 | 172 | 97 | 269 |
| 41 | 36 | 80 | 12 | 104 | 33 | 83 | 116 |
| 42 | 239 | 59 | 25 | 273 | 242 | 56 | 298 |
| 43 | 27 | 52 | 14 | 65 | 12 | 67 | 79 |
| 44 | 149 | 56 | 18 | 187 | 125 | 80 | 205 |
| 45 | 62 | 47 | 18 | 91 | 24 | 85 | 109 |
| 46 | 46 | 45 | 11 | 80 | 17 | 74 | 91 |

HOURLY ST, TIME EARNINGS BY LOCATION--DEC, 1972

| LOCATION 1=60 | FT &TM | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|---|
| 47 | | 107 | 45 | 19 | 133 | 41 | 91 | 132 |
| 48 | | 147 | 26 | 14 | 159 | 48 | 111 | 159 |
| 49 | | 95 | 20 | 16 | 99 | 12 | 103 | 115 |
| 50 | | 180 | 19 | 22 | 177 | 86 | 113 | 199 |
| 51 | | 111 | 10 | 14 | 107 | 20 | 101 | 121 |
| 52 | | 77 | 12 | 10 | 79 | 0 | 89 | 89 |
| 53 | | 105 | 13 | 15 | 103 | 18 | 100 | 118 |
| 54 | | 55 | 7 | 7 | 55 | 5 | 57 | 62 |
| 55 | | 49 | 4 | 2 | 51 | 0 | 53 | 53 |
| 56 | | 42 | 5 | 1 | 46 | 1 | 46 | 47 |
| 57 | | 28 | 4 | 4 | 28 | 0 | 32 | 32 |
| 58 | | 31 | 3 | 2 | 32 | 0 | 34 | 34 |
| 59 | | 19 | 4 | 3 | 20 | 0 | 23 | 23 |
| 60 | | 18 | 3 | 1 | 20 | 0 | 21 | 21 |
| 61 | | 9 | 3 | 3 | 9 | 0 | 12 | 12 |
| 62 | | 7 | 1 | 2 | 6 | 0 | 8 | 8 |
| 63 | | 10 | 0 | 0 | 10 | 0 | 10 | 10 |
| 64 | | 5 | 0 | 1 | 4 | 0 | 5 | 5 |
| 65 | | 4 | 0 | 0 | 4 | 0 | 4 | 4 |
| 66 | | 3 | 0 | 0 | 3 | 0 | 3 | 3 |
| 67 | | 1 | 0 | 0 | 1 | 0 | 1 | 1 |



HOURLY ST, TIME EARNINGS BY LOCATION--DEC, 1972

| LOCATION 1=60 | FT &TM | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|---|
| 68 | | 2 | 0 | 0 | 2 | 0 | 2 | 2 |
| 70 | | 1 | 0 | 1 | 0 | 0 | 1 | 1 |
| 74 | | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 76 | | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| | | 2654 | 2258 | 703 | 4189 | 2196 | 2696 | 4892 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION *

2077 *

| HICKORY | MEN | WOMEN | MIN | OTHER | BW | PU | TOTAL |
|---|---|---|---|---|---|---|---|
| 28 | 5 | 1 | 4 | 2 | 6 | 0 | 6 |
| 29 | 8 | 0 | 6 | 2 | 8 | 0 | 8 |
| 30 | 238 | 22 | 52 | 208 | 260 | 0 | 260 |
| 31 | 45 | 6 | 9 | 42 | 51 | 0 | 51 |
| 32 | 213 | 6 | 26 | 193 | 219 | 0 | 219 |
| 33 | 188 | 4 | 37 | 155 | 192 | 0 | 192 |
| 34 | 216 | 1 | 44 | 173 | 217 | 0 | 217 |
| 35 | 30 | 0 | 3 | 27 | 30 | 0 | 30 |
| 36 | 109 | 0 | 11 | 98 | 109 | 0 | 109 |
| 38 | 29 | 0 | 4 | 25 | 29 | 0 | 29 |
| 39 | 99 | 0 | 11 | 88 | 99 | 0 | 99 |
| 40 | 2 | 0 | 1 | 1 | 2 | 0 | 2 |
| 41 | 12 | 0 | 0 | 12 | 12 | 0 | 12 |
| 42 | 18 | 0 | 0 | 18 | 18 | 0 | 18 |
| 45 | 26 | 0 | 0 | 26 | 26 | 0 | 26 |
| 48 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 49 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 51 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 52 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| | 1745 | 40 | 250 | 1077 | 1285 | 0 | 1285 |

906

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION *

2100 *

| DOLLAR | MEN | WOMEN | MIN | OTHER | BW | PU | TOTAL |
|---|---|---|---|---|---|---|---|
| 30 | 1 | 46 | 5 | 39 | 44 | 0 | 44 |
| 31 | 11 | 134 | 27 | 118 | 145 | 0 | 145 |
| 32 | 5 | 143 | 32 | 116 | 148 | 0 | 148 |
| 33 | 38 | 165 | 46 | 157 | 203 | 0 | 203 |
| 34 | 44 | 53 | 13 | 84 | 97 | 0 | 97 |
| 35 | 43 | 24 | 12 | 55 | 67 | 0 | 67 |
| 36 | 47 | 6 | 14 | 39 | 53 | 0 | 53 |
| 37 | 37 | 0 | 0 | 37 | 37 | 0 | 37 |
| 38 | 7 | 0 | 1 | 6 | 7 | 0 | 7 |
| 39 | 17 | 0 | 0 | 12 | 17 | 0 | 17 |
| 40 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 41 | 9 | 0 | 1 | 8 | 9 | 0 | 9 |
| 42 | 29 | 0 | 0 | 29 | 29 | 0 | 29 |
| 43 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 44 | 6 | 0 | 0 | 6 | 6 | 0 | 6 |
| 45 | 42 | 0 | 1 | 41 | 42 | 0 | 42 |
| 47 | 20 | 0 | 0 | 20 | 20 | 0 | 20 |
| 51 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 52 | 5 | 0 | 4 | 5 | 5 | 0 | 5 |
| 53 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 54 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |

907

HOURLY ST. TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION *
2180 *

| HOLLAR | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| | 368 | 568 | 157 | 779 | 936 | 0 | 936 |

908

HOURLY ST. TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION *
2120 *

| HOUSTN | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 31 | 4 | 0 | 2 | 2 | 4 | 0 | 4 |
| 32 | 20 | 23 | 21 | 22 | 43 | 0 | 43 |
| 33 | 0 | 2 | 0 | 1 | 2 | 0 | 2 |
| 34 | 8 | 8 | 9 | 11 | 16 | 0 | 16 |
| 37 | 5 | 2 | 3 | 4 | 7 | 0 | 7 |
| 38 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 42 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 43 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 44 | 2 | 0 | 1 | 1 | 2 | 0 | 2 |
| 49 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| | 43 | 35 | 32 | 46 | 78 | 0 | 78 |

606

HOURLY BY_ TIME EARNINGS BY LOCATION--DEC. 1972

| LOCATION | JOMLSB | MEN | NOMEN | MIN | OTHER | BU | PU | TOTAL |
|---|---|---|---|---|---|---|---|---|
| | 2480 | | | | | | | |
| | 37 | 0 | 20 | 0 | 20 | 20 | 0 | 20 |
| | 38 | 20 | 50 | 0 | 70 | 70 | 0 | 70 |
| | 39 | 94 | 69 | 2 | 120 | 120 | 0 | 120 |
| | 30 | 32 | 17 | 0 | 49 | 49 | 0 | 49 |
| | 31 | 17 | 22 | 0 | 39 | 39 | 0 | 39 |
| | 32 | 27 | 5 | 0 | 32 | 32 | 0 | 32 |
| | 33 | 21 | 5 | 0 | 26 | 26 | 0 | 26 |
| | 34 | 1 | 1 | 0 | 2 | 2 | 0 | 2 |
| | 35 | 17 | 5 | 0 | 22 | 22 | 0 | 22 |
| | 36 | 2 | 2 | 0 | 4 | 4 | 0 | 4 |
| | 37 | 9 | 2 | 0 | 11 | 11 | 0 | 11 |
| | 38 | 4 | 0 | 0 | 4 | 4 | 0 | 4 |
| | 39 | 2 | 1 | 0 | 3 | 3 | 0 | 3 |
| | 40 | 15 | 0 | 0 | 15 | 15 | 0 | 15 |
| | 41 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| | 42 | 15 | 0 | 0 | 15 | 15 | 0 | 15 |
| | 43 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| | 44 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| | 45 | 19 | 0 | 0 | 19 | 19 | 0 | 19 |
| | 46 | 10 | 0 | 0 | 10 | 10 | 0 | 10 |
| | 47 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| | | 239 | 196 | 2 | 436 | 437 | 0 | 437 |



HOURLY BY_ TIME EARNINGS BY LOCATION--DEC. 1972

| LOCATION | JOMLSB | MEN | NOMEN | MIN | OTHER | BU | PU | TOTAL |
|---|---|---|---|---|---|---|---|---|
| | 2480 | | | | | | | |
| | 26 | 18 | 2 | 0 | 4 | 9 | 0 | 12 |
| | 27 | 134 | 61 | 2 | 196 | 202 | 13 | 213 |
| | 28 | 37 | 23 | 0 | 54 | 43 | 13 | 48 |
| | 29 | 56 | 37 | 11 | 104 | 86 | 27 | 113 |
| | 30 | 43 | 21 | 0 | 61 | 50 | 14 | 64 |
| | 31 | 14 | 10 | 1 | 25 | 11 | 13 | 24 |
| | 32 | 29 | 13 | 1 | 53 | 12 | 42 | 54 |
| | 33 | 68 | 70 | 6 | 132 | 32 | 106 | 138 |
| | 34 | 41 | 43 | 2 | 86 | 3 | 63 | 66 |
| | 35 | 98 | 34 | 2 | 82 | 17 | 47 | 64 |
| | 36 | 14 | 9 | 0 | 23 | 14 | 9 | 23 |
| | 37 | 29 | 14 | 1 | 42 | 13 | 30 | 43 |
| | 38 | 11 | 4 | 0 | 15 | 0 | 15 | 15 |
| | 39 | 16 | 4 | 0 | 20 | 13 | 7 | 20 |
| | 40 | 2 | 0 | 0 | 2 | 0 | 2 | 2 |
| | 41 | 4 | 0 | 0 | 4 | 1 | 3 | 4 |
| | 42 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| | 43 | 16 | 0 | 0 | 16 | 16 | 0 | 16 |
| | 44 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| | 45 | 4 | 0 | 0 | 4 | 4 | 0 | 4 |
| | 46 | 2 | 0 | 0 | 2 | 0 | 2 | 2 |
| | 47 | 16 | 0 | 0 | 16 | 13 | 7 | 20 |
| | 48 | 11 | 4 | 0 | 15 | 0 | 15 | 15 |
| | 49 | 29 | 14 | 1 | 42 | 13 | 30 | 43 |
| | 50 | 15 | 9 | 0 | 23 | 14 | 9 | 23 |
| | 51 | 98 | 34 | 2 | 82 | 17 | 47 | 64 |
| | 52 | 41 | 43 | 2 | 86 | 3 | 63 | 66 |
| | 53 | 68 | 70 | 6 | 132 | 32 | 106 | 138 |
| | 54 | 29 | 28 | 1 | 58 | 12 | 42 | 54 |
| | 55 | 14 | 10 | 1 | 25 | 11 | 13 | 24 |
| | 56 | 43 | 31 | 3 | 61 | 50 | 14 | 64 |
| | 57 | 56 | 37 | 11 | 104 | 86 | 27 | 113 |
| | 58 | 37 | 23 | 6 | 54 | 43 | 13 | 48 |
| | | 579 | 405 | 57 | 927 | 546 | 444 | 984 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION
2648

| LOUISV | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 30 | 31 | 30 | 23 | 38 | 2 | 59 | 61 |
| 31 | 48 | 79 | 30 | 97 | 10 | 117 | 127 |
| 32 | 178 | 154 | 69 | 243 | 120 | 212 | 332 |
| 33 | 381 | 135 | 132 | 384 | 191 | 325 | 516 |
| 34 | 515 | 151 | 120 | 538 | 324 | 342 | 666 |
| 35 | 468 | 262 | 165 | 932 | 132 | 930 | 662 |
| 36 | 1203 | 988 | 418 | 1773 | 419 | 1774 | 2193 |
| 37 | 1645 | 845 | 381 | 2109 | 395 | 2135 | 2498 |
| 38 | 1888 | 919 | 384 | 2099 | 298 | 2113 | 2483 |
| 39 | 1539 | 128 | 176 | 1486 | 63 | 1579 | 1662 |
| 40 | 1301 | 62 | 130 | 1313 | 432 | 1011 | 1443 |
| 41 | 648 | 34 | 68 | 696 | 40 | 684 | 724 |
| 42 | 762 | 93 | 96 | 779 | 220 | 619 | 839 |
| 43 | 325 | 10 | 23 | 312 | 8 | 327 | 335 |
| 44 | 269 | 4 | 11 | 262 | 99 | 174 | 273 |
| 45 | 378 | 6 | 4 | 322 | 249 | 81 | 326 |
| 46 | 44 | 1 | 3 | 42 | 12 | 33 | 45 |
| 47 | 91 | 0 | 2 | 89 | 84 | 7 | 91 |
| 48 | 34 | 0 | 2 | 32 | 32 | 2 | 34 |
| 49 | 10 | 0 | 0 | 10 | 9 | 1 | 10 |
| 50 | 122 | 0 | 1 | 121 | 122 | 0 | 122 |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION
2648

| LOUISV | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 51 | 473 | 0 | 6 | 467 | 473 | 0 | 473 |
| 52 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 53 | 9 | 0 | 0 | 9 | 9 | 0 | 9 |
| 54 | 20 | 0 | 0 | 20 | 20 | 0 | 20 |
| 55 | 50 | 0 | 0 | 50 | 50 | 0 | 50 |
| 57 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| | 12454 | 3452 | 2117 | 13789 | 3705 | 12121 | 15906 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION •
3788 •

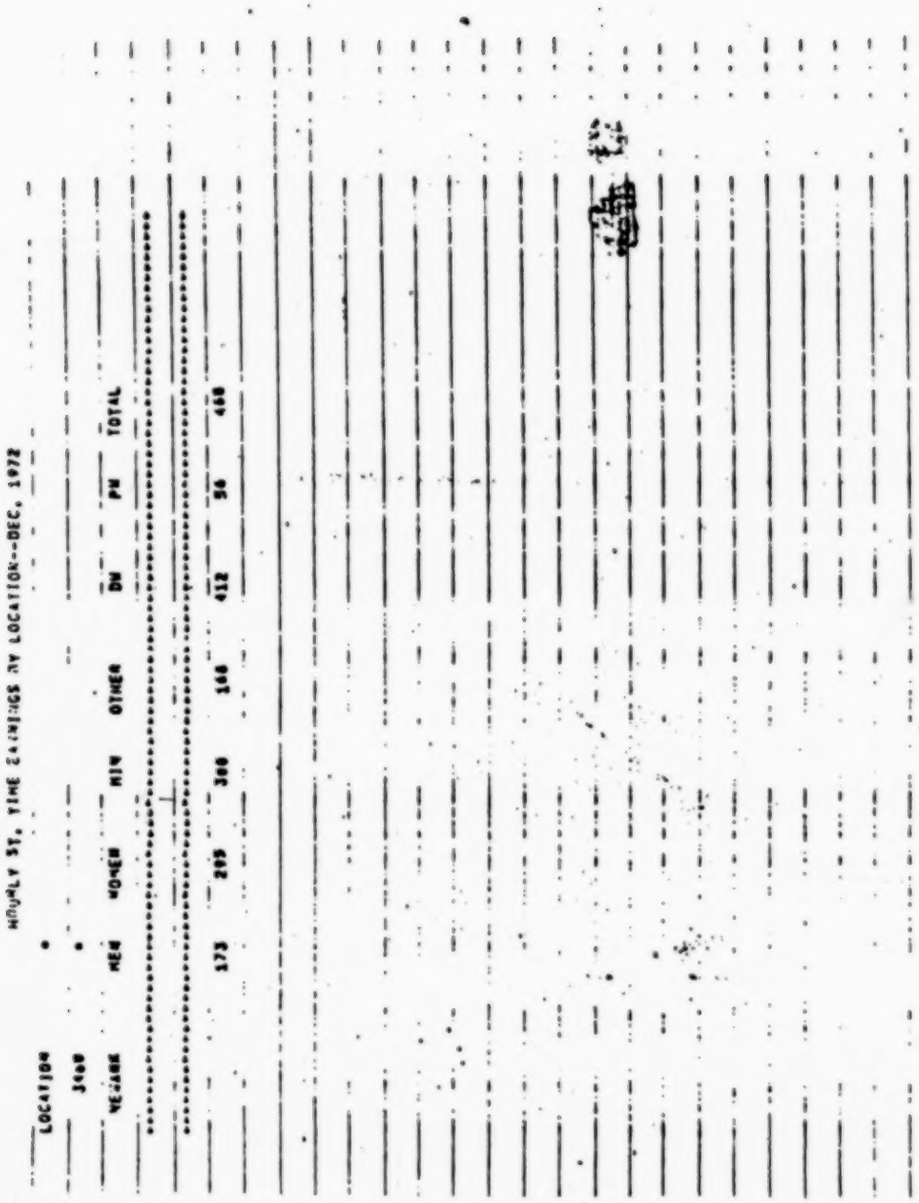
| HDFFMN | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 29 | 1 | 53 | 31 | 23 | 2 | 52 | 54 |
| 30 | 13 | 333 | 170 | 176 | 306 | 40 | 346 |
| 31 | 6 | 131 | 56 | 79 | 104 | 33 | 137 |
| 32 | 17 | 61 | 28 | 50 | 23 | 55 | 78 |
| 33 | 6 | 52 | 17 | 43 | 8 | 52 | 60 |
| 34 | 2 | 31 | 6 | 25 | 3 | 30 | 33 |
| 35 | 2 | 32 | 10 | 24 | 2 | 32 | 34 |
| 36 | 6 | 20 | 9 | 17 | 6 | 20 | 26 |
| 37 | 7 | 17 | 7 | 17 | 7 | 17 | 24 |
| 38 | 6 | 17 | 7 | 16 | 7 | 16 | 23 |
| 39 | 7 | 8 | 9 | 6 | 7 | 8 | 15 |
| 40 | 41 | 10 | 10 | 41 | 41 | 10 | 51 |
| 41 | 3 | 5 | 3 | 5 | 3 | 8 | 8 |
| 42 | 16 | 3 | 2 | 17 | 16 | 3 | 19 |
| 43 | 2 | 5 | 0 | 7 | 2 | 5 | 7 |
| 44 | 46 | 3 | 3 | 46 | 46 | 3 | 49 |
| 45 | 126 | 2 | 0 | 128 | 126 | 2 | 128 |
| 46 | 2 | 1 | 0 | 3 | 2 | 1 | 3 |
| 47 | 3 | 1 | 1 | 3 | 3 | 1 | 4 |
| 48 | 38 | 1 | 0 | 39 | 38 | 1 | 39 |
| 50 | 0 | 1 | 0 | 1 | 0 | 1 | 1 |



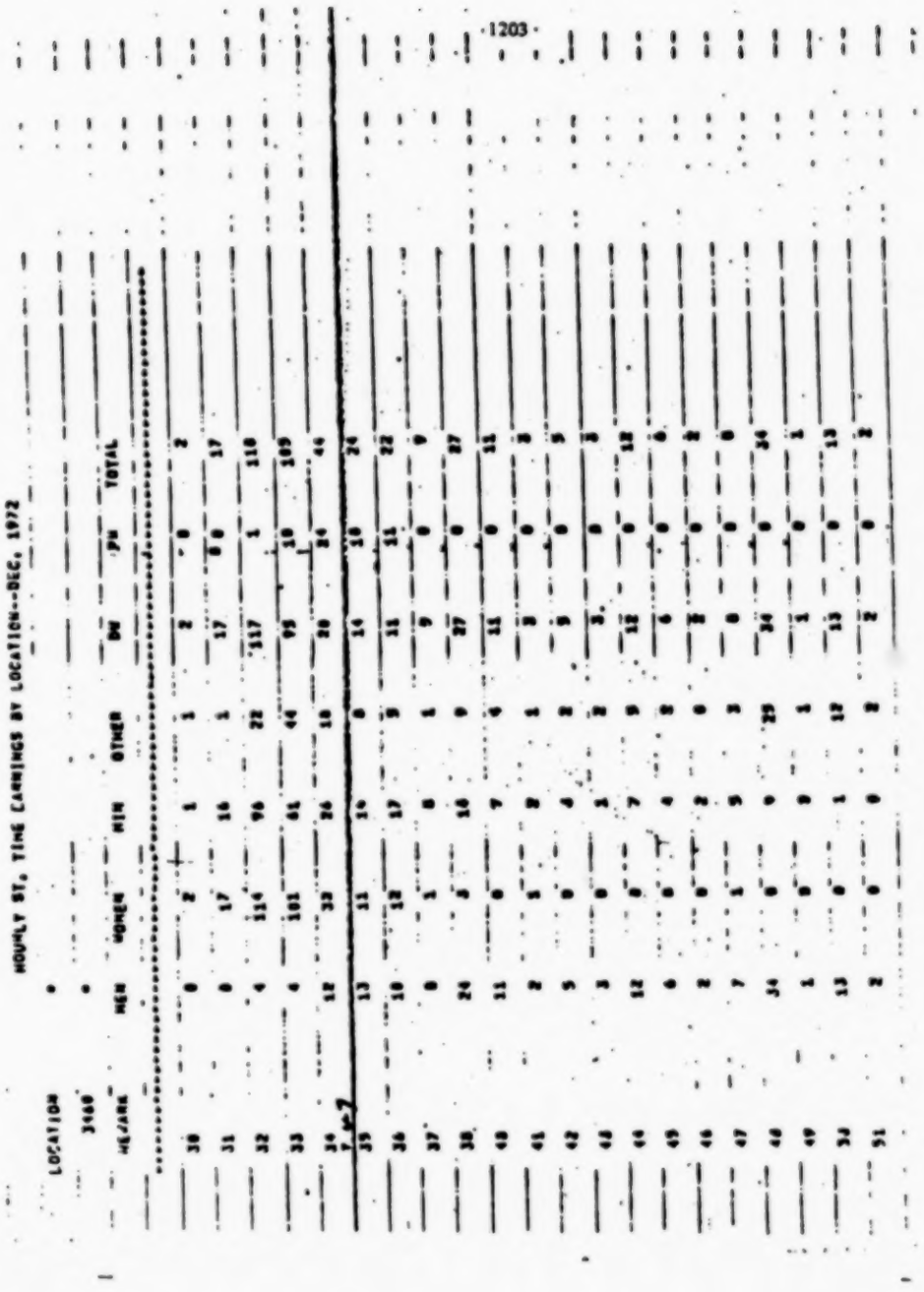
HOURLY ST. TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION •
3230 •

| HDFFMN | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| | 352 | 787 | 369 | 770 | 752 | 387 | 1139 |







BEST COPY AVAILABLE

HOURLY ST. TIME FARNINGS BY LOCATION--DEC. 1972

LOCATION
3693

| OUTLET | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 30 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 31 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 33 | 0 | 1 | 0 | 1 | 1 | 0 | 1 |
| 35 | 13 | 0 | 7 | 6 | 13 | 0 | 13 |
| 36 | 4 | 0 | 2 | 4 | 4 | 0 | 4 |
| 37 | 2 | 0 | 5 | 2 | 2 | 0 | 2 |
| 38 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 39 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 40 | 7 | 0 | 5 | 2 | 7 | 0 | 7 |
| 41 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 42 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| | 36 | 1 | 14 | 25 | 36 | 0 | 39 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

| LOCATION | 3730 | OAKLYN | KEY | HOMEM | MIN | OTHER | DV | PD | TOTAL |
|---|---|---|---|---|---|---|---|---|---|
| 27 | | | 2 | 0 | 2 | 0 | 0 | 2 | 2 |
| 28 | | | 2 | 0 | 1 | 1 | 0 | 2 | 2 |
| 29 | | | 9 | 0 | 6 | 3 | 0 | 9 | 9 |
| 30 | | | 9 | 0 | 7 | 3 | 0 | 9 | 9 |
| 31 | | | 14 | 0 | 6 | 6 | 2 | 12 | 14 |
| 32 | | | 47 | 12 | 33 | 71 | 96 | 0 | 104 |
| 33 | | | 122 | 14 | 33 | 74 | 105 | 11 | 116 |
| 34 | | | 46 | 12 | 17 | 44 | 42 | 10 | 61 |
| 35 | | | 179 | 29 | 64 | 124 | 146 | 46 | 108 |
| 36 | | | 177 | 36 | 61 | 132 | 136 | 37 | 213 |
| 37 | | | 145 | 18 | 96 | 97 | 119 | 24 | 152 |
| 38 | | | 127 | 20 | 46 | 119 | 109 | 34 | 149 |
| 39 | | | 26 | 37 | 16 | 37 | 0 | 33 | 43 |
| 40 | | | 241 | 13 | 60 | 166 | 199 | 37 | 236 |
| 41 | | | 90 | 29 | 29 | 90 | 33 | 92 | 125 |
| 42 | | | 105 | 26 | 25 | 156 | 111 | 74 | 185 |
| 43 | | | 87 | 8 | 16 | 78 | 24 | 55 | 89 |
| 44 | | | 148 | 11 | 26 | 134 | 76 | 61 | 139 |
| 45 | | | 116 | 9 | 18 | 111 | 36 | 85 | 121 |
| 46 | | | 245 | 8 | 29 | 236 | 189 | 82 | 267 |
| 47 | | | 340 | 8 | 19 | 312 | 251 | 81 | 332 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

| LOCATION | 3730 | OAKLYN | KEY | HOMEM | MIN | OTHER | DV | PD | TOTAL |
|---|---|---|---|---|---|---|---|---|---|
| 33 | | | 1 | 2 | 1 | 2 | 3 | 0 | 3 |
| 34 | | | 8 | 7 | 0 | 7 | 15 | 0 | 15 |
| 35 | | | 4 | 1 | 1 | 4 | 5 | 0 | 5 |
| 36 | | | 5 | 0 | 1 | 4 | 5 | 0 | 5 |
| 37 | | | 13 | 1 | 6 | 18 | 16 | 0 | 16 |
| 38 | | | 11 | 0 | 2 | 9 | 11 | 0 | 11 |
| 39 | | | 1 | 0 | 1 | 0 | 1 | 0 | 1 |
| 40 | | | 4 | 0 | 2 | 2 | 4 | 0 | 4 |
| 41 | | | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 42 | | | 12 | 0 | 6 | 6 | 12 | 0 | 12 |
| 43 | | | 6 | 0 | 4 | 2 | 6 | 0 | 6 |
| 44 | | | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 45 | | | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 46 | | | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 47 | | | 1 | 0 | 1 | 0 | 1 | 0 | 1 |
| 48 | | | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 49 | | | 1 | 0 | 1 | 0 | 1 | 0 | 1 |
| 50 | | | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 51 | | | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 52 | | | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
|

HOURLY ST. TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION
3948

| PHILAB | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 48 | 80 | 2 | 15 | 67 | 15 | 67 | 82 |
| 49 | 152 | 1 | 14 | 139 | 63 | 90 | 153 |
| 50 | 111 | 0 | 5 | 106 | 34 | 77 | 111 |
| 51 | 71 | 0 | 3 | 68 | 2 | 69 | 71 |
| 52 | 89 | 0 | 10 | 79 | 27 | 62 | 89 |
| 53 | 75 | 0 | 3 | 72 | 18 | 57 | 75 |
| 54 | 66 | 0 | 2 | 64 | 2 | 64 | 66 |
| 55 | 43 | 1 | 2 | 42 | 0 | 44 | 44 |
| 56 | 48 | 1 | 5 | 44 | 2 | 47 | 49 |
| 57 | 27 | 0 | 2 | 25 | 0 | 27 | 27 |
| 58 | 27 | 0 | 2 | 25 | 0 | 27 | 27 |
| 59 | 38 | 0 | 1 | 37 | 0 | 38 | 38 |
| 60 | 33 | 0 | 4 | 29 | 0 | 33 | 33 |
| 61 | 38 | 0 | 0 | 38 | 0 | 38 | 38 |
| 62 | 24 | 0 | 0 | 24 | 0 | 24 | 24 |
| 63 | 22 | 0 | 1 | 21 | 0 | 22 | 22 |
| 64 | 24 | 0 | 1 | 23 | 0 | 24 | 24 |
| 65 | 14 | 0 | 1 | 13 | 0 | 14 | 14 |
| 66 | 16 | 0 | 0 | 16 | 0 | 16 | 16 |
| 67 | 12 | 0 | 0 | 12 | 0 | 12 | 12 |
| 68 | 11 | 0 | 0 | 11 | 0 | 11 | 11 |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION
3948

| PHILAB | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 69 | 12 | 0 | 0 | 12 | 0 | 12 | 12 |
| 70 | 6 | 0 | 0 | 6 | 0 | 6 | 6 |
| 71 | 9 | 0 | 1 | 8 | 0 | 9 | 9 |
| 72 | 11 | 0 | 0 | 11 | 0 | 11 | 11 |
| 73 | 2 | 0 | 0 | 2 | 0 | 2 | 2 |
| 74 | 4 | 0 | 0 | 4 | 0 | 4 | 4 |
| 75 | 3 | 0 | 0 | 3 | 0 | 3 | 3 |
| 76 | 2 | 0 | 0 | 2 | 0 | 2 | 2 |
| 77 | 3 | 0 | 0 | 3 | 0 | 3 | 3 |
| 78 | 6 | 0 | 0 | 6 | 0 | 6 | 6 |
| 79 | 3 | 0 | 1 | 2 | 0 | 3 | 3 |
| 80 | 3 | 0 | 0 | 3 | 0 | 3 | 3 |
| 81 | 2 | 0 | 0 | 2 | 0 | 2 | 2 |
| 82 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 84 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 87 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| | 3426 | 278 | 676 | 3026 | 1868 | 1836 | 3704 |

| PITCLD | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 30 | 11 | 11 | 2 | 20 | 22 | 0 | 22 |
| 31 | 1 | 5 | 0 | 6 | 6 | 0 | 6 |
| 32 | 27 | 93 | 4 | 116 | 120 | 0 | 120 |
| 33 | 129 | 154 | 17 | 266 | 282 | 0 | 282 |
| 34 | 69 | 29 | 2 | 92 | 94 | 0 | 94 |
| 35 | 149 | 29 | 10 | 168 | 178 | 0 | 178 |
| 36 | 217 | 40 | 10 | 247 | 257 | 0 | 257 |
| 37 | 203 | 24 | 6 | 221 | 227 | 0 | 227 |
| 38 | 49 | 24 | 2 | 71 | 73 | 0 | 73 |
| 39 | 260 | 11 | 7 | 264 | 269 | 2 | 271 |
| 40 | 74 | 4 | 4 | 74 | 77 | 1 | 78 |
| 41 | 369 | 15 | 10 | 394 | 400 | 4 | 404 |
| 42 | 364 | 9 | 7 | 366 | 372 | 1 | 373 |
| 43 | 173 | 2 | 0 | 175 | 174 | 1 | 175 |
| 44 | 376 | 1 | 9 | 372 | 377 | 0 | 377 |
| 45 | 259 | 0 | 1 | 258 | 258 | 1 | 259 |
| 46 | 506 | 1 | 6 | 501 | 506 | 1 | 507 |
| 47 | 268 | 0 | 4 | 264 | 266 | 2 | 268 |
| 48 | 155 | 0 | 1 | 154 | 154 | 1 | 155 |
| 49 | 205 | 0 | 2 | 203 | 203 | 2 | 205 |
| 50 | 74 | 0 | 0 | 74 | 71 | 3 | 74 |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
3970

| PITCLD | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 51 | 78 | 0 | 0 | 78 | 75 | 3 | 78 |
| 52 | 42 | 0 | 0 | 42 | 41 | 1 | 42 |
| 53 | 47 | 0 | 0 | 47 | 45 | 2 | 47 |
| 54 | 11 | 0 | 0 | 11 | 7 | 4 | 11 |
| 55 | 16 | 0 | 0 | 16 | 16 | 0 | 16 |
| 56 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 57 | 6 | 0 | 0 | 6 | 6 | 0 | 6 |
| 58 | 6 | 0 | 0 | 6 | 5 | 1 | 6 |
| 59 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 60 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| | 4172 | 452 | 109 | 4524 | 4994 | 30 | 4624 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
4030

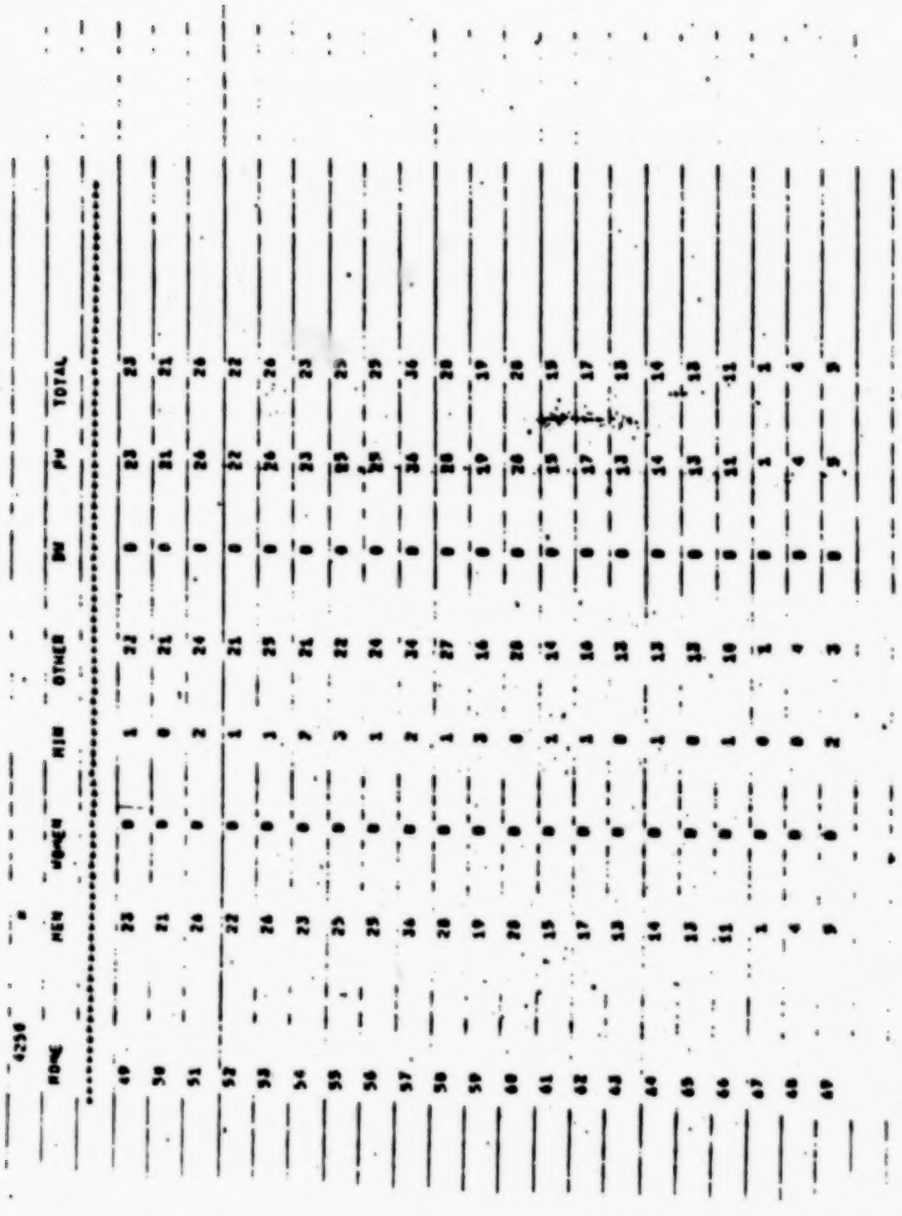
| PROVID | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 25 | 0 | 1 | 0 | 1 | 0 | 1 | 1 |
| 26 | 1 | 58 | 22 | 59 | 2 | 79 | 81 |
| 27 | 0 | 36 | 5 | 31 | 0 | 36 | 36 |
| 28 | 0 | 49 | 12 | 36 | 0 | 41 | 49 |
| 29 | 3 | 61 | 6 | 58 | 14 | 50 | 64 |
| 30 | 28 | 83 | 11 | 100 | 69 | 42 | 111 |
| 31 | 9 | 50 | 0 | 51 | 29 | 30 | 59 |
| 32 | 45 | 42 | 10 | 69 | 42 | 25 | 87 |
| 33 | 52 | 26 | 9 | 69 | 53 | 25 | 78 |
| 34 | 27 | 14 | 2 | 39 | 26 | 15 | 41 |
| 35 | 33 | 11 | 4 | 48 | 27 | 17 | 44 |
| 36 | 20 | 2 | 0 | 22 | 14 | 8 | 22 |
| 37 | 22 | 5 | 3 | 24 | 20 | 7 | 27 |
| 38 | 31 | 4 | 2 | 33 | 26 | 9 | 35 |
| 39 | 16 | 3 | 1 | 18 | 13 | 6 | 19 |
| 40 | 8 | 1 | 0 | 9 | 5 | 4 | 9 |
| 41 | 25 | 0 | 1 | 24 | 23 | 2 | 25 |
| 42 | 24 | 1 | 2 | 23 | 19 | 6 | 25 |
| 43 | 13 | 1 | 0 | 14 | 8 | 6 | 14 |
| 44 | 17 | 1 | 1 | 17 | 13 | 5 | 18 |
| 45 | 6 | 1 | 2 | 5 | 0 | 7 | 7 |



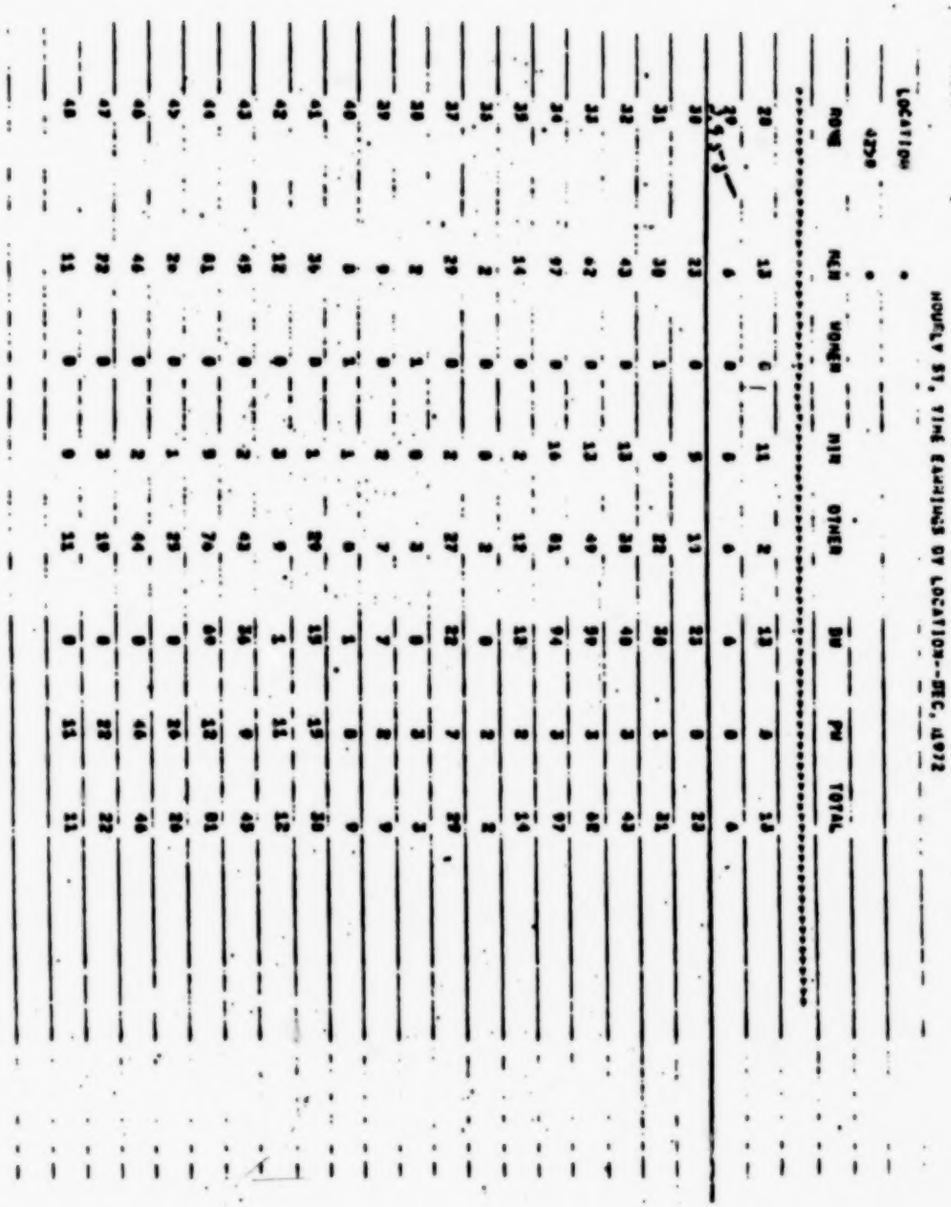
HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
4030

| PROVID | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 46 | 10 | 0 | 0 | 10 | 7 | 3 | 10 |
| 47 | 14 | 0 | 1 | 13 | 8 | 6 | 14 |
| 48 | 9 | 0 | 0 | 9 | 3 | 6 | 9 |
| 49 | 27 | 0 | 1 | 26 | 24 | 3 | 27 |
| 51 | 2 | 0 | 0 | 2 | 1 | 1 | 2 |
| 52 | 2 | 0 | 1 | 1 | 1 | 1 | 2 |
| 53 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 54 | 2 | 0 | 0 | 2 | 0 | 2 | 2 |
| 57 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 98 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| | 449 | 472 | 113 | 888 | 476 | 445 | 921 |







HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION •
4278 •

| RANGE | MEN | WOMEN | MIN | OTHER | DU | PU | TOTAL |
|---|---|---|---|---|---|---|---|
| 70 | 5 | 0 | 1 | 4 | 0 | 5 | 5 |
| 71 | 4 | 0 | 0 | 4 | 0 | 4 | 4 |
| 73 | 2 | 0 | 0 | 2 | 0 | 2 | 2 |
| 74 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 1028 | 3 | 113 | 988 | 428 | 595 | 1024 | |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION •
4417 •

| SALEN | MEN | WOMEN | MIN | OTHER | DU | PU | TOTAL |
|---|---|---|---|---|---|---|---|
| 29 | 8 | 7 | 5 | 9 | 10 | 0 | 10 |
| 30 | 133 | 215 | 98 | 250 | 348 | 0 | 348 |
| 31 | 56 | 244 | 68 | 240 | 308 | 0 | 308 |
| 32 | 165 | 73 | 41 | 197 | 238 | 0 | 238 |
| 33 | 301 | 58 | 96 | 304 | 359 | 0 | 359 |
| 34 | 132 | 14 | 21 | 125 | 146 | 0 | 146 |
| 35 | 65 | 1 | 9 | 57 | 66 | 0 | 66 |
| 36 | 453 | 19 | 48 | 424 | 472 | 0 | 472 |
| 37 | 7 | 0 | 0 | 7 | 7 | 0 | 7 |
| 38 | 61 | 0 | 4 | 57 | 61 | 0 | 61 |
| 39 | 100 | 0 | 4 | 96 | 100 | 0 | 100 |
| 41 | 116 | 0 | 6 | 110 | 116 | 0 | 116 |
| 42 | 9 | 0 | 0 | 9 | 9 | 0 | 9 |
| 43 | 72 | 0 | 1 | 71 | 72 | 0 | 72 |
| 45 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| 46 | 17 | 0 | 0 | 17 | 17 | 0 | 17 |
| 48 | 4 | 0 | 0 | 4 | 4 | 0 | 4 |
| 92 | 8 | 0 | 1 | 7 | 8 | 0 | 8 |
| | 1709 | 631 | 346 | 1990 | 2336 | 0 | 2336 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
4488

| SAM JR | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 32 | 2 | 2 | 0 | 4 | 0 | 4 | 4 |
| 33 | 0 | 2 | 1 | 1 | 0 | 2 | 2 |
| 34 | 0 | 1 | 0 | 1 | 0 | 1 | 1 |
| 35 | 7 | 5 | 1 | 11 | 7 | 5 | 12 |
| 36 | 20 | 4 | 9 | 15 | 10 | 9 | 24 |
| 37 | 6 | 3 | 3 | 6 | 3 | 6 | 9 |
| 38 | 14 | 5 | 4 | 13 | 10 | 9 | 19 |
| 39 | 4 | 2 | 2 | 4 | 0 | 6 | 6 |
| 40 | 13 | 6 | 0 | 11 | 6 | 13 | 19 |
| 41 | 6 | 3 | 0 | 9 | 3 | 6 | 9 |
| 42 | 10 | 0 | 3 | 13 | 14 | 4 | 18 |
| 43 | 7 | 0 | 4 | 3 | 2 | 5 | 7 |
| 44 | 10 | 3 | 3 | 14 | 12 | 7 | 19 |
| 45 | 23 | 3 | 6 | 20 | 19 | 7 | 26 |
| 46 | 9 | 0 | 3 | 6 | 2 | 7 | 9 |
| 47 | 7 | 3 | 0 | 9 | 4 | 6 | 10 |
| 48 | 9 | 0 | 1 | 8 | 5 | 4 | 9 |
| 49 | 6 | 0 | 0 | 6 | 2 | 4 | 6 |
| 50 | 12 | 0 | 3 | 9 | 6 | 6 | 12 |
| 51 | 4 | 0 | 1 | 3 | 1 | 3 | 4 |
| 52 | 6 | 0 | 0 | 6 | 0 | 6 | 6 |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
4488

| SAM JR | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 53 | 5 | 1 | 1 | 5 | 0 | 6 | 6 |
| 54 | 7 | 0 | 2 | 5 | 2 | 5 | 7 |
| 55 | 3 | 1 | 2 | 2 | 1 | 3 | 4 |
| 56 | 4 | 0 | 1 | 3 | 1 | 3 | 4 |
| 57 | 2 | 0 | 1 | 1 | 0 | 2 | 2 |
| 58 | 3 | 0 | 2 | 1 | 0 | 3 | 3 |
| 59 | 2 | 0 | 0 | 2 | 0 | 2 | 2 |
| 60 | 1 | 0 | 1 | 1 | 0 | 2 | 2 |
| 62 | 1 | 0 | 1 | 0 | 0 | 1 | 1 |
| | 220 | 42 | 76 | 192 | 119 | 143 | 262 |



BEST COPY AVAILABLE

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
4500

| SCHEDT | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 30 | 0 | 4 | 0 | 4 | 4 | 0 | 4 |
| 31 | 33 | 96 | 0 | 129 | 129 | 0 | 129 |
| 32 | 95 | 9 | 7 | 97 | 104 | 0 | 104 |
| 33 | 478 | 90 | 44 | 524 | 568 | 0 | 568 |
| 34 | 203 | 68 | 18 | 267 | 285 | 0 | 285 |
| 35 | 554 | 116 | 45 | 625 | 670 | 0 | 670 |
| 36 | 648 | 87 | 36 | 699 | 735 | 0 | 735 |
| 37 | 708 | 61 | 55 | 714 | 769 | 0 | 769 |
| 38 | 344 | 69 | 46 | 863 | 909 | 0 | 909 |
| 39 | 194 | 21 | 6 | 209 | 215 | 0 | 215 |
| 40 | 627 | 13 | 29 | 611 | 640 | 0 | 640 |
| 41 | 267 | 6 | 11 | 262 | 273 | 0 | 273 |
| 42 | 949 | 3 | 44 | 908 | 952 | 0 | 952 |
| 43 | 276 | 3 | 7 | 272 | 279 | 0 | 279 |
| 44 | 1264 | 4 | 21 | 1247 | 1268 | 0 | 1268 |
| 45 | 728 | 2 | 24 | 706 | 730 | 0 | 730 |
| 46 | 259 | 0 | 4 | 255 | 259 | 0 | 259 |
| 47 | 498 | 0 | 3 | 495 | 498 | 0 | 498 |
| 48 | 1541 | 1 | 4 | 1538 | 1542 | 0 | 1542 |
| 49 | 198 | 0 | 4 | 194 | 198 | 0 | 198 |
| 50 | 399 | 0 | 5 | 394 | 399 | 0 | 399 |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
4500

| SCHEDT | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 51 | 210 | 0 | 1 | 209 | 210 | 0 | 210 |
| 52 | 187 | 0 | 0 | 187 | 187 | 0 | 187 |
| 53 | 271 | 0 | 1 | 270 | 271 | 0 | 271 |
| 54 | 97 | 0 | 0 | 97 | 97 | 0 | 97 |
| 55 | 105 | 0 | 2 | 103 | 105 | 0 | 105 |
| 56 | 108 | 0 | 0 | 108 | 108 | 0 | 108 |
| 57 | 36 | 0 | 0 | 36 | 36 | 0 | 36 |
| 58 | 48 | 0 | 0 | 48 | 48 | 0 | 48 |
| 59 | 18 | 0 | 0 | 18 | 18 | 0 | 18 |
| 60 | 5 | 0 | 0 | 5 | 5 | 0 | 5 |
| 61 | 5 | 0 | 0 | 5 | 5 | 0 | 5 |
| 63 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| | 11243 | 669 | 426 | 11486 | 11912 | 0 | 11912 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
4569

| SOURCE | MEN | WOMEN | MIN | OTHER | DU | PU | TOTAL |
|---|---|---|---|---|---|---|---|
| 29 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 30 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 31 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| 32 | 5 | 0 | 0 | 5 | 5 | 0 | 5 |
| 33 | 22 | 0 | 0 | 22 | 22 | 0 | 22 |
| 34 | 18 | 0 | 0 | 18 | 18 | 0 | 18 |
| 35 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| 36 | 45 | 0 | 1 | 44 | 45 | 0 | 45 |
| 37 | 41 | 0 | 0 | 41 | 41 | 0 | 41 |
| 40 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 45 | 11 | 0 | 0 | 11 | 11 | 0 | 11 |
| 46 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| | 157 | 0 | 1 | 156 | 157 | 0 | 157 |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
4569

| SOURCE | MEN | WOMEN | MIN | OTHER | DU | PU | TOTAL |
|---|---|---|---|---|---|---|---|
| 27 | 6 | 41 | 5 | 42 | 47 | 0 | 47 |
| 29 | 7 | 0 | 0 | 15 | 15 | 0 | 15 |
| 30 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| 32 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 33 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 35 | 4 | 0 | 0 | 4 | 4 | 0 | 4 |
| 36 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| 37 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 39 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 41 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 42 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 43 | 11 | 0 | 0 | 11 | 11 | 0 | 11 |
| 44 | 5 | 0 | 0 | 5 | 5 | 0 | 5 |
| 47 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| | 85 | 41 | 5 | 99 | 104 | 0 | 104 |

HOURLY ST, [illegible] BY LOCATION--DEC, 1972

LOCATION 4628

| SPGFLD | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 30 | 1 | 0 | 1 | 0 | 1 | 0 | 1 |
| 31 | 2 | 0 | 2 | 0 | 2 | 0 | 2 |
| 32 | 2 | 11 | 2 | 11 | 13 | 0 | 13 |
| 33 | 3 | 11 | 4 | 10 | 14 | 0 | 14 |
| 34 | 4 | 2 | 1 | 5 | 6 | 0 | 6 |
| 35 | 17 | 1 | 5 | 13 | 18 | 0 | 18 |
| 36 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 37 | 15 | 2 | 3 | 14 | 17 | 0 | 17 |
| 40 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 41 | 2 | 1 | 0 | 3 | 3 | 0 | 3 |
| 43 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 44 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| 47 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 49 | 0 | 0 | 1 | 7 | 0 | 0 | 0 |
| 50 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 52 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 53 | 6 | 0 | 1 | 5 | 6 | 0 | 6 |
| 54 | 11 | 0 | 0 | 11 | 11 | 0 | 11 |
| 55 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 56 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 59 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |



HOURLY ST, TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION 4628

| SPGFLD | MEN | WOMEN | MIN | OTHER | DW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 61 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| 62 | 12 | 0 | 0 | 12 | 12 | 0 | 12 |
| 63 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 64 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| 66 | 5 | 0 | 0 | 5 | 5 | 0 | 5 |
| 67 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 68 | 1 | 0 | 0 | 1 | 1 | 0 | 1 |
| | 111 | 28 | 28 | 119 | 139 | 0 | 139 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
4660

| SYRCSE | MEN | WOMEN | NIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 30 | 3 | 437 | 41 | 399 | 435 | 5 | 440 |
| 31 | 8 | 470 | 60 | 418 | 451 | 19 | 470 |
| 32 | 62 | 146 | 24 | 184 | 289 | 3 | 292 |
| 33 | 228 | 119 | 22 | 329 | 338 | 9 | 347 |
| 34 | 50 | 27 | 7 | 70 | 71 | 6 | 77 |
| 35 | 177 | 67 | 25 | 219 | 243 | 1 | 244 |
| 36 | 88 | 19 | 7 | 96 | 101 | 2 | 103 |
| 37 | 79 | 20 | 12 | 87 | 92 | 7 | 99 |
| 38 | 45 | 14 | 3 | 56 | 50 | 9 | 59 |
| 39 | 17 | 13 | 2 | 28 | 19 | 11 | 30 |
| 40 | 42 | 8 | 4 | 46 | 45 | 5 | 50 |
| 41 | 13 | 12 | 1 | 24 | 15 | 10 | 25 |
| 42 | 39 | 23 | 1 | 61 | 46 | 16 | 62 |
| 43 | 25 | 13 | 0 | 38 | 23 | 15 | 38 |
| 44 | 96 | 5 | 0 | 96 | 96 | 5 | 101 |
| 45 | 93 | 0 | 0 | 93 | 92 | 1 | 93 |
| 46 | 22 | 3 | 0 | 25 | 20 | 5 | 25 |
| 47 | 46 | 1 | 0 | 47 | 46 | 1 | 47 |
| 48 | 173 | 1 | 2 | 172 | 170 | 4 | 174 |
| 49 | 13 | 1 | 0 | 14 | 9 | 5 | 14 |
| 50 | 30 | 1 | 1 | 30 | 22 | 9 | 31 |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
4660

| SYRCSE | MEN | WOMEN | NIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 51 | 33 | 1 | 0 | 34 | 28 | 6 | 34 |
| 52 | 28 | 0 | 1 | 27 | 22 | 6 | 28 |
| 53 | 54 | 0 | 0 | 54 | 53 | 1 | 54 |
| 54 | 38 | 0 | 1 | 37 | 33 | 5 | 38 |
| 55 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| 56 | 9 | 0 | 1 | 8 | 7 | 2 | 9 |
| 57 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 58 | 5 | 0 | 0 | 5 | 0 | 5 | 5 |
| 59 | 6 | 0 | 0 | 6 | 0 | 6 | 6 |
| 61 | 2 | 0 | 0 | 2 | 0 | 2 | 2 |
| 62 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| | 1526 | 1397 | 220 | 2703 | 2732 | 191 | 2928 |

NOWLEY ST. TIKE EARNINGS BY LOCATION--DEC. 1972

| LOCATION | TELL C | MEN | WOMEN | MIN | OTHER | BU | PU | TOTAL |
|---|---|---|---|---|---|---|---|---|
| 4630 | | | | | | | | |
| 29 | 3 | 6 | 1 | 8 | 4 | 8 | 9 | |
| 30 | 13 | 92 | 15 | 92 | 56 | 149 | 107 | |
| 31 | 5 | 143 | 7 | 143 | 99 | 51 | 150 | |
| 32 | 25 | 62 | 9 | 88 | 46 | 49 | 97 | |
| 33 | 138 | 66 | 7 | 197 | 137 | 47 | 201 | |
| 34 | 72 | 29 | 6 | 85 | 13 | 46 | 61 | |
| 35 | 16 | 26 | 3 | 53 | 47 | 39 | 56 | |
| 36 | 39 | 48 | 4 | 63 | 48 | 47 | 67 | |
| 37 | 13 | 28 | 1 | 52 | 5 | 48 | 53 | |
| 38 | 18 | 22 | 4 | 39 | 0 | 43 | 43 | |
| 39 | 37 | 26 | 4 | 63 | 20 | 37 | 57 | |
| 40 | 11 | 29 | 1 | 39 | 0 | 48 | 48 | |
| 41 | 30 | 32 | 1 | 63 | 1 | 41 | 42 | |
| 42 | 14 | 20 | 1 | 35 | 2 | 22 | 24 | |
| 43 | 18 | 16 | 0 | 34 | 0 | 26 | 26 | |
| 44 | 12 | 16 | 1 | 29 | 1 | 25 | 26 | |
| 45 | 9 | 15 | 2 | 26 | 0 | 20 | 20 | |
| 46 | 7 | 10 | 2 | 19 | 0 | 17 | 17 | |
| 47 | 12 | 6 | 1 | 19 | 0 | 18 | 18 | |
| 48 | 14 | 7 | 1 | 22 | 0 | 21 | 21 | |
| 49 | 36 | 2 | 0 | 38 | 0 | 28 | 28 | |

940

NOWLEY ST. TIKE EARNINGS BY LOCATION--DEC. 1972

| LOCATION | TELL C | MEN | WOMEN | MIN | OTHER | BU | PU | TOTAL |
|---|---|---|---|---|---|---|---|---|
| 4610 | | | | | | | | |
| 29 | 0 | 10 | 0 | 0 | 0 | 0 | 0 | |
| 30 | 72 | 469 | 7 | 536 | 299 | 246 | 545 | |
| 31 | 43 | 177 | 1 | 219 | 182 | 38 | 220 | |
| 32 | 22 | 34 | 0 | 56 | 22 | 34 | 56 | |
| 33 | 13 | 19 | 0 | 32 | 14 | 18 | 32 | |
| 34 | 9 | 15 | 1 | 17 | 5 | 13 | 18 | |
| 35 | 30 | 33 | 0 | 63 | 32 | 31 | 63 | |
| 36 | 3 | 2 | 4 | 9 | 3 | 2 | 9 | |
| 37 | 21 | 20 | 0 | 41 | 22 | 19 | 41 | |
| 38 | 11 | 11 | 0 | 22 | 10 | 12 | 22 | |
| 39 | 15 | 9 | 0 | 20 | 13 | 9 | 20 | |
| 40 | 44 | 6 | 0 | 50 | 44 | 6 | 50 | |
| 41 | 1 | 6 | 0 | 1 | 1 | 0 | 1 | |
| 42 | 1 | 6 | 0 | 1 | 1 | 0 | 1 | |
| 43 | 1 | 6 | 0 | 1 | 1 | 0 | 1 | |
| 44 | 1 | 8 | 0 | 2 | 1 | 2 | 3 | |
| 45 | 12 | 6 | 0 | 18 | 12 | 0 | 12 | |
| 46 | 7 | 0 | 0 | 7 | 7 | 0 | 7 | |
| 47 | 1 | 0 | 0 | 1 | 1 | 0 | 1 | |
| 48 | 2 | 6 | 0 | 8 | 2 | 0 | 2 | |
| 49 | 7 | 0 | 0 | 7 | 7 | 0 | 7 | |
| | 312 | 799 | 9 | 1161 | 777 | 323 | 1110 | |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC, 1972

| LOCATION | MEN | WOMEN | MEN | WOMEN | MEN | WOMEN | MEN | WOMEN | MEN | WOMEN | MEN | WOMEN |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 4930 | | | | | | | | | | | | |
| TAMPA | | | | | | | | | | | | |
| MIAMI | | | | | | | | | | | | |
| 4950 | | | | | | | | | | | | |
| ORLANDO | | | | | | | | | | | | |
| 4960 | | | | | | | | | | | | |
| TALLAHASSEE | | | | | | | | | | | | |
| 4970 | | | | | | | | | | | | |
| JACKSONVILLE | | | | | | | | | | | | |
| 4980 | | | | | | | | | | | | |
| PENSACOLA | | | | | | | | | | | | |
| 4990 | | | | | | | | | | | | |
| TALLAHASSEE | | | | | | | | | | | | |
| 5000 | | | | | | | | | | | | |
| JACKSONVILLE | | | | | | | | | | | | |
| 5010 | | | | | | | | | | | | |
| PENSACOLA | | | | | | | | | | | | |
| 5020 | | | | | | | | | | | | |
| TALLAHASSEE | | | | | | | | | | | | |
| 5030 | | | | | | | | | | | | |
| JACKSONVILLE | | | | | | | | | | | | |
| 5040 | | | | | | | | | | | | |
| PENSACOLA | | | | | | | | | | | | |
| 5050 | | | | | | | | | | | | |
| TALLAHASSEE | | | | | | | | | | | | |
| 5060 | | | | | | | | | | | | |
| JACKSONVILLE | | | | | | | | | | | | |
| 5070 | | | | | | | | | | | | |
| PENSACOLA | | | | | | | | | | | | |
| 5080 | | | | | | | | | | | | |
| TALLAHASSEE | | | | | | | | | | | | |
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| JACKSONVILLE | | | | | | | | | | | | |
| 5100 | | | | | | | | | | | | |
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| 5110 | | | | | | | | | | | | |
| TALLAHASSEE | | | | | | | | | | | | |
| 5120 | | | | | | | | | | | | |
| JACKSONVILLE | | | | | | | | | | | | |
| 5130 | | | | | | | | | | | | |
| PENSACOLA | | | | | | | | | | | | |
| 5140 | | | | | | | | | | | | |
| TALLAHASSEE | | | | | | | | | | | | |
| 5150 | | | | | | | | | | | | |
| JACKSONVILLE | | | | | | | | | | | | |
| 5160 | | | | | | | | | | | | |
| PENSACOLA | | | | | | | | | | | | |
| 5170 | | | | | | | | | | | | |
| TALLAHASSEE | | | | | | | | | | | | |
| 5180 | | | | | | | | | | | | |
| JACKSONVILLE | | | | | | | | | | | | |
| 5190 | | | | | | | | | | | | |
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| 5200 | | | | | | | | | | | | |
| TALLAHASSEE | | | | | | | | | | | | |
| 5210 | | | | | | | | | | | | |
| JACKSONVILLE | | | | | | | | | | | | |
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| 5230 | | | | | | | | | | | | |
| TALLAHASSEE | | | | | | | | | | | | |
| 5240 | | | | | | | | | | | | |
| JACKSONVILLE | | | | | | | | | | | | |
| 5250 | | | | | | | | | | | | |
| PENSACOLA | | | | | | | | | | | | |
| 5260 | | | | | | | | | | | | |
| TALLAHASSEE | | | | | | | | | | | | |
| 5270 | | | | | | | | | | | | |
| JACKSONVILLE | | | | | | | | | | | | |
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| 5290 | | | | | | | | | | | | |
| TALLAHASSEE | | | | | | | | | | | | |
| 5300 | | | | | | | | | | | | |
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| JACKSONVILLE | | | | | | | | | | | | |
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| TALLAHASSEE | | | | | | | | | | | | |
| 5360 | | | | | | | | | | | | |
| JACKSONVILLE | | | | | | | | | | | | |
| 5370 | | | | | | | | | | | | |
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| 5380 | | | | | | | | | | | | |
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| 5390 | | | | | | | | | | | | |
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| TREATM | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 31 | 4 | 0 | 3 | 1 | 0 | 4 | 4 |
| 34 | 1 | 0 | 0 | 1 | 0 | 1 | 1 |
| | 484 | 110 | 209 | 309 | 147 | 427 | 594 |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION •

4898 •

| TYLER | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 31 | 23 | 20 | 19 | 24 | 43 | 0 | 43 |
| 33 | 211 | 140 | 136 | 221 | 357 | 0 | 357 |
| 33 | 259 | 43 | 66 | 236 | 302 | 0 | 302 |
| 34 | 301 | 69 | 134 | 236 | 370 | 0 | 370 |
| 35 | 132 | 18 | 49 | 101 | 149 | 1 | 150 |
| 36 | 124 | 7 | 23 | 108 | 131 | 0 | 131 |
| 37 | 26 | 2 | 3 | 25 | 28 | 0 | 28 |
| 38 | 34 | 1 | 0 | 35 | 35 | 0 | 35 |
| 39 | 43 | 0 | 3 | 40 | 43 | 0 | 43 |
| 40 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 41 | 13 | 0 | 2 | 11 | 13 | 0 | 13 |
| 42 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |
| 44 | 4 | 0 | 0 | 4 | 4 | 0 | 4 |
| 45 | 44 | 0 | 0 | 44 | 44 | 0 | 44 |
| 49 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| 50 | 17 | 0 | 0 | 17 | 17 | 0 | 17 |
| | 1238 | 306 | 435 | 1109 | 1543 | 1 | 1544 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
9250

| WARREN | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 30 | 0 | 1 | 0 | 1 | 0 | 1 | 1 |
| 31 | 0 | 4 | 1 | 3 | 4 | 0 | 4 |
| 32 | 0 | 69 | 18 | 67 | 81 | 4 | 85 |
| 33 | 4 | 209 | 29 | 184 | 210 | 3 | 213 |
| 34 | 12 | 58 | 7 | 43 | 66 | 4 | 70 |
| 35 | 15 | 10 | 3 | 22 | 16 | 9 | 25 |
| 36 | 54 | 82 | 14 | 122 | 60 | 76 | 136 |
| 37 | 14 | 133 | 17 | 130 | 14 | 133 | 147 |
| 38 | 6 | 22 | 3 | 25 | 6 | 22 | 28 |
| 39 | 1 | 8 | 0 | 9 | 1 | 8 | 9 |
| 40 | 8 | 10 | 2 | 16 | 9 | 9 | 18 |
| 41 | 6 | 3 | 1 | 10 | 8 | 3 | 11 |
| 42 | 28 | 3 | 0 | 31 | 28 | 3 | 31 |
| 43 | 3 | 3 | 0 | 6 | 3 | 3 | 6 |
| 44 | 23 | 2 | 3 | 22 | 23 | 2 | 25 |
| 45 | 28 | 1 | 1 | 28 | 28 | 1 | 29 |
| 46 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| 47 | 13 | 2 | 0 | 15 | 13 | 2 | 15 |
| 48 | 16 | 1 | 0 | 17 | 16 | 1 | 17 |
| 49 | 8 | 0 | 0 | 8 | 8 | 0 | 8 |
| 50 | 37 | 1 | 0 | 38 | 37 | 1 | 38 |

946

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
9250

| WARREN | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 51 | 16 | 0 | 0 | 16 | 16 | 0 | 16 |
| | 297 | 638 | 99 | 836 | 638 | 285 | 939 |

947

HOURLY ST, TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION
9290

| WATER | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 32 | 7 | 0 | 1 | 6 | 7 | 0 | 7 |
| 33 | 24 | 0 | 8 | 16 | 24 | 0 | 24 |
| 34 | 11 | 0 | 1 | 10 | 11 | 0 | 11 |
| 35 | 84 | 0 | 10 | 74 | 84 | 0 | 84 |
| 36 | 17 | 0 | 3 | 14 | 17 | 0 | 17 |
| 37 | 9 | 0 | 0 | 9 | 9 | 0 | 9 |
| 38 | 40 | 0 | 3 | 37 | 40 | 0 | 40 |
| 40 | 29 | 0 | 1 | 28 | 29 | 0 | 29 |
| 41 | 31 | 0 | 0 | 31 | 31 | 0 | 31 |
| 42 | 109 | 0 | 6 | 108 | 109 | 0 | 109 |
| 43 | 4 | 0 | 0 | 4 | 4 | 0 | 4 |
| 44 | 15 | 0 | 0 | 15 | 15 | 0 | 15 |
| 45 | 62 | 0 | 0 | 62 | 62 | 0 | 62 |
| 46 | 16 | 0 | 0 | 16 | 16 | 0 | 16 |
| 47 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| 48 | 39 | 0 | 0 | 39 | 39 | 0 | 39 |
| 49 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| | 507 | 0 | 34 | 479 | 507 | 0 | 507 |



HOURLY ST, TIME EARNINGS BY LOCATION--DEC, 1972

LOCATION
9460
WEST L

| | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 29 | 9 | 28 | 2 | 35 | 0 | 37 | 37 |
| 30 | 31 | 22 | 3 | 50 | 47 | 6 | 53 |
| 31 | 49 | 18 | 4 | 63 | 58 | 9 | 67 |
| 32 | 66 | 133 | 20 | 179 | 182 | 17 | 199 |
| 33 | 161 | 43 | 28 | 176 | 190 | 14 | 204 |
| 34 | 87 | 34 | 27 | 94 | 102 | 19 | 121 |
| 35 | 103 | 76 | 11 | 168 | 150 | 29 | 179 |
| 36 | 317 | 37 | 43 | 311 | 321 | 33 | 354 |
| 37 | 192 | 33 | 16 | 169 | 156 | 31 | 187 |
| 38 | 282 | 19 | 21 | 260 | 285 | 16 | 301 |
| 39 | 13 | 3 | 0 | 16 | 2 | 14 | 16 |
| 40 | 429 | 6 | 34 | 409 | 423 | 12 | 435 |
| 41 | 43 | 6 | 4 | 45 | 31 | 18 | 49 |
| 42 | 260 | 7 | 14 | 274 | 274 | 13 | 287 |
| 43 | 88 | 3 | 4 | 87 | 79 | 12 | 91 |
| 44 | 646 | 5 | 27 | 624 | 593 | 58 | 651 |
| 45 | 76 | 2 | 1 | 77 | 64 | 14 | 78 |
| 46 | 508 | 6 | 8 | 506 | 485 | 29 | 514 |
| 47 | 432 | 14 | 9 | 438 | 378 | 76 | 446 |
| 48 | 182 | 2 | 7 | 177 | 131 | 53 | 184 |
| 49 | 592 | 0 | 19 | 582 | 569 | 23 | 592 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

| LOCATION | WEST L | MEAN | MDMEN | MIN | OTMEN | DU | PU | TOTAL |
|---|---|---|---|---|---|---|---|---|
| 9360 | | | | | | | | |
| 71 | | 82 | 0 | 1 | 21 | 0 | 82 | 82 |
| 72 | | 17 | 0 | 0 | 17 | 0 | 17 | 17 |
| 73 | | 18 | 0 | 0 | 18 | 0 | 18 | 18 |
| 74 | | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 75 | | 4 | 0 | 0 | 4 | 0 | 4 | 4 |
| 76 | | 4 | 0 | 0 | 4 | 0 | 4 | 4 |
| 77 | | 6 | 0 | 0 | 6 | 0 | 6 | 6 |
| 78 | | 4 | 0 | 0 | 4 | 0 | 4 | 4 |
| 79 | | 4 | 0 | 0 | 4 | 0 | 4 | 4 |
| 80 | | 1 | 0 | 1 | 1 | 0 | 1 | 1 |
| 81 | | 3 | 0 | 0 | 3 | 0 | 3 | 3 |
| 82 | | 0 | 0 | 1 | 1 | 0 | 1 | 1 |
| | | 6332 | 582 | 884 | 6706 | 9307 | 1727 | 7034 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

| LOCATION | WEST L | MEN | WOMEN | MIN | OTMEN | DU | PU | TOTAL |
|---|---|---|---|---|---|---|---|---|
| 9360 | | | | | | | | |
| 50 | | 601 | 1 | 10 | 592 | 536 | 66 | 602 |
| 51 | | 164 | 1 | 0 | 97 | 31 | 74 | 105 |
| 52 | | 131 | 0 | 2 | 129 | 95 | 36 | 131 |
| 53 | | 133 | 0 | 2 | 136 | 90 | 43 | 133 |
| 54 | | 66 | 0 | 2 | 63 | 9 | 57 | 66 |
| 55 | | 78 | 0 | 4 | 74 | 3 | 75 | 78 |
| 56 | | 69 | 0 | 0 | 69 | 1 | 66 | 69 |
| 57 | | 46 | 0 | 1 | 47 | 2 | 46 | 48 |
| 58 | | 49 | 0 | 1 | 48 | 4 | 45 | 49 |
| 59 | | 71 | 0 | 1 | 70 | 2 | 69 | 71 |
| 60 | | 99 | 0 | 1 | 98 | 0 | 99 | 99 |
| 61 | | 91 | 0 | 0 | 91 | 0 | 91 | 91 |
| 62 | | 95 | 0 | 1 | 94 | 0 | 95 | 95 |
| 63 | | 73 | 0 | 1 | 72 | 0 | 73 | 73 |
| 64 | | 96 | 0 | 0 | 96 | 0 | 96 | 96 |
| 65 | | 46 | 0 | 1 | 45 | 0 | 46 | 46 |
| 66 | | 44 | 0 | 0 | 44 | 0 | 44 | 44 |
| 67 | | 33 | 0 | 0 | 33 | 0 | 33 | 33 |
| 68 | | 25 | 0 | 0 | 25 | 0 | 25 | 25 |
| 69 | | 37 | 0 | 0 | 37 | 0 | 37 | 37 |
| 70 | | 19 | 0 | 1 | 18 | 0 | 19 | 19 |

HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
3500

| YOUNGS | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 31 | 1 | 0 | 2 | 4 | 6 | 0 | 6 |
| 32 | 9 | 184 | 66 | 125 | 187 | 6 | 193 |
| 33 | 12 | 317 | 124 | 295 | 486 | 43 | 529 |
| 34 | 11 | 163 | 25 | 89 | 36 | 78 | 114 |
| 35 | 8 | 47 | 10 | 45 | 70 | 35 | 55 |
| 36 | 48 | 25 | 16 | 47 | 43 | 22 | 65 |
| 37 | 20 | 2 | 12 | 19 | 30 | 1 | 31 |
| 38 | 18 | 0 | 2 | 16 | 18 | 0 | 18 |
| 39 | 2 | 1 | 1 | 2 | 3 | 0 | 3 |
| 40 | 20 | 0 | 0 | 20 | 20 | 0 | 20 |
| 41 | 5 | 1 | 0 | 6 | 6 | 0 | 6 |
| 42 | 24 | 0 | 5 | 19 | 24 | 0 | 24 |
| 43 | 7 | 0 | 0 | 7 | 7 | 0 | 7 |
| 44 | 19 | 0 | 0 | 19 | 19 | 0 | 19 |
| 45 | 13 | 0 | 2 | 11 | 13 | 0 | 13 |
| 46 | 9 | 0 | 2 | 7 | 9 | 0 | 9 |
| 47 | 18 | 0 | 1 | 17 | 18 | 0 | 18 |
| 48 | 36 | 0 | 0 | 36 | 36 | 0 | 36 |
| 50 | 15 | 0 | 0 | 15 | 15 | 0 | 15 |
| 51 | 4 | 0 | 0 | 4 | 4 | 0 | 4 |
| 53 | 2 | 0 | 0 | 2 | 2 | 0 | 2 |



HOURLY ST. TIME EARNINGS BY LOCATION--DEC. 1972

LOCATION
3500

| YOUNGS | MEN | WOMEN | MIN | OTHER | BW | PW | TOTAL |
|---|---|---|---|---|---|---|---|
| 54 | 3 | 0 | 0 | 3 | 3 | 0 | 3 |
| | 309 | 883 | 282 | 906 | 1025 | 165 | 1190 |

(PLAINTIFFS' EXHIBIT NO. 12)
JOhn Winthrop Hammond, "Men and Volts: The Story of General Electric" (Lippincott Co.s1941)

EXHIBIT NO. M to Pre-Trial Stipulation of Facts

*A PERIOD ENDS* 383

* * * A pension plan had been set up in 1912; a mutual benefit association to provide benefits in case of sickness, death, or hospitalization had been established in 1913; a profit-sharing system in 1916; a life-insurance plandin 1920; a savings plan in 1922. A suggestion system, whereby employees were paid for suggestions helpful to the operation of the Company, had been established as far back as 1906, and through the intervening years one plan after another had been added to protect employees against the vicissitudes of life, and to provide opportunity and a measure of security.

* * *

EPILOGUE

THE SECOND GENERATION

With the death of Charles A. Coffin the first great era in General Electric history came to a close. During his administration he had launched a new industrial art and established it firmly as an essential part of mankind's way of living. Now, under the leadership of Owen D. Young and Gerard Swope, a new era in the Company's history began.

* * *

In the 18 years of their leadership, the teamwork of these two men produced many marvels, but none of



more lasting significance than their common effort on behalf of labor. For years the Company had been in the forefront of American industry in providing fair compension and good working conditions for employees, but these were to be supplemented by many employee benefits plans. Many of these plans had been inaugurated before Mr. Coffin retired, but under Mr. Young and Mr. Swope they were expanded and welded into a unified program for the employees' welfare. Since 1916 there had been in effect supplementary compensation and profit-sharing plans for the employees, and Mr. Swope and Mr. Young applied themselves to the perfecting of these plans. Together they further developed the pension plan which had operated since 1912, and the mutual-benefit associations which provided sickness, hospitalization, and death benefits. They established life insurance plans; a savings plan; the suggestion system, whereby employees reap the benefits from their suggestions for improving methods and working conditions; vacations with pay; a plan to adjust employee earnings automatically as variations occur in the cost of living; loan funds; a plan to assist employees in acquiring homes; and year by year additional methods were worked out to protect employees against the vicissitudes of life, and provide opportunity and a measure of security. Employee representation was instituted, unemployment insurance was put into operation, and educational and recreational facilities for employees developed.

* * *

As the years passed and large corporations came into being, there came about a separation of management and ownership—now represented by stockholders—but management still considered itself the agent of the owners, working in their interests. It was this conception of man-

agement that prevailed throughout the business world at the time Mr. Young and Mr. Swope succeeded to the Board Chairmanship and Presidency of General Electric.

* * *

(PLAINTIFFS' EXHIBIT NO. 13A)
David Loth, "Swope of GE: Story of Gerard Swope and General Electric in American Business" (Simon & Schuster, New York, 1958).

EXHIBIT NO. N–1 to Pre-Trial Stipulation of Facts

152 The habit of looking to Swope as chief did not stem entirely from his speeches, his organization of camps and new lines of manufacture, his improved distribution methods, his forceful driving personality. A big factor was his active concern for the security of everyone who worked
153 for the General Electric Company. He wanted them all, from the porter to the president to have savings, life and health insurance, a chance to own their homes, protection from unemployment. Blind admirers, judicious appraisers of his role in industry, bitter critics of his policies and methods, men he promoted and men he fired, agree on this: Swope's employee benefits programs were not only a service to the thousands directly affected but a salutary lesson to industry in general. Within the company, these programs cemented a loyalty to him and the organization among many who might not have felt so warmly about "the most machinelike person I ever knew," as he was called by one who deplored almost everything else he ever did.

* * *

Wherever they had got their notions, both were going around in the early 1920s asking people, in preparation



for an improved pension plan, what was the most useful age of man. Whitney remembers that he stubbornly refused to say. He wanted to know what man they were talking about. But his former pupil was not relying upon casual questions. In his first year as president, Swope assigned the general auditor and an eager youngster, who later would be the company's secretary, to survey em-
154 ployee benefits generally and submit recommendations. On the basis of this and other studies, he reached the conclusion that on the average men were at their peak at thirty-two and down to about half their best productivity at sixty-five.

"So let's take half away from the old fellow and give it to the young one," he told Whitney. "If we retire the older men at half pay, we make not only their pay but their places available to the young."

Before these studies were completed, Swope had moved on homes and savings. The first was fairly simple; he put the company's guarantee behind a second mortgage, and 2,760 employees took up the offer in building or buying houses in the next few years.

For a savings program, he reviewed the history of one which Young had tried in 1920 with Coffin's approval–allowing employees to buy stock through pay-roll deductions.

Swope made a few false starts in his proposals for life insurance. A great believer in it himself, he assumed that all men would grasp eagerly at the opportunity to acquire some. Young had helped institute a system of free coverage up to a modest amount for all employees after a certain length of service. Swope thought help in getting larger policies was better than a gift of small ones–"things should be done *with* people, not for them," he explained. So he announced that free insurance would go only to new employees who took out some for themselves. It

was a flat failure.

"I was surprised," he admitted,"to find that new employees said to themselves that they weren't going to die or weren't going to stay with this company all their lives, and so did not take the insurance."

He applied pressure, and at the same time modified the plan. The insurance was offered to employees of forty-five or younger after five years' service, along with a message from the president that the company wanted men who recognized their obligation to their families and society. This hint plus the attraction of limiting the offer did the trick. General Electric had twenty-one thousand employees in this age and service bracket, and every one of them joined the insurance plan. Then it was opened to older men, and 85 per cent of them signed up, too. Swope limited it to men because he doubted that the sixteen thousand women the company then employed would consent to pay-roll deductions for this purpose.

"Frankly," he confessed, "our theory had been that women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company."

He couldn't have been more mistaken. When they got the chance, nearly twelve thousand of them took out the insurance.

He made one more wrong judgment of employee reactions when he tried to win adoption of an unemployment insurance plan which he worked out in the belief that sensible people fortify themselves in good times against the hazards of bad. By 1925 employment and wages were at an all-time high in General Electric plants. He proposed, therefore, that the workers and the company together build up a fund from which men who



might be laid off in any future slump could draw up to half their normal earnings. A factory pay-roll deduction of 1 per cent of wages would be matched by the company, and the fund would be administered by a board drawn equally from representatives of workers and management. The fund might provide emergency loans as well as unemployment benefits. If unemployment in the plants grew beyond the limits of the fund, the 1 per cent contribution and matching company payments would be extended to the clerical and executive personnel, all the way up to the president and chairman.

It was something new in security for the employees of a large corporation, and the men were suspicious of it. In one plant after another they turned it down by very substantial majorities.

"They said business was good and this was just another scheme to deduct something from their wages," Swope wrote regretfully.

Disappointed as he was—ever since Hull House he had known that benefits for the jobless were a sound idea—he turned to other security measures and was consoled for the unexpected failure of his unemployment insurance program by the equally unexpected success of a pension plan. He though the men would need a great deal of education before they consented to a pay-roll deduction for it—he proposed 1½ per cent of earnings. But when he put it up to hem, a large majority voted for it right away, and on the decisive test only one man held out against it while seven thousand who were not eligible asked to be taken in.

The universal practice up to this time was that, if pensions were provided, they were a gift from the company. Their purpose was the very practical one of keeping useful men. General Electric had had such a program since 1912.

EXHIBIT NO. N-2 to Pre-Trial Stipulation of Facts
(PLAINTIFFS' EXHIBIT NO. 13B)
Speech of Gerard Swope, then president of GE, entitled "Management Cooperation with Worker in Economic Welfare," made on December 5 or 6, 1930, reprinted in the Annals of the American Academy, Vol. 154.

## Management Cooperation with Workers for Economic Welfare

By GERARD SWOPE, LL.D.
President, The General Electric Company, New York City

SECURITY as I understand it is quite a separate thing in industry, and there are three fundamentals that can never be replaced by anything else. These are satisfactory conditions of work, reasonable hours of labor, and adequate compensation. Unless these are assured, there will not be the peace of mind in the worker that security itself is intended to produce; and although he may be sure of his job, it is well that he should also like to retain his job.

Now, assuming that every worker is going to accept his responsibility in our social structure, the first and most momentous question that we all have to face is the uncertainty of life and the certainty of death.

* * *

### GROUP LIFE INSURANCE

In 1919, the General Electric Company offered free group life insurance to its employees, for certain amounts and after a certain term of service. Later on, believing very heartily in the theory that things should not be done *for* people nor *to* people, but *by* and *with* people, we announced an additional insurance plan and said that all



new employees would have free insurance only if they took an equal amount for which they paid.

* * *

A few years later I woke up to the fact that that theory might have been good, but was not true. The people coming into the organization said to themselves, "Well, I am not going to stay with this company, or I am not going to die: why should I pay out of my income every a relatively small sum for insurance when I can use it to better advantage?" As a result, the new employees were not taking the additional insurance and therefore were not securing the free insurance offered by the company. In other words, looking forward a generation, we would have defeated the entire thing that we had in mind, and there would have been no protection for the employees and their families, either granted by the company or provided by themselves.

So we reversed ourselves almost immediately and explained to our employees that we wanted people in our organization who were serious-minded, though young, and who would recognize their responsibilities as members of society. We put the question of additional insurance up to all male employees who were forty-five years of age and less and had been with the company over five years. We used that age because lower than forty-five they are all young, and having given over five years of service they had been with us long enough to know whether they wanted to stay, and we had had them long enough to know whether we wanted to retain them.

The result was amazing. There were twenty-one thousand men in that group according to accurate figures, and one hundred per cent of those twenty-one thousand people

accepted the additional insurance plan. We then said to those over forty-five years of age and with over five years of service, "Do you want to come in?" There were twenty-eight thousand people in that group, and eighty-five per cent of them came in.

Our company is a man-run company, possibly unfortunately, and there was a difference in opinion among us as to whether the women would come in under this plan. We had sixteen thousand women in the organization, and we asked them if they wanted to take additional insurance. Our theory was that women did not recognize the responsibilities of life and were hoping to get married soon and would leave us, and, therefore, this insurance premium deduction from their pay would not appeal to them. But of the sixteen thousand women, seventy-three per cent, or nearly twelve thousand, said, "Yes, we'd like to come in under this plan."

As a result of the acceptance of this plan, all employees after one year of service are eligible to come in under the company and additional life insurance plan.

* * *

In the entire time that these insurance plans have been in effect, six and a half millions of dollars have been paid to the families of the employees of the company. In the year 1930, on the basis of the first ten months, a million dollars will have been paid out in insurance benefits to the families of deceased employees; and this interesting point comes out, that four hundred thousand dollars of this insurance has been paid for by the company and six hundred thousand dollars represents the additional insurance for which the employees have paid, which their families would not have had except for the introduction of that plan.



## HOME OWNERSHIP

The second thing, it seems to me, that appeals to responsible citizens, especially those having a family, is to feel secure in home ownership. Some years ago we instituted a plan of helping our employees to buy and build homes. The company does not own these homes. We assist the owners by guaranteeing the second mortgages to the banks.

* * *

## SAVINGS AND INVESTMENT

When you have provided for the responsibilities and uncertainties of life and the security in a home, the third provision would seem to be savings and investment.

Ten years ago, like other industries, we offered to our employees common stock of the General Electric at what we thought a very favorable price and on favorable terms of payment.

* * *

## PENSION SYSTEMS

In a sense—and possibly theoretically—if each man had recognized his responsibilities and the uncertainty of life, second, if he has his own home where his family is sheltered, and third, if he has made investments from time to time and saved something out of his income—which for many people is difficult—the emergencies that may arise in the future are really provided for, and possibly the following measures are then unnecessary; but as a matter of fact, so far they are necessary.

So a pension system has been put into effect. In the beginning, corporations inaugurated pension systems not with the

idea of giving security and peace of mind to the employee, but to reduce the turnover of employees. It was a time when recognition of adequate earnings had not yet come with as much force and effect as it has today. The General Electric Company, with others, extended to its employees in 1912, under certain conditions, free old-age pensions.

* * *

## REACTIONS OF EMPLOYEES

What I want to show is the mental reaction of people in industry in regard to such plans when they are suggested. All employees of the company, men and women, were to come in under this additional pension plan. It was felt that in the case of women there would be no hardship, because this one and a half per cent which was deducted from their earnings would be their money. If they left the company to get married or for any other reason they would take it with them, plus the interest; if they died it would be given to their families or beneficiaries; if they remained with the company until retirement it would be given to them as an additional pension; so they could not lose. So we offered the plan to all our people, men and women alike. The group of people forty-five years and less who had served five years and more numbered twenty-seven thousand, and a hundred per cent accepted.

* * *

Of the older men and women, with over five years of service, ninety-one per cent accepted. Of course we then made the condition that all new employees might join after one year of service, but after five years of service they must join if they wanted to remain with the company. August 1, 1930, two and a half millions of dollars had



been put aside by the employees as their additional pension fund, bearing interest.

As an illustration of what this means, let us assume that a young man comes to the organization at the age of twenty-five and remains to the retiring age of sixty-five (for women it is sixty)—a period of forth years—and say his average wage is forty dollars a week, or two thousand dollars a year. The pension at the time of his retirement will be thirty dollars a week, or seventy-five per cent of his earnings, ten dollars of which will have been accumulated from his own savings, and twenty dollars from the pension fund provided by the company.

* * *

Almost four million dollars have been paid to pensioners in these eighteen years, and the pensions are now running at the rate of a million dollars per year.

To illustrate how wrongly we sometimes conceive the mass psychology of people and especially of women, in certain of our departments our managers said that the women would not take insurance but they would take the pension. As a matter of fact, from a recent study of these figures, it has been found that women seem to recognize their responsibilities to their families even earlier and more seriously than the men. They have taken insurance even before completing a year of service with the company, whereas there is no obligation upon them to do so; while for the additional pension, they come into the plan only at the end of five years.

* * *

## UNEMPLOYMENT INSURANCE

Unemployment insurance, of course, is only an amelioration of conditions when unemployment has come; it is not a preventive, and if people have saved money and have been frugal they can take care of themselves. Personally, I think there is also some responsibility on industry and some on society. I think industry must recognize its responsibility, and therefore we have gone forward in an experiement.

Over five years ago I proposed to our employees an unemployment plan, but then we were in the heyday of this new economy and our workmen said, "There's never going to be any unemployment again, and we don't want to have something more to pay for. Gradually you are taking all our money away and putting it into thrift plans and savings, and we don't want to do it."

* * *

So last spring, when unemployment began to affect us more seriously, I brushed the dust off this plan of some five years ago and again proposed it. This time it met with more ready response and we said it would be put into effect only if sixty per cent of the people at any plant wished to go into it. All of the plants accepted it, in varying percentages from seventy-three to one hundred. On December first, the plan had been in effect four months. Benefits were not to be paid until six months had elapsed. Thirty-five thousand men and women have joined, and three hundred and fifty thousand dollars have been paid in, half by the employees and half by the company.

* * *



## HOW THE PLAN WORKS

So I have learned that men do recognize their responsibilities to their brothers in service, and endeavor to take care of them. So we said that in an unemployment emergency, all the people in the company, whether they were members of the plan or not, should contribute one percent of their earnings as long as they were working fifty per cent or more of the time. These contributions were to be made by the office boy, the salaried people, the salesmen, and the management, from the president down, and from the people in remote places like Denver and San Francisco.

On December first we declared that unemployment emergency existed, and collections are beginning to be made. In such unemployment emergency the company pays an amount equal to that contributed by the employees.

* * *

EXHIBIT NO. 0-1 to the Pre-Trial Stipulation of Facts. (PLAINTIFFS' EXHIBIT NO. 44A) 37th Annual Report of GE 1928.

1928 *General Electric Annual Report*

* * *

## GROUP LIFE AND DISABILITY INSURANCE

For nearly nine years your Company has provided group life and disability insurance protecting a large majority of the employees.

The 1926 annual report described an Additional Group Life and Disability Insurance Plan which was offered to employees in the latter part of 1925. In December 1927 announcement was made to employees that on January 1, 1929, this plan would become a mutual condition of employment for some and optional for others. It met with such general acceptance that after conferring with the representatives of the employees, the effective date was advanced to July 1, 1928.

Acceptance of the plan was made a mutual condition of employment for all men employees who had completed five years of continuous service and who on July 1, 1928, were forty-five years of age or less and for all men employees thereafter completing five years of continuous service. Every one of this group of 21,000 accepted the plan. For men employees over forty-five years of age on July 1, 1928, and with more than five years of service, the plan is optional. It is also optional for men employees who have served more than one year and less than five years, until the expiration of the fifth year, when it becomes a mutual condition of employment. There were



approximately 28,000 men in these two groups and 85 percent accepted the plan. It is optional for all women employees after one year of service. There were approximately 16,000 women eligible, of whom 73 percent accepted the plan.

Since the "additional" insurance plan was put into effect in November 1925, $2,608,867 has been paid to 1186 employees (or their beneficiaries), of which $1,217,367 was under the free insurance policy of the Company, and $1,391,500 was the additional insurance paid for by the employees.

* * *

EXHIBIT NO. 0-1 to the Pre-Trial Stipulation of Facts (PLAINTIFFS' EXHIBIT NO. 44B) 39th Annual Report of GE 1930.

## VARIOUS EMPLOYEE PLANS

For many years the General Electric Company has been making constant endeavors, each one a step in a comprehensive program, toward removing fear of the future from the minds of its employees—that is, the constant fear of being unable to provide for those dependent upon them.

*Group Life and Disability Insurance*

The first plan aims to give peace and security of mind by provision for the uncertainty of life. In 1920, free group life and disability insurance was provided by the Company, to which, in 1925, was added a participation by the employees, so that the life and disability insurance of

employees has been increased. All employees may participate after one year of service. The maximum insurance provided free by the Company is $1500 and the additional insurance, paid for by the employees, varies with age and salary, but the average is larger than the free insurance. At the close of 1930, approximately 67,000 employees were insured for $75,000,000 under the free policy and for $102,000,000 under the additional plan, or a total of $177,000,000.

* * *

*Home Owndership*

The second matter of importance in assuring peace of mind, not only to the employees, but even more frequently to their wives, is the ownership of the home. While the General Electric Company is not a landlord, it does assist employees in acquiring or building homes by making provisions so that they can borrow the necessary capital on favorable terms. During 1930, 321 homes, having a value of $2,242,000, were financed. In the last 7 years, 2562 homes, representing a value of about $19,000,000, have been acquired or built by employees. Payments of upwards of $7,000,000 have been made on these homes, the balance being held in the form of first and second mortgages by regular financial institutions.

*Savings Plan for Employees*

The third plan is one to enable employees to put something aside for the inevitable "rainy day." The General Electric Company, like many others, started with a plan which allowed employees to subscribe to its common stock.

* * *



*Pensions*

The fourth plan to give security and peace of mind is provision for old age. If each employee made provision, under some plan, for a home and adequate savings, other provision for old age, theoretically, would not be necessary. Experience, however, has proven that it is.

In 1912 the General Electric Company adopted a plan which provides for a pension for every employee, and this has since been supplemented by an "Additional Pension Plan," whereby the employees contribute a minimum of 1 1/2 percent of their earnings (the rate depending upon age at entrance). This will eventually have the effect of increasing the average pension on retirement by approximately 50 percent, so that in many cases employees may retire on pensions of three-quarters or more of the income received while in active service, about one-third being provided by the Additional Pension Plan, which they have paid for, and the remainder by the pension provision of the Company.

* * *

*Employees Unemployment Pension Plan*

The fifth step, and probably the most important from the standpoint of the worker, is protection against the recurrent fear of unemployment.

* * *

The foregoing program briefly describes definite, specific things that your Company has done to provide peace and security of mind to the employees, to stabilize employment, and to ameliorate the tragic effects of unemployment on

those employees who are in no way responsible for their lack of work.

EXHIBIT NO. 0-3 to the Pre-Trial Stipulation of Facts (PLAINTIFFS' EXHIBIT NO. 44C) 52nd Annual Report of GE 1943.



## GENERAL ELECTRIC

## EMPLOYEE BENEFIT PLAN STATISTICS

**General Profit Sharing Plan** (Authorized by stockholders in 1934)

| | |
|---|---|
| Earnings under Plan for 1943 | $ 2,707,995 |
| Undistributed earnings under Plan for previous year | 111,821 |
| Available for distribution to eligible employees in April, 1944 | $ 2,819,816 |

**Extra Compensation Plan** (Authorized by stockholders in 1934)

| | |
|---|---|
| Amount available under Plan for 1943 of which such portion as the Directors may determine will be distributed to eligible employees in April, 1944. The amount available for 1942 was $2,497,000, of which $2,241,000 was distributed. | $ 2,450,000 |

**Suggestion Plan** (Established in 1922)

| | |
|---|---|
| Awards for employees' suggestions—year 1943 | $ 277,220 |
| —21 years ended Dec. 31, 1943 | $ 1,472,402 |

**Life Insurance Plan*** (Established in 1920)

| | |
|---|---|
| Insurance paid for by the Company | $103,251,705 |
| Additional insurance, paid for by employees | 219,851,100 |
| Total life insurance in force Dec. 31, 1943 | $323,102,805 |
| Number of employees insured | 122,619 |
| Benefits paid—year 1943 | $ 1,619,890 |
| —24 years ended Dec. 31, 1943 | $ 22,652,617 |
| Number of beneficiaries | 10,041 |

**Savings Plans**

**G.E. Employees Securities Corporation*** (Organized in 1923)

| | |
|---|---|
| Debenture bonds issued—21 years ended Dec. 31, 1943 (a) | $107,433,510 |
| Debenture bonds redeemed in this period | 72,946,560 |
| Debenture bonds held by individuals Dec. 31, 1943 (b) | 34,486,950 |
| Notes held by Additional Pension Trust Dec. 31, 1943 (c) | 22,005,045 |
| Total obligations Dec. 31, 1943, representing employees' savings | $ 56,491,995 |
| Total interest and additional payments made on the Corporation's obligations—21 years ended Dec. 31, 1943 | $ 47,847,575 |
| (a) No offering since establishment of War Savings Plan in 1941. | |
| (b) Number of bondholders | 25,878 |
| (c) Number of employees saving through the Additional Pension Plan (see opposite page) | 42,263 |

**War Savings Plan** (Established in 1941)

| | |
|---|---|
| U.S. War Bonds paid for by employees May 1, 1941 to Dec. 31, 1943 (maturity value) | $105,624,125 |
| As of Dec. 31, 1943, 90.8% of all employees had authorized payroll deductions (equivalent to 10.7% of total payroll) for the purchase, on an annual rate, of U.S. War Bonds with a maturity value of | $ 65,015,600 |

* Statistics apply to General Electric and its affiliated companies.

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# GENERAL ELECTRIC

## EMPLOYEE BENEFIT PLAN STATISTICS

**Pension Plans***

**Company Pension Plan (Established in 1912)**

| | | |
|---|---|---|
| Assets of G.E. Pension Trust Jan. 31, 1944 (a) (Funds contributed by the Company) | $ | 73,706,279 |
| Pension and life retirement payments—year 1943 | $ | 2,516,332 |
| —32 years ended Dec. 31, 1943 | $ | 36,242,739 |
| Number on pension and life retirement rolls Dec. 31, 1943 | | 3,843 |
| Average age | | 70.8 years |
| Average continuous service | | 29.7 years |
| Average annual payment (of which $81 was paid by the Government) | $ | 786 |

(a) A payment of $12,000,000, for the year 1943, was made by the General Electric Company in January, 1944.

**Additional Pension Plan (Established in 1928)**

| | | |
|---|---|---|
| Assets of G.E. Additional Pension Trust Dec. 31, 1943 (Funds contributed by employees) | $ | 23,180,123 |
| Number of participating employees | | 42,263 |
| Amount returned to individuals—16 years ended Dec. 31, 1943 | $ | 5,701,866 |

**Contributory Pension Plan (Established in 1936)**

| | | |
|---|---|---|
| Assets of G.E. Contributory Pension Trust Dec. 31, 1943 (Funds contributed ⅓ by Company and ⅔ by employees) | $ | 313,876 |
| Number of participating employees | | 1,480 |

**Vacation Plan (Established in 1892)**

| | | |
|---|---|---|
| Vacation and military duty allowances for year 1943 | $ | 10,634,000 |

**Relief and Loan Plans (Established in 1936)**

| | | |
|---|---|---|
| Assets of Relief and Loan Associations Dec. 31, 1943 (Funds contributed ½ by Company and ½ by employees) | $ | 2,646,000 |
| Eight years ended Dec. 31, 1943—loans granted | $ | 3,641,000 |
| —loans repaid | $ | 3,467,000 |
| —relief payments | $ | 143,000 |
| Loans outstanding December 31, 1943 | $ | 174,000 |

**Other Voluntary Employee Benefits** include educational courses, educational loans and scholarships, and loans for purchase or construction of homes.

Through Mutual Benefit Associations (established in 1902) and through a Group Sickness, Hospitalization and Accident Benefit Plan (established in 1939) employees and their families may receive disability, hospitalization and death benefits for sickness and accident cases not covered by Workmen's Compensation laws. The cost of operating these Plans is borne by the employees, except that the Company pays the cost of administration.

* Statistics apply to General Electric and its affiliated companies.



# EMPLOYEE PLAN STATISTICS

General Electric has pioneered in the field of social benefits for employees, as indicated by the following statistics which apply to Plans currently in effect for the Parent Company and all participating affiliates.

• • •

**Relief and Loan Plans** (Established in 1936)

| | | |
|---|---|---|
| Assets of Relief and Loan Associations December 31, 1949 (Funds provided equally by the Company and by employees) | $ | 3,012,000 |
| Loans granted—14 years ended December 31, 1949 (97 per cent repaid) | $ | 6,488,000 |
| Relief payments—14 years ended December 31, 1949 | $ | 282,000 |

**Company Pension Plan** (Established in 1912. Provides old age pensions, disability pensions and payments upon death under certain conditions. Employees have a vested right to pensions upon compliance with certain conditions as to age and service. Pensions are divided into two parts (1) past service annuities—paid for entirely by the Company—for all employees who had one or more years of continuous service on September 1, 1946, and (2) future service annuities—paid for jointly by the Company and employees—applicable to service after September 1, 1946 for all employees who elect to participate.)

| | | |
|---|---|---|
| Assets of the General Electric Pension Trust December 31, 1949 (a) | $ | 223,018,000 |
| Pensions paid—year 1949 | $ | 7,059,000 |
| Pensions paid—38 years ended December 31, 1949 | $ | 66,543,000 |
| Number on pension rolls December 31, 1949 | | 11,462 |
| Average age of pensioners December 31, 1949 | | 68.4 years |
| Average continuous service of pensioners to date of retirement | | 25.3 years |
| Average annual rate of pension at December 31, 1949 (excluding Social Security benefits) for employees who retired after 25 or more years' continuous service | $ | 958 |

(a) These assets consisted principally of U.S. Government and other high grade securities. The total amount payable to the Trust for the year 1949 was $49,281,000 ($37,400,000 by the Company and $11,881,000 by employees) of which $24,097,000 was paid prior to December 31, 1949 and the balance prior to February 28, 1950.

Note: Under an Additional Pension Plan, established in 1928 to promote savings by employees for supplemental pension purposes and terminated as of September 1, 1946 except as to amounts accumulated on that date, 20,934 employees had $18,983,000 on deposit with the Trustees as of December 31, 1949.

**Pensioners Hospitalization Plan** (Established in 1948. Provides free hospitalization benefits, within specified limitations, for eligible pensioners of the Company.)

| | | |
|---|---|---|
| Assets of G.E. Pensioners Hospitalization Trust December 31, 1949 | $ | 5,899,000 |

These assets consisted principally of U.S. Government securities, and the funds were made available upon dissolution of G.E. Employees Securities Corporation by actions of its Board and the Board of the Parent Company.

**General Electric Educational Fund** (Established in 1945, in honor of Charles A. Coffin and Gerard Swope, the Fund consists of the Charles A. Coffin Foundation, created in 1922, the Gerard Swope Foundation, and the G.E. Employees Education Foundation. Income of the Fund provides educational loans, fellowships, and scholarships for employees and others.)

| | | |
|---|---|---|
| Assets of the General Electric Educational Fund December 31, 1949 | $ | 1,022,000 |
| Amount of grants—27 years ended December 31, 1949 | $ | 288,000 |
| Number of grants (to 425 individuals) | | 624 |

**Other Employee Benefits** include vacation and military duty allowances, payments for observed holidays, educational courses, and, in special circumstances, loans for purchase of homes. Through Mutual Benefit Associations (established in 1902) and through Group Disability Insurance Plans (established in 1939) employees and their families may receive disability, hospitalization, surgical and death benefits for sickness and accident cases not covered by Workmen's Compensation Laws; in general, the cost of benefits paid under these plans is borne by employees, and the cost of their administration is borne by the Company.

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EXHIBIT NO. 0-5 to the Pre-Trial Stipulation of Facts
(PLAINTIFFS' EXHIBIT NO. 44E) GE Annual Report 1956.

**1956 Progress for Employees**

**Continuing progress in employee compensation**

General Electric's emphasis on the worthwhile personal satisfactions of its employees carries into the Company's attitude toward the compensation of employees in exchange for their interest, initiative, skill, care, effort and teamwork. Compensation at General Electric is interpreted broadly to include not only monetary returns but also the value of benefit programs. In 1939 the average General Electric employee earned $2,026 a year including the value of benefits. In 1956 a General Electric position was, on the average, worth well over 2 1/2 times as much, and included a broad package of pension, insurance, vacation, holiday and other benefits providing better economic security and personal satisfaction.

* * *

Employees benefited from the first full year of the more than 30 improvements included in the Company's Better Living Program. Among these benefits was the aid that many employees received in meeting medical costs ranging from the more normal types of expense up through the "catastrophic." The Company's insurance plan covers over half a million people, including employees and dependents. Medical benefits paid during 1956 totaled $28 million.



**EXHIBIT NO. 0-6 to the Pre-Trial Stipulation of Facts**
**PLAINTIFFS' EXHIBIT NO. 44F**
**GE Annual Report 1957.**

FINANCIAL HIGHLIGHTS OF 1957

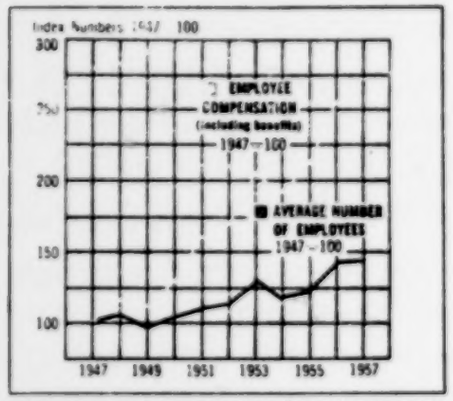
* * *

TO ATTRACT, DEVELOP AND RETAIN HIGH-CALIBER EMPLOYEES

General Electric has built one of the world's finest creative and productive teams. As the following pages indicate, the Company has achieved this by attracting high-caliber people throughout the organization and by trying to provide for them a working climate that encourages each individual to develop his abilities to the fullest. Thus the Company continued in 1957 to try to make itself a strong center of trained manpower working for America's security and progress.

In its approach to manpower development the Company has sought to establish plans based on principles that apply to all employees.

* * * * *




EMPLOYMENT AT GENERAL ELECTRIC reflects Company's willingness to invest in new growth businesses. Average cost of supplying facilities for a new production job rose to an estimated $16,000 in 1957. Total employee compensation (including benefits) was a record $1,715 million.

## INCENTIVES INCLUDE EMPLOYEE BENEFIT PLANS

In providing incentives to encourage employees throughout the organization to contribute their best, General Electric recognizes the importance of non-material motivations as well as the financial and material. The elements that create in individual employees a sense of full and responsible participation in the enterprise include the opportunities for self-development described above. They also include the factors of good leadership and supervision, good working conditions, on-the-job relationships in which respect for individual dignity is the rule, and awareness that management is trying to promote steady employment despite unpredictable changes in the economy or in customer demands.

General Electric's employee benefit plans are particularly effective in helping to attract top-quality people at all levels and encouraging them to make their careers with the Company. The plans in effect during 1957 included:

**Pension Plan** provisions for employees reaching retirement age, or those who have become permanently disabled after 15 or more years of credited service, have been increased many times in the 45 years since the Company adopted its first pension plan. A total of 19,444 pensioners were receiving payments at the end of 1957. As indicated in the financial statements at left, payments to pension plans for 1957 by the Company and all subsidiaries were $59.9 million. Free hospital and surgical insurance up to a maximum of $1,500 during the pensioner's lifetime is provided eligible pensioners and their wives.

**Comprehensive health insurance** is provided for both employees and their dependents. This pioneering medical expense insurance, whose costs are shared by the Company and the employees, covers a large proportion of the expenses of sicknesses or accidents, including the usual as well as



those of a "catastrophic" nature. The plan covers over three quarters of a million people, including employees and their dependents. This type of health insurance, instituted by General Electric, has been adopted by hundreds of other companies.

**Insurance Plan** provisions also include life insurance equal to double the employee's annual normal straighttime pay, paybale upon death for any cause, or a payment equal to three times annual pay in cases of accidental death. Disability benefits of $32.50 to $85 per week are provided. Total cost of the Company's insurance plans for 1957 was an estimated $55 million, of which $25 million was paid by the Company and $30 million by contributions from employees.

* * * * *

**Other plans** include paid vacations, an Emergency Aid Plan, payments for certain specified holidays, tuition refunds for courses in the employee's field of work, payments for absences due to death in the family, and military duty allowances. Also for 1957 the Company paid out $40 million for social security taxes such as old-age and survivors' insurance and unemployment insurance.

## PROVIDING SOUND FINANCIAL INCENTIVES

General Electric has endeavored to provide sound compensation as a fair exchange for employees' effort, skill, initiative and results. The total of employee earnings and benefits reached a new high of $1,715 million in 1957.

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**EXHIBIT NO. P to the Pre-Trial Stipulation of Facts**

**(PLAINTIFFS' EXHIBIT NO. 14)**
**Speech of Gerard Swope, then President of GE, on December 16, 1930, printed in U.S. Dept. of Commerce, "Unemployment: Industry seeks a Solution" (GPO 1931).**

## FOREWORD

With the purpose of placing the experience and judgment of outstanding industrial executives before those concerned with the problems of unemployment, the President's Emergency Committee for Employment arranged the series of radio addresses here compiled. The addresses were given as nation-wide broadcasts during December and January. The speakers participating in the series were invited to explain the program and experience of their organizations in stabilizing employment and alleviating the evils of unemployment, and in the abridgment of the radio addresses for publication, emphasis has been placed upon the various features of company policy as explained by the speaker.

The committee is grateful for the assistance afforded both by the speakers and by the Columbia Broadcasting Co. and the National Broadcasting Co. in the arrangements for the series.

Arthur Woods, *Chairman,*
*President's Emergency Committee for Employment.*

February 10, 1931.



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# UNEMPLOYMENT

## INDUSTRY SEEKS A SOLUTION

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## I. SAFEGUARDS FOR EMPLOYEE SECURITY

By Mr. Gerard Swope, *president of the General Electric Co. (Dec. 16, 1930)*

**Compiler's note.–The General Electric Co. during the past 12 years has been developing a balanced program for employee security. This program includes provisions for life insurance, home ownership, savings investment, old-age pensions, and finally unemployment benefits, loans, and relief. The last feature is closely coupled with a determined effort to stabilize employment.**

For many years the General Electric Co. has been making constant endeavors, each one a step in a comprehensive program, for removing fear of the future from the mind of the worker in the shops; that is, his constant fear of not being able to provide for and take care of his responsibilities, first to his parents or, if he has taken on further responsibilities, to his wife and children.

The first item to give peace and security of mind is provision for the uncertainty of life. In 1919 free group life insurance was offered by the company, to which later was added a participaton by the employees, so that the life insurance of each employee has been increased.

* * * * *

The second matter of importance in assuring peace of mind, not only of the employee but even more frequently of the wife, is the ownership of the home. While the General Electric Co. has never been in the position of landlord, it does assist the employees in acquiring or building homes.

* * * * *

The third is a plan to enable the worker to put something aside for the inevitable "rainy day." The General Electric Co., like many companies, started with the plan of having the employees subscribe to its common stock.

* * * * *

The fouth item to give security and peace of mind is provision for old age. Of course, if each employee made provision along the line of the above, for death, a home and savings, old-age provision, theoretically, might not be necessary, but experience has proved that it is. The General Electric Co. in 1912 adopted a pension plan which gave a pension to every employee, and this has since been supplemented by what we call an additional pension plan, whereby the employee contributes 1½ percent of his earnings.

* * * * *

The fifth and probably the most important, from the standpoint of the worker, is the recurrent dread and fear of unemployment.

* * *

But no one company is able to grapple effectively with this problem of cyclical variations in business, so the best that can be done is to have a plan which will ameliorate the hardships when they do arise. Five years ago a plan of unemployment pensions, loans, and relief was offered, but at that time the employees considered unemployment remote and it was not accepted. This year it was again proposed and received immediate acceptance.

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**EXHIBIT NO. Q to the Pre-Trial Stipulation of Facts**

**(PLAINTIFFS' EXHIBIT NO. 45)**

**Testimony of Gerard Swope before Select Committee on Unemployment Insurance, U.S. Senate, 72nd Cong., 1st Sess., pp. 23-39 (10-19-31).**

STATEMENT OF GERARD SWOPE, PRESIDENT GENERAL ELECTRIC CO., NEW YORK, N.Y.

The Chairman. Mr. Swope, your full name is Gerard Swope?
Mr. Swope. Yes, sir.
The Chairman. You are president of the General Electric Co.?
Mr. Swope. Yes, sir.

* * *

We think, of course, that security and peace of mind on the part of the workman is really a very large contributing factor to his doing good work. We think that a man whose mind is distracted, who is worrying about whether he will have work to-morrow, is not going to do as effective work as one whose mind is free from such worries; and we have been discussing this plan for some time, because this is a very much more radical plan, and we have now announced to our people, and they are now voting upon it, that, effective November 1, for the next six months we will guarantee employment in our shops – this means to the piece workers and the hourly workers, and there are about 40,000 of them in the apparatus shops – that there will be no further lay-offs in that 6-months' period for lack of work. They are practically guaranteed at least half work, but not in excess of $15.

* * *

* * * * *

Senator Glenn. Without going into great detail, where did you get the idea of this plan which you have related to the committee?

Mr. Swope. Oh, I do not know. I have studied the plans in Germany and in England – years ago, I mean. I have been interested in those things; and it has just come to the course of my work, in dealing with our employees and dealing with our problems.

You see, the General Electric Co., just like many industries, years ago started – to give you an instance – a pension plan. The reason companies, quite frankly, started pension plans was to reduce turnover, so that people should be tempted to stay with them, and that would reduce costs. They did it as a free and voluntary thing. They asked for no cobtributions from the employees.

Of course, the employees accepted that, because it meant nothing so far as they were concerned except recipients getting it at the end of that time. The same thing was true with other plans that industries had in effect, like life insurance. That went into effect a number of years ago in a number of industries. That was usually free life insurance, and it was very interesting.

* * *

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* * *

Mr. Chairman. You mean that you would not have any legislation?

Mr. Swope. I would not have any legislation as to uniform unemployment insurance, but I would do it through



the trade associations, so that the American Iron and Steel Institute, the Petroleum Institute, the National Electrical Manufacturers' Association, and so forth, will adopt standards for their industries.

The Chairman. That is in line with the statement you have already made on stabllization of industry?

Mr. Swope. Yes, sir.

The Chairman. And does not contemplate any legislative action?

Mr. Swope. Not of that kind.

The Chairman. Except to authorize that it be done?

Mr. Swope. Yes, sir.

* * *

Mr. Swope. Well, Senator, as I understood Senator Hebert's question, it was, "Could you by act of legislature say that all industry throughout the United States shall pay X percent of its earnings into a fund, and the company should match it, and that should be the unemployment fund, and that should be compulsory by law?" I should say "No" to that. But if, on the other hand, you say that you can frame such legislation as to empower companies to join trade associations – of course, this comes back to my plan of stabilization of industry – and then the purposes of such trade associations shall be to stabilize employment, one of the fundamentals, and to provide an unemployment fund, which shall be independent of any one company, which shall be trusteed, so that it does not depend upon the success or failure of any company, that I should think would be possible.

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**EXHIBIT NO. R to the Pre-Trial Stipulation of Facts**
**(PLAINTIFFS' EXHIBIT NO. 15)**
**J. George Frederick, "The Swope Plan," The Business Bourse, N.Y. 1931.**

# THE SWOPE PLAN

*DETAILS, CRITICISMS, ANALYSIS*

*Plan by*
**GERARD SWOPE,**
*President,* General Electric Co.

*Book Edited by*
J. GEORGE FREDERICK

**Economist and Publicist, Author, "Modern Industrial Consolidation," "Common Stocks and the Average Man," "Humanism as a Way of Life," Editor Symposium "A Philosophy of Production."**

◆

1931

The Business Bourse, New York

II

## THE SWOPE PLAN – DETAILS
(By Gerard Swope)

In the situation that confronts us at the present, the most disturbing aspect is that men who are able to work, who are competent workers, who above all things desire to work, cannot find work to do. That this condition has ever been present in such periods detracts nothing from its wrongness. That industry must evolve and make effective those measures which will first ameliorate and ultimately eliminate it, must be the reaction of everyone who gives



thought to what is taking place. I say that industry must do this thing, because it will surely be done.

* * *

The psychology of fear must be removed, and this cannot be done unless they have reasonable expectation of protection for their families in case of the breadwinner's death, protection for their old age, and protection against unemployment. By "protection" I do not mean a protection for their old age, and protection against unemployment. By "protection" I do not mean a protection that is given to them, but I mean protection that they themselves help to provide.

Shall we wait for society to act through its legislatures, or shall industry recognize its obligation to its employees and to the public and undertake the task? Coordination of production is impossible under our present laws, and it is vain to think of their amendment or repeal unless the public is assured of the constructive nature of the steps industry will take, and that the interests of the public will be adequately safeguarded.

The general principles underlying what I am going to say are as follows:

1. Every effort should be made to stabilize industry and thereby stabilize employment to give to the worker regularity and continuity of employment, and when this is impracticable, Unemployment Insurance should be provided.

2. Organized industry should take the lead, recognizing its responsibility to its employees, to the public, and to its stockholders – rather than that democratic society should act through its government. If the various States act, industry will be confronted with different solutions, lacking

uniformity and imposing varying burdens, making competition on a national scale difficult. If either the individual States or the Federal Government act, the power of taxation has no economic restraints.

* * *

4. Production and consumption should be coordinated on a broader and more intelligent basis thus tending to regularize employment and thereby removing fear from the minds of the workers as to continuity of employment; as to their surviving dependents in case of death; and as to old age. This should be done preferably by the joint participation and joint administration of management and employees. These things cannot be done by an individual unit – organized industry must do them.

* * *

8. For the protection of employees, the following plans shall be adopted by all of these companies:

* * *

(B) *LIFE AND DISABILITY INSURANCE.* All employees of companies included in this plan may, after two years of service with such companies, and shall, before the expiration of five years of service, be covered by life and disability insurance.

* * *

(C) *PENSIONS.* All employees of companies included in this plan shall be covered by old age pension plans which will be adopted by the trade associations and approved by the federal supervisory body. The principal provisions will be as follows:

* * *



(D) *UNEMPLOYMENT INSURANCE.* All employees on piece work, hourly work daily, weekly, or monthly work, with normal pay of $5,000 per year or less (approximately $96.15 per week) shall be covered by unemployment insurance.

* * * * *

*CONCLUSION.* The foregoing plan tends to put all domestic corporations of the class described on a parity for domestic business, thereby removing the inequalities of the different laws in the several states, provides for standard forms of financial reports and their periodical issuance for the information of stockholders, places on organized industry the obligation of coordinating production and comsumption, and of a higher degree of stabilization. This will tend to assure more uniform and continuous employment for the worker and to remove fear from his mind, allowing him to devote himself whole-heartedly to his task. Cost of the product will include these items and will therefore be paid for by the users of the article or service and not in general by members of the community reached by the vicarious method of the imposition of a tax. Then organized industry will be in the position that it should rightly assume of serving the public, with public confidence and with the join participation of workmen and management in the solution of these vital and far-reaching problems.

* * *

*Owen D. Young's View of It:*

"To the insistent calls for industrial leadership in these disorganized times, there has been a discouraging silence. To the demands for an industrial plan which would guard us in the future from repeating our present disaster there has been little definite response. True, some have spoken

publicly in general terms of what should be done. For the most part either these generalities have been so self-evidently true as not to need stating at all; or, they have been so indefinite as not to be practically useful. Some have put forth academic theses which, in varying degrees, stimulate our thinking but are as far removed from practical application as researches in pure science. Some have had the courage to write definite plans on paper, but for one reason or another they have not received the support of operating concerns nor have they been submitted to the critical review of the public.

"Gerard Swope, after previous conference with his associates in the electrical manufacturing industry, submits a plan for the organization of that industry which is definite in terms and which, if I am correctly informed, has received from many in the electrical industry a testimonial of practicability.

"The plan is not free from criticism. Mr. Swope would be the first to admit that.

* * *

"Anyhow, the question is whether the people who are calling for economic planning really mean what they say. Are they willing to surrender their individual freedom to the extent necessary to execute a plan? It is fruitless to demand unified action by a large number of industrial units and by the individuals connected with them and expect to retain for each unit and each individual the same freedom and the same kind of initiative which existed before the plan was made. Too many people who speak of the matter seem to think that we can have an effective plan without paying anything for it. They are all for the advantages of the plan, but they refuse to pay the price.

* * *



"Then, too, the question is to whom this individual freedom is to be surrendered? If the government is to undertake the great obligations which Mr. Swope's plan visualizes, then the price must be in the form of a surrender to political government. If industry itself is to perform those obligations, as is here contemplated, then the surrender of the individual units is to be made to the organized group, of which the unit is a part. If results are to be obtained, they call for surrender somewhere. The question for the public is to say whether they wish the results, and if so, by what agency they are to be accomplished.

"Therefore, I welcome the plan, not as a final answer to the problems with which it deals, but as a definite proposal which will enable us to consider those problems intelligently. Other industries may develop similar plans, and if they do, then for the first time we should have organized units of the several branches of industry out of which we could build a National Industrial Council.

"There are three courses open to us:

"First – To do nothing. In that case, we should abandon the cry for economic planning. We should accept the advantages and disadvantages of the present system – and it has both. It is a system of intensified individualism which, because of its disordered action, necessarily brings great peaks of prosperity and valleys of depression.

"Second – To place upon industry itself the responsibility for the formulation and execution of a definite plan. This would pass the cost of protective insurances for employees to the public in the cost of the product in so far as it was not absorbed by better management. It would inevitably place on industry a high penalty for unbalanced economic conditions. Not only would capital in idleness have to be carried, but labor as well.

"Third – To acquiesce in the government providing the means for employee protection through the power of taxation. This carries only a political and not an economic check on such expenditures.

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**EXHIBIT NO. S to the Pre-Trial Stipulation of Facts**

**(PLAINTIFFS' EXHIBIT NO. 47)**
**"Lecture entitled New Frontiers for Professional Managers by Ralph C. Cordiner, President of GE, printed by McGraw-Hill Co., 1956.**

**McKINSEY FOUNDATION LECTURE SERIES**

*Sponsored by the*
*Graduate School of Business, Columbia University*

## NEW FRONTIERS FOR PROFESSIONAL MANAGERS

**RALPH J. CORDINER**
*President, General Electric Company*

*McGraw-Hill Book Company, Inc.*
*New York Toronto Lodon 1956*

* * *

From reading the headlines these days, one might assume that the so-called fringe benefits are a recent innovation in the business world. On the contrary, this Company and others pioneered many years ago in programs to provide for employment security. The General Electric Pension Plan was introduced in 1912 and has already paid out $150,000,000. Our insurance plans started in 1920 and many other benefit programs had their beginnings in that



era. The Company is still pioneering. Last year there were 32 significant improvements in pay and benefits, including a medical insurance plan which is far ahead of any other medical insurance plan in industry, providing employees up to $15,000 insurance against the cost of catastrophic illnesses.

Over and above these obvious pay and security values, we are engaged in deep research into the really important values of human work: the spiritual satisfactions that come from a challenging position that brings a man or woman a sense of achievement, of belonging, of worthwhile personal expression.

* * *

### ECONOMIC INCENTIVES

As a concrete example of this, General Electric began, five years ago, a thorough study into the matter of financial and economic incentives. The purpose of this continuing study is not only to develop integrated compensation practices that recognize the distinctive contributions of individuals in every component of the organization; the study includes more important basic research into the nature and effect of the economic motivations, their relationships to other motivations that may be more deeply significant, and ways to express these relationships in the practices of the Company so that they provide optimum incentives and rewards for all employees.

At the present time, General Electric utilizes four principal types of financial incentive:

First, there are wages and salaries, in which the Company tries to establish fair compensation levels for satisfactory performance, position by position and community-by-community. This is done both for positions subject to collective

bargaining and for others. For the salaried employees who are exempt from overtime provisions of the Fair Labor Standards Act, the Company has developed an integrated structure of 28 position levels which are applied throughout the organization. Each of these position levels has a certain salary range, and each "exempt" salaried position in the Company, from the beginner to the President, is identified with one of these levels. Thus the Company has a rational and balanced salary structure, but the responsibility and authority to determine at which level a position should be located, and how much salary an individual receives in the range of that position level, has been decentralized. It is interesting to note as an evidence of decentralization that the typical General Electric department manager now has as much authority over salaries as the President formerly had.

The second form of financial incentive is what are known as "employee benefit programs," such as pensions, medical and life insurance, and the like. In this field, as I have indicated in earlier lectures, General Electric has long pioneered. It should be noted that the Company has only one system of employee benefit programs, and it applies across the Company from the man in the factory to the Officers of the Company.

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**EXHIBIT NO. T to the Pre-Trial Stipulation of Facts**

**(PLAINTIFFS' EXHIBIT NO. 16)**
**Decision of the War Labor Board in *General Electric Company*, 28 War Labor Rep. 666 (1945).**


# WAR LABOR REPORTS

Title Registered U. S. Patent Office

## WAGE & SALARY STABILIZATION

Reports of Decisions and Orders
National War Labor Board,
Subsidiary Agencies and
Courts
with
Headnotes and Index-Digest

Wage and Salary Stabilization Regulations
Office of Economic Stabilization
Office of Stabilization Administrator
and
Bureau of Internal Revenue

VOLUME 28

Cited: 28 War Lab. Rep.

Published 1946 by
THE BUREAU OF NATIONAL AFFAIRS
Washington, D. C.

# GENERAL ELECTRIC CO. AND WESTINGHOUSE ELECTRIC CORP.–

**Decision of National Board**

In re General Electric Company [Schenectady, N.Y.] and Westinghouse Electric Corporation [Pittsburgh, Pa.] *and* United Electrical, Radio and Machine Workers of America (CIO). Cases No. 111-17208-D and 111-17209-D, Dec. 12, 1945 (made public Dec. 29, 1945).*

Supplementing 28 War Lab. Rep. 357.

**WAGE DIFFERENTIALS–Reduction of differentials between men's and women's jobs**

Electrical companies should increase all women's rates by 4 cents an hour to reduce but not eliminate substantial long-standing differentials between rates for women's jobs and men's jobs which it, was proven, cannot be justified on the basis of comparative job content. Exceptions from general increase are made in cases of (1) plants in which women's rates may recently have been adjusted for purpose of narrowing sex differentials; (2) plants in which proportion of women to men is so great as to invalidate intra-plant comparisons of their rates; and (3) plants in which present ratio of minimum women's job rates to minimum men's job rates is exceptionally high of plants in which present differential is as small as 4 cents or less.

In addition to granting general 4-cent increase in women's rates to reduce differentials between women's and men's jobs, electrical companies should establish fund equal to 2

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* Ed. Note: For the National Board's supplementary recommendations of Dec. 21, 1945, see 28 War Lab. Rep. 803.



cents per woman employee on women's jobs in all plants involved in case, including those excepted from award of 4-cent increase. Fund should be allocated by agreement of parties or, failing agreement, on basis of recommendations of special Board representative.

**For other rulings are Index-Digest 235.600 and 265.135 in this other volumes.**

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Majority decision of Board. Opinion by Lloyd K. Garrison, chairman. Public members concurring: Mr. Garrison, Nathan P. Feinsinger, Edwin E. Witte, and Lewis M. Gill. Labor members concurring: Carl J. Shipley, Delmond Garst, Robert J. Watt, and Paul Chipman. Employer members dissenting: Vincent P. Ahearn, Randall Irwin, Earl N. Cannon, and Walter Knauss.

*Recommendation*

By virtue of and pursuant to the powers vested in it by the Executive Orders 9017 and 9599 of Jan. 12, 1942, and Aug. 18, 1945, respectively, the Executive Orders, directives, and regulations issued under the Act of June 25, 1943, the National War Labor Board hereby recommends that the following terms and conditions of employment shall govern the relations between the parties:

I. (A) Except as provided in Par. (B) below, women's rates in each of the plants involved in this case shall be increased four (4) cents per hour immediately, retroactive to Apr. 1, 1945.

(B) The record in this case indicates that there may be special circumstances in particular plants which would not justify, under the circumstances of this case, any or all of

the adjustment across the board contemplated by Par. I (A) above. Such exceptions shall be limited to particular plants in the following categories: (1) Plants in which women's rates may recently have been adjusted through collective bargaining or by Board order for the purpose of narrowing intra-plant sex differentials, subject to any understanding between the parties with respect to such adjustments in relation to this case or (2) plants in which it might be contended that the proportion of women to men is so great, particularly in lamp plants, that an intra-plant comparison of men's and women's rates would be of doubtful validity or (3) plants in which the present ratio of minimum women's job rates to minimum men's job rates is exceptionally high or plants in which the present differential between such rates is as small as four (4) cents or less.

II. The parties shall, upon receipt of these recommendations, meet for the purpose of determining which particular plants fall within the special cateogires mentioned above and what part, if any, of the four (4) cent adjustment is not justified for such plants or groups therein under the circumstances of this case. If, within ten (10) days, the parties have not fully agreed on these questions, final recommendations on any question remaining will be made by Mr. William E. Simkin as special representative of the Board.

III. In addition to the four (4) cent general adjustment recommended in Par. I (A) above, the company shall establish a fund equal to two (2) cents per woman employee on women's jobs in all the plants involved in this case, to be allocated by the parties through collective bargaining among any or all of such plants, including plants in Categories I (B) (1), (2), or (3) above, in such form as the parties may agree. If within sixty (60) days or such other period as the parties may jointly determine, complete agreement has not been reached with respect to the allocation



of the two (2) cent fund, Mr. William E. Simkin, as special representative of the Board, will make final recommendations to the parties.

IV. All adjustments made pursuant to Par. III shall be made effective as of Dec. 13, 1945.*

V. It is recommended that the foregoing terms and conditions be incorporated in a signed agreement reciting the intentions of the parties to have their relations governed thereby, as recommended by the Board.

*Opinion of the Board*

*Dec. 12, 1945*

**INTRODUCTION**

Garrison, Chairman:—This opinion deals with both the General Electric Company (No. 111-17208-D) and Westinghouse Electric and Manufacturing Company (No. 111-17209-D) cases, involving the United Electrical, Radio and Machine Workers of America (CIO). The cases were certified to the Board on the same day, namely, July 20, 1945. The major demands in each case are the same. The companies are competitors; and it is desirable that, so far as the major wage issues are concerned, the approach of the Board should be the same in principle in each case.

This opinion deals only with the two most important wage demands: (1) The demand for a minimum hiring-in rate for all workers, regardless of sex, of not less than 72 cents per hour for hourly workers and not less than $28.80 per 40-hour week for salaried employees and (2) the demand for the elimination of sex differentials in rates of pay.

* Ed. Note: In the Westinghouse Electric and Manufacturing Company case, the effective date is Dec. 12, 1945.

## 1. MINIMUM HIRING-IN RATE

At the General Electric Company, the demand for a 72-cent minimum rate would affect some of the men's and all of the women's hiring-in rates. The men's hiring-in rates range from 55 cents to 82½ cents, varying from plant to plant, while the women's hiring-in rates range from 50 cents to 65 cents. The plants are located in 33 cities.

There is no complaint in these cases that, in instances in which women have been assigned to work on jobs customarily performed by men, they have not received the men's rates on those jobs. The union contends, however, that the jobs customarily performed by women are paid less, on a comparative job content basis, than the jobs customarily performed by men; that this relative underpayment constitutes a sex discrimination; and that this discrimination affects all the women's jobs in the plants of both companies.

The companies, as the case developed, virtually conceded that there were sex differentials in their plants but contended that the differentials were of long-standing and had been recognized in collective bargaining, that the rates for women's jobs were in line with industry and area practice; and that to change them would place the companies at a serious competitive disadvantage.

### Nature of Wage Structures

*General Electric*

General Electric plants have two wage rates schedules, one for men and one for women. These schedules are step rate schedules, progressing from a starting to a job rate through a series of step rates which automatically increase at the end of specified periods until the job rate is reached.



After a job rate of $1 has been reached, the progression is on merit at 5-cent intervals. The women's step rate schedule has the same time intervals as the men's but the rates and the differentials between the steps are lower. A typical step rate schedule is shown below:

Schenectady

| Intervals | Rate | |
|---|---|---|
| | Men | Women |
| Start | $.705 | $.565 |
| 2 Wks. | .770 | .590 |
| 1 Mo. | .800 | .620 |
| 2 Mos. | .840 | .650 |
| 3 Mos. | | .680 |
| 4 Mos. | .880 | .710 |
| 5 Mos. | | |
| 6 Mos. | .920 | .740 |
| 7 Mos. | .960 | |

This schedule shows the progression of any job from starting to job rate.

The job rate may be any one of the steps, depending on its content. Each step roughly represents a labor grade. The schedule does not, of course, indicate how many workers are at any particular job rate at any particular time. At Schenectady, for example, we understand that the lowest job rate at which men are now employed is 80 cents and for women 68 cents.

Differentials between the top rates of men's and women's jobs on the progressive schedule range from 10 cents to 25 cents* while differentials between men's and women's starting rates range from 5 cents to 19 cents. The company's figures follow:

*General Electric*

At General Electric, the union relies primarily on a point evaluation plan which was in use in 1937. It is described generally in a manual entitled "Job Evaluation" and in more detail, as applied to a particular plant, in a manual prepared by the planning and wage payment department of the Erie Works, dated May 10, 1937. In this latter manual, the following statements are made:

"In evaluating the characteristics of a job, the point value allowed each characteristic should be in proportion to its importance on that job.***

"Thus, all jobs receive proper consideration, one to another on each characteristic, and the sum total of the characteristic values of each job, after adding the base content, will be in correct relationship to each other, and the rates so determined will be equitable and just.***

"The total points, including the base points thus assigned, are then to be multiplied by the value per point which is suitable to the status of the job.

"The value per point for day work performance is to be set to establish average day rates with a maximum permissible day rate of 5 percent above, while the value per point for incentive performance is to be 15 percent higher than for day work. For female operators, the value shall be two-thirds of the value for adult male workers."

Neither the union nor the company furnished the Board with any further information regarding the 1937 point evaluation system, and the company belittled its importance, asserting that, after a few years of trial, it had been found to be impractical and had been given up at about the time the union was recognized as the collective bargaining agent. The company was even unable to supply the Board with a



copy of the Erie manual, and the only available copy was furnished by the union. The manual seems to us significant, however, as indicating that, at least, as recently as in 1937, a mark-down technique was used in rating women's jobs which did not differ in substance from that employed under the Westinghouse 1938 plan, which is still in effect.

**Extensiveness of Women's Jobs Below Male Common Labor Rate**

There is a heavy concentration in the plants of each company of women's jobs carrying rates substantially below those of the male common labor rates. For example:

At the Lynn River Works of the General Electric Company, a breakdown by the company as of August 1945 of the jobs performed by the 923 women then employed showed that, approximately, 5 percent were on job rates at 62 cents (day work); 20 percent were at 65 cents; 15 percent at 68 cents; 15 percent at 70 cents; 35 percent at 74 cents; 20 percent at 77 cents; 4/10 of 1 percent at 80 cents; 2/10 of 1 percent of 84 cents, the highest rate of women's jobs. Male common labor was at 80 cents.

* * *

*General Electric**

PHOTOG – TABLE on page 1280----------

* * *

**Conclusion as to Extent of Sex Differentials**

On the basis of the entire record, we conclude that the union has established the existence in the plants of both companies of substantial differentials between rates for women's jobs and men's jobs which cannot be justified on the basis of comparative job content. For reasons which will be discussed more fully below, the exact extent of the differentials ascribable to sex cannot now be precisely determined nor can we say that they are the same in all plants or with respect to all jobs.

In our final discussions with the parties, the representatives of both companies virtually conceded that the differentials could not be justified on the basis of job content. They advanced other justifications which will now be considered.

**Grounds Advanced for Justification of Sex Differentials**

*Sociological Factors*

As has already been noted, the Westinghouse wage administration manual frankly states the factors which, in the company's judgment, have warranted, up to this time, a lower wage curve for women than for men. Those factors are listed as: "the more transient character of the service of the former, the relative shortness of their activity in industry, the differences in environment required, the extra services that must be provided, overtime limitations, extra help needed for the occasional heavy work, and the general sociological factors not requiring discussion herein."

While the General Electric representatives did not define these factors quite so explicitly, it was evident from their presentation that they share the same general point of view,



namely, that women are worth less for purposes of factory employment than men.

In cases previously before the National War Labor Board, analyzed under "applicable precedents and principles" above, these arguments were considered and rejected. The principle was laid down that intangible alleged cost factors incident to the employment of women could not legitimately be used to reduce the rates to which the women would otherwise be entitled on the basis of job content.

The principle was also laid down that, where there were ascertainable and specific added costs to the company resulting from the use of women, such as provision for extra helpers or for rest periods not necessary in the case of men, appropriate adjustments in rates may be made. In the cases now before us, no evidence of such costs was introduced.

From our study of these cases, we make the following additional observations. If men were to be substituted for women on the so-called women's jobs, there would probably be a very real loss in efficiency and productivity since it is recognized that men are not as well adapted as women for light, repetitive work requiring finger dexterity. The productive worth of women on the jobs to which they are customarily assigned, if fairly weighed, might well offset any added production costs resulting from such factors as absenteeism, transient character of service, etc.

In any event, these factors are not taken into account by the companies or by employers generally when women are working on men's jobs or on jobs which are interchangeable with men. Industry generally has accepted the principle of equal pay for equal work in such situations. If the inferior value of women as workers could validly be argued, it could be argued that, even in the situations mentioned, women should be paid at a lower rate than men.

In a bulletin issued by the National Association of Manufacturers in May 1942, the factors enumerated by Westinghouse above as affecting the values to be assigned to women's jobs were cited, but the bulletin nevertheless stated that:

"There is little difference between men and women as regards their satisfactory performance in industry. Sound employment and personnel practices are applicable to both men and women and no emphasis should be placed on any distinctions between them as workers."

The true source of the sex differentials is probably to be found in history rather than in any objective tests or cost calculations. In a memorandum entitled "Differentials In Pay For Women," dated September 1945, submitted by the Women's Bureau of the Department of Labor to this Board as a part of the record in this case, it is pointed out that:

"In an early period when women were first entering industry as a new part of the labor force, carrying over into the factory household skills that were not given a high money value in the public mind, women were paid at lower scales of wages than those usually paid men. In this, they suffered from the same type of wage exploitation that ordinarily has occurred with the entrance of any new group to industry, such as migrant workers or those of different nationalities or races.***

"***From this, two parallel wage structures grew up, one for men and one for women, the latter fixed on a lower scale, frequently without valid reasons that would hold up under objective tests. Frequently and especially where women are involved, wage rates have been determined by tradition or custom or prejudice wholly unrelated



to the requirements of the job or its exactions from the worker.

"These low pay scales for women were continued long after women had demonsrated their efficiency in various skilled occupations even though industry came to depend on their work to an increasing extent. There were several reasons why this was so, not the least being that there has been little public understanding of the serious effects of this situation on the American economy as a whole."

On the record before us, we conclude that the companies have not made out a justification for the existing sex differentials on the basis of sociological factors affecting the value of women as industrial employees.

*Community Practice*

There is no doubt that the rates paid by the companies for women's work are in line with the community practice in the different localtieis and that the companies periodically survey the going rates in each community as a guide to adjustments in their own wage structures. As stated above, the companies rely on this practice as constituting a community judgment with which the government ought not to interfere – at least not in the case of a single plant among many plants in a particular community. This argument is closely akin to the argument that any decision in the pending cases would place General Electric and Westinghouse respectively at an unfair competitive disadvantage in the industry. We shall discuss the competitive question presently. For the moment, we are concerned with the contention that, because a given community places a certain value on particular types of women's jobs, that value judgment should stand.

If this contention were sound, it would follow that no exploitation of any group could be ended (save by voluntary action) if it constituted the common practice of the employers in the locality. The real question is whether any exploitation exists. If it does exist, as we believe that it does from the evidence in this case, it should be ended, and the fact that others practice it ought not to stand as a bar.

This conclusion is strengthened by the fact that in recent years there has been an increasing trend toward the elimination of sex differentials in industry so that community practices are already in the process of change.

The Women's Bureau, in the memorandum referred to above, reports that:

"During the war, an increasing number of progressive employers have paid women the same rate as men if on similar work, and certain of the most advanced employers have systems of job evaluation which result in equitable relationships between rates of women and men on different jobs as well as equal pay for women on jobs comparable to men's.

"In most of the major airframe and shipbuilding plants visited by the Women's Bureau agents during the war period, the policy was to hire women and men under the same progression policy and pay them the same rates. This situation probably reflects the influence of the National War Labor Board in these industries.

"The 1943 New York state study, previously referred to, showed that, in 60 percent of 143 manufacturing plants reported and in 63 percent of 56 nonmanufacturing firms, inexperienced women received the same entrance rates as men.



"Of 148 plants studied in March 1943 by the National Industrial Conference Board, over half paid inexperienced women to be placed on men's jobs identical rates with men.*

The National Association of Manufacturers, in the bulletin referred to above†, stated that:

"In the matter of wage policies, we advocate the principle of equal pay for equal performance by women. In effectuating this policy, it is essential that consideration be given to methods whereby 'equal work' may be measured. In this connection we recommend that industry give thought to the wider use of such techniques as job analysis and evaluation to determine the precise nature of the job and the elements comprising it.

"In approaching this problem certain pertinent factors are apparent, among them***."

The bulletin then listed the factors of absenteeism, etc. which have already been discussed above.

These trends toward the elimination of differentials have been further reflected in and, in turn, encouraged by, policies of the Federal Government which run back as far as 1915 and state legislative action beginning in 1931. These governmental policy dedevelopments are summarized in the following section.

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* *The Conference Board Management Record*, October 1943, p. 404.

† *Labor Relations Bulletin No. 41*, p. 1.

**Policies of Federal and State Governments**

The Women's Bureau memorandum in this case lists (with supporting citations) orders, rulings, or declarations in favor of equal pay for equal work by the following agencies of the Federal Government:

The Commission on Industrial Relations (1915), the War Department (1917), the War Labor Conference Board and the National War Labor Board (1918), the Women in Industry Service of the Department of Labor (1918), the U. S. Railroad Administration (1918), and the U.S. Civil Service.

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**EXHIBIT NO. U-1 to the Pre-Trial Stipulation of Facts (not printed here as it is printed at pp. , *supra*).**

**PLAINTIFFS' EXHIBIT 17A-1)**
**Employee and Community Relations Instructions, Salem, Virginia, dated 2-1-68, p. 1, Instruction No. ER 2.31.**

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**EXHIBIT NO. U-2 to the Pre-Trial Stipulation of Facts**

**(PLAINTIFFS' EXHIBIT NO. 17A-2)**
**Employee and Community Relations Instructions, Salem, Va. dated 2-1-68, p. 1, Instruction No. ER 2.32.**

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PERSONAL ILLNESS

It is the obligation of an employee removed for personal illness to keep his supervisor informed monthly as to the probable date of return to work. This obligation to notify the supervisor will be waived in case of pregnancy until after eight weeks after termination of pregnancy.

A. Notice of Recovery from Disability

It will be the supervisor's responsibility that an employee returning to work after an absence of two weeks or more due to personal illness, from absence of any duration due to an injury in the plant or from confinement in the hospital of any duration, report to the plant dispensary for an examination prior to starting to work.

On the initial day of his return, the employee must present a doctor's statement regarding the advisability of his returning to work. An employee who, in the opinion of the plant physician, is determined satisfactory to resume work, will be given a Notice of Recovery from Disability (Form AF-715), in duplicate. He will present this notice to Personnel Practices for consideration for re-employment and will give the copy to his supervisor.

B. Recall from Personal Illness-Pregnancy

In general, when an employee is removed from the payroll for "personal illness-pregnancy," she will be returned to her former job assignment and classification.

If an employee leaves for "personal illness-pregnancy" before the normal six-month period of leaving or does not return to work within the allotted time of eight weeks following termination of pregnancy, there is no guarantee that she will be returned to her same job classification and assignment; however, every effort consistent with effective operations will be made to return her to her same job classification and assignment.

If the employee cannot return to her former job classification and assignment, she will, in accordance with her continuity of service, displace the shortest service employee in her former job classification or a similar occupation.

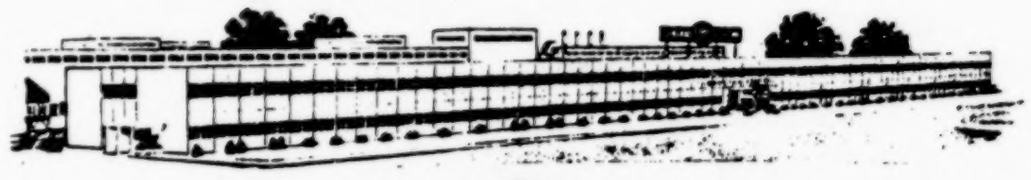
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**PLAINTIFFS' EXHIBIT NO. 17B**
**Employee Handbook, GE, Industry Control Dept., Salem, Va., issued employees at Salem, Va. February 1970.**

**This is also EXHIBIT U-3 to the Pre-Trial Stipulation of Facts.**

# EMPLOYEE HANDBOOK



## GENERAL ELECTRIC

## Industry Control Department

## Salem, Virginia

Maternity Absence

It is the policy of the Department that pregnant employees will be required to terminate active work at the end of the sixth month of pregnancy. The employee may terminate active work any time before the end of the sixth month if she so elects.

Unless there are verified medical complications, an employee desiring to return to work must report back not later than eight weeks after termination of pregnancy.

**EXHIBIT NO. V to the Pre-Trial Stipulation of Facts**
**(PLAINTIFFS' EXHIBIT NO. 48)**
**"Filled-in form on subject of pregnancy leave from J.P. Yandell, Specialist, Personnel Practice, GE Tyler, Texas, directing Faye Thomas to quit work on February 16, 1972.**

**GENERAL ELECTRIC**

PHOTOG – p. 1285 THE TOP OF THE PAGE

Dr. Kenneth Orten examined Faye Thomas due to pregnancy on 2/14/72. A statement from her personal physician advised her expected date of delivery to be 5/19/72. Furthermore, in compliance with company policy, Dr. Orten advised that she may continue her regular duties until 2/18/72 assuming no contraindications arise. She should report to the company nurse in the Dispensary once monthly until the beginning of her 6th month at which time she should report to the nurse weekly thereafter. Her absence due to pregnancy, unless otherwise indicated, should commence 2/18/72. All of the above facts have been explained to the employee.

/s/ J.P. YANDELL
J.P. Yandell
Specialist, Personnal
Personnel Practices

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**EXHIBIT NO. X to the Pre-Trial Stipulation of Facts**
**(PLAINTIFFS' EXHIBIT NO. 50)**
**"Letter from Oliver N. Pettey to D.V. Dorsey dated 2-15-72.**

Mr. D. V. Dorey
Manager, E. & C. R.
General Electric
Tyler, Texas 75701

Subject: Pregnancy Leaves.

Dear Mr. Dorey:

The International Union of Electrical, Radio, & Machine Workers and IUE, Local 782 consider your company policy requiring female employees to leave work three (3) months before expected delivery during pregnancy is illegal under Title VII of the Civil Rights Act of 1964.

Several decisions on this subject have been rendered by the Equal Employment Opportunity Commission and by The Courts. For your information we cite, *Cohen v. Chesterfield County School Board*, 3 FEP Cases 526 (U.S.D.C.-E.D. Va. May 17, 1971; *Middletown Board of Education*, 56 LA 830 April 26, 1971; *Schattman v. Texas Employment Commission*, 3 EPD Par. 8146 U.S.D.C.W.D. of Texas, March 4, 1971.

Erma F. Thomas has been notified by Employer & Community Relations that she cannot work after February 18, 1972. At least one other employee, and possibly others, are or soon will be given similar notification, only the dates varying.

We request that Mrs. Thomas be notified that she may continue active employment at the Tyler General Electric Plant until her personal physician declares her unable to work. We further request any and all others similarly situated now or in the future be allowed their legal right to continue active employment until declared disabled from work by the physician in charge of the case(s).

Mr. D. V. Dorey
February 15, 1972 FILE COPY page 2

I would appreciate an immediate affirmative answer in writing from you about this matter, as in Mrs. Thomas' case there is little time remaining before her active employment will be interrupted.

Yours truly,

Oliver N. Pettey
President
IUE, Local 782

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**EXHIBIT NO. Y to the Pre-Trial Stipulation of Facts**
**(PLAINTIFFS' EXHIBIT NO. 51)**
**"Letter from S.J. Przywara to Oliver N. Pettey, dated 2-16-72.**

PHOTOG – HEAD p. 1287——————————

February 16, 1972

Mr. Oliver Pettey, President
Local 782, IUE (AFL-CIO)
P L A N T

Re: Removal for Personal Illness - Pregnancy

Dear Mr. Pettey:

The Tyler plant practice regarding removal of pregnant employees from payroll at the end of a specific number of months of pregnancy had previously been modified to consider the removal based on the individual's ability to perform the specific duties of her regular job, efficiency and personal medical safety.

This modification apparently was not incorporated into the dispensary procedure when Erma Thomas was informed of her removal date. Accordingly, she will be permitted to continue working based on the above criteria, including her personal and Company physicians' evaluations.

Yours very truly,

/s/ S.J. PRZYWARA
S.J. Przywara, Manager
Union Relations and Compensation

SJP:ws

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**EXHIBIT Z-1 to the Pre-Trial Stipulation of Facts**
**(PLAINTIFFS' EXHIBIT NO. 18)**
**Murfreesboro, Tennessee News Digest, Jan. 15, 1973.**

PHOTOG – NEWS DIGEST HEAD p. 1288 ---------

DAVE'S QUESTION CORNER

Well, I got my first batch of questions last Friday and I am starting to work on the answers. Some questions I can get answers for easily but others may take a little time.

Q. Is it a Company policy that all pregnant female employees take their leave of absence at the beginning of their sixth months?

A. The best information I could get on this question is that generally speaking pregnant employees may work until the end of their sixth month at which time they are to take their leave of absence. If you leave on maternity absence your service with the Company will be protected for eight weeks after the birth of your child. Additional information on this subject can be obtained from the Dispensary.

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**EXHIBIT NO. AA to the Pre-Trial Stipulation of Facts**

**(PLAINTIFFS' EXHIBIT NO. 52)**

**Grievance of Betty Snyder, Tell City, Indiana, filed 2-11-70.**

EMPLOYEE GRIEVANCE FORM

No. 2861 Department SD

Date Feb. 11, 1970

Employee Name Betty Snyder Clock No. 22096

Job Shaded Coil Operator Foreman Jerry Thomas Union Rep. Mary Blake

My Grievance is that I was denied the right to continue working through my seventh month of pregnancy as allowed by Company rules and practices. The last day I was allowed to work was June 30, 1969. My doctor had told me I could work until August 1, 1969. My delivery date was October 7, 1969.

I ask that I be made whole for any and all losses due to this arbitrary action.

Betty R Snyder
Employee Signature

Received by Foreman: Hour 10:00 AM Date 2-11-70

Forman Disposition of Grievance: Our file show some conflicting information concerning your pregnancy terms. However the last date shown 11-14-68 in all reports from Dr Pena even the one dated a little out 6-27-69.

In your case to be given pregnancy terms should be applied during all other terms and appeal last day at seven months. As was done in other cases.

There was no breach of Company rules or practices

L H Thomas - 2-18-70
Foreman Signature

Rejected - B.R.S.

Received by Personnel Office: Hour Date

Appealed: Hour Date Forwarded To Hdq. Representative Hour Date

1 2



**EXHIBIT NO. BB to the Pre-Trial Stipulation of Facts**

**(PLAINTIFFS' EXHIBIT No. 53)**

**Appeal filed 9-16-70 by Betty Snyder from denial of grievance.**

GRIEVANCE APPEAL FORM

SECTION SHD DATE 2/16/70

NAME Betty Snyder CLOCK No. 22096

JOB Shaded Coil Operater FOREMAN Jerry Thomas UNION REP. Mary Blake

We do not accept disposition of grievance No. 2861 and wish to appeal.

SUMMARY OF GRIEVANCE:

Denied the right to work through seventh month of pregnancy as allowed by Company rules and practices. Appeal to Step #2

RECEIVED. Hour Date SUBMITTED BY Hubert Winchell

5 393 Rev.

**EXHIBIT NO. CC to the Pre-Trial Stipulation of Facts**

**(PLAINTIFFS' EXHIBIT NO. 54)**

**National Docket No. 23,980, Second Step Answer to grievance of Betty Snyder.**

Nat. 23980

MAR 1 9

DISPOSITION OF GRIEVANCE

Toll City PLANT SECTION SMD DATE 2/18/70

NAME Betty Snyder CLOCK No.

YOUR GRIEVANCE No. 2861 IS DISPOSED OF AS FOLLOWS: STEP 2 ☐ STEP 4

We have again checked the doctor's reports on your case. On all rep the LMP is shown as 11/14/68.

We treated your case as we have others before and since. Your reque for pay for time not worked is denied.

Union

A. E. Oberhausen (Signed)
COMPANY REPRESENTATIVE

BEST COPY AVAILABLE



**EXHIBIT NO. DD to Pre-Trial Stipulation of Facts**

**"Third Step answer to Betty Snyder grievance, N.D. No. 23,980."**

COMPANY POSITIONS IUE Meeting Date-June 25, 1970-July 10, 1970

Tell City, Indiana

* * *

N.D. 23980 Discrimination or Coercion

It is the Company position that there was no discrimination involved or intended and there was no violation of the Agreement.

* * *

**EXHIBIT NO. HH to the Pre-Trial Stipulation of Facts**
**(PLAINTIFFS' EXHIBIT NO. 29)**
**"Letter, Metropolitan to Randall, dated 11-1-71.**

**METROPOLITAN LIFE**
One Madison Avenue
New York, N.Y.

Mr. J.C. Randall, Supervisor
General Electric Company
Industry Control Department
1501 Roanoke Boulevard
Salem, Va.

Re: BARBARA HALL

Dear Mr. Randall

The claim recently submitted on behalf of Mrs. Hall has been received and indicates that the insured is under the care of a physician for pregnancy.

Since benefits under the Weekly Sickness and Accident Insurance are not payable for any absence due to pregnancy or resulting childbirth or to complications in connection therewith, we regret our inability to favorably consider the claim for benefits.

Yours truly,

/s/

N.E. Sarmiento, Assistant Supervisor
Group Health Claims

November 1, 1971
DC:JNO

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**EXHIBIT NO. LL to the Pre-Trial Stipulation of Facts**
**(PLAINTIFFS' EXHIBIT NO. 56)**
**Minutes of Negotiations Between GE and IUE, August 31, 1960.**

National Level Negotiations
August 31, 1960
Conference Room - 10th floor - New York City

IUE

Present at Meeting:

Company: Moore, Ritter, Willis, Hilbert, Dolfi, Reed, Kneeland, Baldwin, Northrup, Highton, Nunn, Zook (a.m. only), Barecca, Wagner (a.m. only)

Union: Carey, Sigal, Lasser, Callahan, Swire, Jandreau, Fitzmaurice, Egan, Quinn, Onion, James, Litano, Lawalin, Stanley, Toughill

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Carey: If there is anything they agree about on this side of the table, Bud, it's you. Can I get past you, Mr. Ritter?

Ritter: I wish you would.

Carey: You have a sense of inferiority which was brought about because of the people around you. Mr. Moore is in the position that you should have, and Day was in it before, and you're embittered.

Ritter: You aren't helping me, Mr. Carey.

Carey: You know what little respect that I had for the three people here that I thought could do something has taken a shattering plunge.

Kneeland: Me too?

Carey: You too.

Stanley: There has been no response to the practical suggestions by the committee, and nothing has been brought out. We have differences in opinion, or don't you think they are different? Are you going to take the position to impose this on the employees, or are you going to get to something? I'll get to Ritter later because I have 144 grievances at the third level, and he has job security.

Jandreau: A few days ago, I asked for some information on the age brackets of the people in the areas that would be affected by the vacations. I would like to have some of this information for this area because you are so concerned with the costs. We have the cost for the holiday of .004%.

Moore: I think your costs are reasonably close.

Jandreau: Is it true that 50% of the employees have 25 years or more of service? If it were 50%, it would bring the cost of the vacations down to 1%.

Moore: Mr. Jandreau, you know we discussed the level of benefits.



Jandreau: From our information, the average wage offer is way above what you are offering. You aren't in line with the going offers. It seems to me that since you don't have it in your offer that there would be room for improvements in vacations and holidays. If we are talking 1%, I think there is room for considerable improvement. These also help employment stability. As for the longer service fellow, as he gets older he needs more time off. You know this provided



employment in the Turbine Department because they had to bring in people when the others had vacations. I think in light of what it would cost the Company, the going offers, and the offer that you put forth, there should be some room for holidays and vacations.

Sigal: The average increase for industry in general has been 9¢ to 10¢ per hour. The best calculation that we can get is that yours is less than 9¢. That's pretty cheap for a going concern like yours. Are my calculations wrong?

Moore: I don't have any idea how you calculated it, Mr. Sigal.

Sigal: Don't you know what it costs?

Moore: I don't know. It hasn't occurred yet, so I don't know what it will cost us.

Sigal: Your proposal you don't know, but yet you said that ours costs $500 million.

Egan: Why did you calculate ours?

Moore: Just to show how ridiculour your demands were.

Egan: Is yours less than 9¢ per hour?

Moore: I don't know.

Sigal: You mean you don't know?

Moore: It's different. Let's look at it. With 3% for an employee who gets $3.00 per hour, he gets 9¢ the first year.

Egan: Take the average employee who gets $2.30 per hour.

Moore: Seven cent increase the first year, and 16¢ over the three year period.

Sigal: He gets less than 5¢ per hour per year then. Find the other 4¢, Mr. Moore.

Moore: We haven't put a figure on the package.

Sigal: Do you expect us to accept that? What is your estimate. Surely you must have estimated this before you came forth with the proposal.

Moore: We don't have an estimate.



Sigal: You obviously considered the cost, did you not?

Moore: Mr. Sigal, don't get yourself all worked up because G.E. works on a level of benefits basis, not the cost per item.

Carey: You talked about the costs of foreign competition and all of that.



Hilbert: Yes, it may cost jobs too.

Carey: Do you know how many jobs it will cost? Do you know what the substantial cost will be in terms of jobs?

Hilbert: It may be many if we don't get the customers.

Carey: Did I understand Mr. Moore to say that the Company bargains on a level of benefits basis and not costs? You can determine our cost, but you can't determine yours. You know the costs of vacations.

Hilbert: What Leo suggested on costs varies from plant to plant. On some of the components it wouldn't cost anything one year and on others it would be a big cost.

Carey: What you are saying is that you could estimate ours but not yours.

Moore: Mr. Jandreau, for the record, the vacation costs are taken across the board by product department or by location.

Jandreau: If you take it by department, then it may affect other locations. For instance, in Turbine it would cut across Lynn and Schenectady and any other places, right?

Willis: It would be allocated to each department. In that situation there are departments in Lynn and in Schenectady and it would be allocated to both.

Sigal: How you allocate the costs isn't important. It's the overall cost that counts. You mean to tell me that you don't know what it will cost you before you make a proposal.

Hilbert: Overall costs don't mean anything in some cases. It may mean a loss of jobs in some other areas.

Sigal: It's nonsense because right now you are figuring on what this proposal will cost in the new orders that you are bidding on.

Moore: Mr. Sigal, you ought to stick to law and not finance.

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**EXHIBIT NO. LL to the Pre-Trial Stipulation of Facts**

**(PLAINTIFFS' EXHIBIT NO. 55)**
**Minutes of September 1, 1960 between IUE & GE.**

IUE September 1, 1960, Philip D. Moore and E.S. Willis representing GE

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2:10 p.m.

Callahan: In the insurance area, the Company did adopt a few minor items that we suggested on pensioners' insurance, dependent coverage while on layoff, coverage for disabled employees and in the maternity area. The Company made some improvements, but in the average situation, the employee would be better off under the old plan.

Willis: In the average case, the employee will get more under this plan. Our figures indicate that the average benefit under this plan will be $185 for a pregnancy. Under the old one it was $150.

Swire: What do you pay when the cost of the pregnancy is $185?

Willis: The plan pays $150.

Swires: Who pays the $35?

Willis: The employee.

Swire: I assumed that the Company would pay this like they would co-insurance.

Willis: No.

Swire: Your proposed plan is no better than your present plan unless the benefit is $300 or over.

Willis: That's right. It wouldn't pay any more.

Callahan: Blue Cross is better.

Willis: You wouldn't want to pay Blue Cross rates would you?

Swire What's the cost of maternities?You gave us a great deal of information over the past two years but . . . . .

Willis: We have given you information since 1955.

Swire: I could not determine the exact cost of the increases in hospital to the costs of the Company.

Willis: What do you think caused the costs to increase?



Swire: If you wouldn't have destroyed the records and would have given us the information, we would know. I'd like to have the figures right here before me so I would know.

On the improvements in medical care for the pensioners that we talked about this morning, I understood that it applied to those who retired previously.

Willis: It applied to those who retire in the future.

Swire: We are asking you to do the same thing that you did in 1955 for the pensioners.



Willis: Mr. Moore told you about the pensioners.

Moore: You don't bargain for them Mr. Swire.

Swire: We are asking for an improvement in maternity. We want the Company to pay everything up to $500, then co-insurance after that.

Willis: Something like that is out of reach. Maternity is the most extensive item.

Swire: What does it cost, Sid?

Willis: We talk level of benefits, not costs.

Swire: You just said it was expensive.

Lasser: In your plants you talked costs. You had listings of the various costs.

Willis: If I recall what we did was compare our insurance with the cost to get similar coverage on the outside.

Callahan: Even with your improvements, it's not a good maternity plan.

Lasser: How many pregnancies do you have a year?

Willis: About 25,000 per year.

Lasser: You mean there are pregnancies for every one out of ten employees?

Willis: You know this includes dependents.

Lasser: Does the premium remain the same?

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EXHIBIT NO. LL to the Pre-Trial Stipulation of Facts

(PLAINTIFFS' EXHIBIT NO. 56)
"Minutes of September 7, 1960 between IUE & GE"

**National Level Negotiations**
**September 7, 1960**
**Conference Room - 10th Floor - New York City**

**IUE**

**Present at Meeting:**

**Company:** Moore, Ritter, Willis, Hilbert, Reed, Kneeland, Dolfi, Baldwin, Northrup, Nunn, Barreca

**Union:** Carey, Callahan, Jandreau, Phelps, Lasser, Toughill, Litano

* * *

Lasser: Yesterday, Mr. Moore, I asked you a qyestion and you didn't answer it for two hours. For two hours I tried to get an answer on your reasoning for wage increases.

Moore: The wage increase justifies itself.

Lasser: If I took you seriously, Mr. Moore, I might get angry because I think you are smarter than you act. From 1951 to 1953 you had a 31 cent increase. From 1952 to 1954 you had a 21 cent increase which included the recession of 1954. From 1953 to 1955 you had a 19 cent increase which included



Lasser: all of the 1954 recession. From 1956 to 1958–a 29 cent increase and from 1957 to 1959, a 33 cent increase; and what do you offer for 1960 to 1963–16 cents per hour increase. It is the worst proposal in a ten year period.

Moore: Your conclusion is impeccable, Mr. Lasser. It is not as much as the past five years and we had told you that it wouldn't be as substantial.

Lasser: How do you justify the wage proposal? It is the worst.

Moore: Do we have to justify it. The trend has been downward, Mr. Lasser.

Lasser: It hasn't been downward.

Moore: At least be honest abouti it, Mr. Lasser.

Lasser: The trend isn't downward–prove it to us. You take the lordly attitude that you don't have to justify your demands.

Moore: Mr. Lasser, did you justify your demands?

Lasser: We took four things, and considered them–the productivity of the workers, the ability to pay, matching the increases in other industries, and providing GE employees with an adequate standard. We submitted 15 pages to you on our justifications for the wages.



Callahan: Are you going to put it in the press that

Callahan: the Company doesn't have to justify their increases?

Moore We said that many factors were considered.

Callahan: I can see tomorrow's headline–Company Doesn't Have to Justify Increase.

Moore: Who is going to believe that. Let us get down to the proposal.

Lasser: You are squirming away again, Mr. Moore.

Moore: We bargain on what is the appropriate thing to do and the level of benefits.

Lasser: What is the appropriate thing to do?

Moore: Other companies' settlements, our level of benefits–you know what they are.

Lasser: We have been standing still for ten years relatively speaking.

Ritter: We are still ahead in other items, aren't we?

Lasser: Like what?

Ritter: Look at the spendid settlements in pensions and insurance of 1955. We are way ahead.

Carey: No, you are falling back Bud. When did you you have additional holidays?

Ritter: That is not the question before us now.

Carey: You have admitted you are falling back relatively.

Reed: We haven't admitted that. Where have we fallen back?



Carey: The steel industry didn't know about paid holidays when GE had them.

Willis: Where is the steel industry in holidays now?

Carey: Steel still isn't where they should be. How about their wages?

Willis: Steel isn't comparable. Their work is different and they don't have women; therefore, our average wage is lower. They also aren't mechanized like us.

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EXHIBIT NO. LL to the Pre-Trial Stipulation of Facts

(PLAINTIFFS' EXHIBIT NO. 57)
"Minutes of September 22, 1960 between IUE and GE.



Willis: Those people retired at a $3 minimum.

Jandreau: It seems to me that we are talking about nothing and seems to me it would lead to an agreement.

Carey: Sid, we were hoping that if you didn't have any limitations posed on you we could get an agreement. You said we left out something. What was it?

Willis: The coverage on the unemployed people–the waiver of the premiums for one year. The contributions for employees and dependents will be waived for one year for those on layoff.

Carey: What is this you are toting around the country on your loan plan?

Willis: You mean Emergency Aid?

Carey: Where does that fit in?

Willis: If you make that No. 10 on your list it is okay with us.

Carey: You don't think there is anything more that can be done on pensions and insurance, is that it Sid?

Willis: I think it is a good liberal pension and insurance plan.

Carey: I think it the most splendid finest offer we have got in negotiations–wouldn't it be a hell of a note if we got down to an agreement and the effective dates caused the plants to shut down?I think it would be a hell of a note if we couldn't get an agreement on that. I would say that you'd be waiting for a miracle from Schenectady, Sid.

Moore: Mr. Carey, we have . . . . . .

Carey: If we can't get an agreement today, it is in a bad way. There are limitations on you and all of the negotiators. You better get a better date than April 2, Mr. Moore.

Moore: We think it is a good date, Mr. Carey.

Carey: Make the pensions proposition October 1, 1960 and October 1, 1961–the same as



Carey: you would make the wages. We made you a proposition yesterday and you didn't grab it.

-15-

Willis: What is that?

Carey: On union pensions–the effective date. Anyway we can negotiate with Management on the dates. Can they be changed, Sid, in any way from the April, 1962 date. It is not a good date.

Swire: If we could get agreement with you in the next five minutes . . . . . .

Carey: Now hold off here.

Willis: The offer stands as it is, Mr. Carey.

Stanley: The offer stands because you refuse on any request that we would make–the cost is of no concern with you, but it is just because we request something that you would refuse to give it.

Willis: These issues go beyond cost. We made this offer after we had listened to you for weeks. It is a very sound proposal.

Stanley: It is nonsensical to sit in these negotiations with you like this.

Carey: Do you think it is unsound with our suggestions?

Willis: I think it is sound now.

Carey: Could you bring in for the conciliators the difference in terms of the cost between what we are propsoing and what you want. You know–the cost of making the effective dates different.

Moore: Are you saying that that is the only difference in reaching an agreement?

Callahan: On pensions it might be.

Stanley: This is evidence of your inflexibility. The only reason you won't incorporate it is because we made the proposal.

Hilbert: Give us some reasons why it should be changed. You haven't convinced us.

Carey: I can. It would help us to get an agreement and the cost of it is very little to you.

Willis: Consider the $2.50 at this time to be unsound with the wage rates the way they are.

-16–

Swire: What do you mean unsound?

Willis: It is too high.

Carey: You know, Sid, I studied in school. I studied mathematics, calculus, and I studied Steinmetz too. You tell me how much. Don't tell me the added costs would make it less sound.

Swire: I estimate the maximum cost to go from



Swire: $2.25 to $2.50 monthly would be .2 of one cent.

Carey: I think it is so insignificant in view of all the reserves that they have Mr. Conciliator. We have $1 billion in the Pension Trust Fund.

Willis: There are very few employees with that type of a guarantee behind them.

Carey: The proposal that I had for housing and the 5% return on it would take care of this little cost. Sid, we want the information on the costs. You can't deprive us of that information. We are asking you to determine the costs of making the effective dates that we suggest and the difference in yours.

Moore: Mr. Carey, we are talking of level of benefits. You know that. We don't talk cost. We talk level of benefits.

Carey: Sid, I would hate to have you wake up some morning like October 2 and find the plants closed down because you wouldn't give us the information.

Willis: I think I'm reasonably safe because I don't think you will close the plants for that alone.

Carey: While Krushchev, Castro and all those guys are here, why can't we come to an agreement. It would be a wonderful thing to do.

Willis: I agree with you. It would be a wonderful thing to get an agreement.

Carey: Why are you hanging on that date, Sid?

Willis: It is the appropriate date, Mr. Carey.

EXHIBIT NO. MM to the Pre-Trial Stipulation of Facts "Statement of Philip D. Moore, Manager, Employee Relations, GE, made to IUE negotions committee on September 22, 1966."

MOORE STATEMENT TO IUE - SEPTEMBER 22, 1966

After more than a week of negotiations discussions with you since September 14th, when we presented our overall economic and benefit proposals we feel that we have a reasonably clear idea of your committee's evaluation of our proposals and also a reasonably clear idea of the priorities you attach to the various counterproposals you have made.

* * *

Our proposal was on the basis of a 36-month duration, and we offered that duration because it seemed to respond best to the needs of both parties. We have reconsidered the contract duration to the extent of an additional two months because—by doing this we think it would then be feasible to do something more on the holiday and the skills adjustment.

The specific effect of extending the contract duration by another two months is not something that can be done in dollars and cents with much accuracy and we



do not propose that we seek to do so here. We think that you will want to balance the attractiveness of the two approaches in terms of what you consider the needs of your members. Throughout our bargaining relationship we have always looked at the level of benefits available to employees rather than trying to figure out how much a given item costs the Company and we think this is the right way in this matter, too.

* * *

EXHIBIT NO. NN to the Pre-Trial Stipulation of Facts "Minutes of September 30, 1966 between IUE and GE."

**IUE-GE NEGOTIATIONS**
(Meeting with Federal Mediators)

Hotel Lexington, New York, N.Y. September 30, 1966
10:00 am

* * *

Moore: You're going down a different path than we are. I asked a very reasonable question. If you're stuck on 36 months then we have no further ideas.

Callahan: You opening statement on September 29 said you have everything on the table. You make it impossible to answer your question.

Abramson: Are you willing to consider or negotiate on our proposal on cost of living.

Moore: I've responded and when I find out your position I'll answer. I don't want to answer your questions one at a time.

Abramson: Assume we were willing to modify our term what of the 8 items you will move in.

Moore: You tell me what length you're really interested in and I'll respond. Offhand I'll tell you we are not going to move on the Union Shop, Arbitration, Geographical Wage Differentials and Contracting out of work. When you answer me I'll be more specific.

Lasser: Are you prepared to make an improvement on your 42 month proposal? If you have no authority to make a change in substance why are we talking about it.

Moore: If your frozen on 36 months I agree.

Lasser: Do you have anything of substance.

Moore: I'm willing to listen to your persuasion.

Lasser: Right now its up to you to persuade us.

Moore: Mr. Mediator until I get some answers I don't see much point.

Callahan: You've said there is nothing. How can you expect us to answer. If you tell us you're willing to give more, we'll answer.

Moore: You have a fixation on breakthrough. Cost is none of your business because we pay and you don't. If you're on a cost kick you're barking up an empty tree.

* * *



PLAINTIFFS' EXHIBIT NO. OO "Minutes of October 9, 1966 between IUE and GE."

Abramson: But this story described what you said to us.

Baldwin: You weren't even interested in listening to our proposal.

Hilbert: It was kind of hard to talk to people who were hiding under a bed?

Abramson: Does this justify the false publication?You didn't even have the decency to let us know in advance and to give us this proposal to our faces.

Baldwin: We were here in this rrom at 11:00 A.M. Are you sure that what we said didn't actually happen.

Abramson: You mean that you were meeting with yourselves?How phoney can you get?

Baldwin: One fallacy of your position is about the quality of the offer that has been made.

Abramson: You mean its virtues are self-evident.

Baldwin: I think as time goes on you will recognize that it is the best offer ever made.

Blackburn: I don't understand how you can offer such a proposal. The people are so angry about what little they know about it they don't even want to know about contract language. I believe you are strike happy.

Baldwin: I think it is a fantastic proposal.

MANGINO: I think it stinks.

STANLEY: Don't you know what your employees think about it.

BALDWIN: I think when they understand the proposal they will think it is wonderful.

ABRAMSON: Is there an obligation on the part of the employees to go to these captive audience meetings in the cafeteria?

BALDWIN: No, it is completely voluntary.

BLACKBURN: They are compelled to go and told not to respond or to ask questions.

HILBERT: That's right we do not want to negotiate with employees.

BALDWIN: I happen to have a copy of the IUE News dated October 20, 1966. You refer to that agreement as the best contract and (reads IUE News story quoting Mr. Jennings). This is a better contract than the one in 1966. You have an opportunity here available to negotiate fully in 1970 and 1971.

SWIRE: And at that time when it comes, let's assume you say there is nothing available.

BALDWIN: Who says that. Those are factors that can be considered at the time of the reopener.

SWIRE: Suppose the cost of living goes down what can we do then?



BALDWIN: You can come up with some facts.

SWIRE: If there is no additional cost of living who makes the decision?

BALDWIN: Our negotiations.

SWIRE: So then you are still taking the same position. What your offer is is a right to strike this year and in '70 and '71.

BALDWIN: We have a record of reaching agreements without strikes, and our negotiations have produced a good record with IUE.

SWIRE: No one can say that the Company's offer can stand up. Nowhere in all of industry has such an offer even been made asking for a three year contract with 2 wage reopeners annually.

BALDWIN: We have had reopeners before.

FRIEDMAN: Those were 1 year contracts with reopeners at 6 months.

HILBERT: It was a reopener.

SWIRE: You only have a reopener. Do you assure that we will get certain things next year?

BALDWIN: All I will guarantee is that I will sit down and negotiate with this committee.

1310 Page 14 October 9, 1969 – PM

* * *

BALDWIN: Let me get back to my friend from Pittsfield. I know you wanted this to be higher but I believe this is the best offer that was ever made by us.

ABRAMSON: Let me tell you of a textile industry that is depressed. It is the dyeing industry. They signed an agreement that provided 35¢, 30¢ and 30¢ plus 20¢ in fringes. And this is in a rough competitive company.

BALDWIN: We don't argue ability to pay. What are their rates now?

ABRAMSON: Their rates are not up to the electrical industry, but they are in a very competitive industry and you always say that is one of your main considerations in deciding wages.

BALDWIN: We have shown you that we are at or above the median in industry.

ABRAMSON: Joe, did the Company ever make an offer on pensions and then later make a major change in that offer?

Page 15 October 9, 1969 – PM

SHAMBO: Could this Company make the changes that we propose in the pension plan without any cost to the Company?

WILLIS: It would involve some costs.



BALDWIN: The cost isn't pertinent because we don't bargain on costs. We are only concerned with how it stacks up against other plans.

SHAMBO: What is this cost?

ABRAMSON: If you can give an increase in benefits without cost, why don't you do it?

WILLIS: The fund does have costs and the fund is maintained against future claims and there is a certain amount unfunded as yet.

ABRAMSON: But does this fund grow?

WILLIS: Yes, it grows that is why you can put in a certain amount of dollars and pay out even more dollars later on. All of these funds are earmarked for benefits to retirees.

ADERS: You say it is earmarked but what happens when some one quits?

WILLIS: It is earmarked but not for any certain individual. It is for all employees covered by the Plan. If someone quits the amount of money remains in the fund.

SWIRE: I said that the experience with the fund has been good. The benefits have increased and your costs go down.

WILLIS: The level of benefits is our plan. We don't negotiate on costs.

* * *

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PLAINTIFFS' EXHIBIT NO. 5
(Exhibit No. B to Pre-Trial Stipulation of Facts)
1970-1973 GE-IUE (AFL-CIO) National Agreement

* * *



## ARTICLE XXII

### INCOME EXTENSION AID

**(Effective January 1, 1971, this Article is modified in a number of respects. These modifications appear at the appropriate place in the Article.)**

1. *General*

An employee with three or more years (two or more years) of continuous service will, in accordance with the provisions hereinafter set forth, have available an Income Extension arrangement for use in the event of layoff for lack of work or plant closing.

* * *

10. A grievance arising under this article may be processed in accordance with the grievance procedure set forth in Article XIII. However, no matter or controvery concerning the provisions of this Article or the interpretation or application thereof shall be subject to arbitration under the provisions of Article XV hereof, except by mutual agreement.

## ARTICLE XXIII

### MILITARY PAY DIFFERENTIAL

* * *

Employees will be permitted to take a vacation and attend a military encampment at separate times and be granted both a vacation pay allowance and a military pay differential.

* * *

* * *

**Effective January 1, 1971, the first two paragraphs of this Article are modified as follows. The last paragraph remains unchanged.**

An employee with 30 days or more of service credits attending annual encampments of or training duty in the Armed Forces, State or National Guard or U.S.

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Reserves shall be granted a military pay differential for a period of up to 17 days annually. The employee shall be granted service credits for such 17 day period or portion thereof during which he is absent. Such military pay differential shall be the amount by which the employee's normal straight time wages or salary, calculated on the basis of a workweek up to a maximum of 40 hours, which the employee has lost by virtue of such absence, exceeds any pay received for such absence from the Federal or State Government, recalculated to exclude the Government pay applicable to Saturdays and Sundays. Such items as subsistence, rental and travel allowance shall not be included in determining pay received from the Government.

**An employee with 30 days or more of service credits, who is called out by the National Guard or the U.S. Reserves to perform temporary emergency duty (other than duty under an order by the President or Congress activating members or units of the Reserves or National Guard) due to a fire, flood or domestic civil disturbance, or other such disaster will be paid a military pay differential calculated as described above, for the pay lost by reason of such emergency duty, for a period not to exceed four weeks in any calendar year, and shall be granted service credits for such absence up to four weeks.**

* * *

## ARTICLE XXV

### Jury Duty

1. When an hourly-paid employee is called for service as a juror, he will be paid the difference between the fee he receives for such service and the amount of straight-time earnings lost by him by reason of such service, up to a limit of 8 hours per day and 40 hours per week.

2. When a salaried employee is called for service as a juror, he will continue to be paid his normal straight-time salary during the period of such service.

**Effective January 1, 1971, the following is added:**

**3. Similar makeup pay as specified in Sections 1 and 2 will be granted to an employee who loses time from work because of his appearance in court pursuant to proper subpoena, except when he is either a plaintiff, defendant or other party to the court proceeding.**



## ARTICLE XXVI

### Absence for Death in Family

* * *

**Effective January 1, 1971, this Article is modified as follows:**

**An hourly paid employee with 30 days or more of service credits who is absent from work solely because of the death and funeral of his or her spouse, child, step-child, foster child (if living in the employee's home), parent, grandparent, brother, sister, mother-in-law or father-in-law, will be compensated, on the basis of his average straight time earnings, for the time lost by him from his regular schedule by reason of such absence, for three days for each such absence and up to eight hours per day.**

## ARTICLE XXVII

### Sick Pay

**1. An hourly employee with five or more years of continuous service, absent because of personal business or personal illness for which weekly disability benefits are not payable under the General Electric Insurance Plan, or under Workmen's Compensation, will, with the Manager's approval, receive Sick Pay for each half day of such absence, up to the number of days applicable in accordance with the following schedule:**

| *Continuous Service* | *Maximum Days of Sick Pay in Each Calendar Year* |
|---|---|
| 5 through 9 years | 2 days |
| 10 through 14 years | 3 days |
| 15 through 24 years | 4 days |
| 25 years and over | 5 days |

* * *

Trial Stipulation of Facts, P

1313

PLAINTIFF'S EXHIBIT NO. PP in Re - Claim filed with GE by Barbara Hall.

(Please answer all questions)

1. Employee's name: Barbara S. Hall (First Name, M.I., Last Name) Department: 1324 Test (Battery Tests)
2. Present address: 3193 (Number) View Ave., S.W. (Street) Roanoke (City) VA. (State) 24018 (Zip Code)

Employee's description: ☐ Male ☒ Female Age 26 ☐ Single ☒ Married ☐ Widowed ☐ Divorced

3. Date you were first disabled by this sickness or injury August 13 19 71
4. If you were hospitalized as a bed patient, answer the following:
   (a) Name and Address of Hospital
   (b) Date Admitted 19 at (time) {a.m. p.m.} (c) Date Discharged 19 at (time) {a.m. p.m.}
5. Was your disability caused by an accident? ☐ Yes ☒ No
   If your answer is "Yes," answer the following:
   (a) When did the accident happen? Date 19 at (time) {a.m. p.m.}
   (b) Were you at work when the accident happened? ☐ Yes ☐ No
   (c) Give a brief description of the accident Maternity disability

I hereby authorize the Physician to release any information requested with respect to this Claim.
I certify that the information furnished by me in support of this claim is true and correct.
Date Nov. 17 19 71 Employee's Signature Barbara S. Hall

TO BE COMPLETED BY THE EMPLOYER
(Please answer all questions)

1. Employee's name Social Security No.
2. Amount of Weekly Benefits—(60% of Employee's Normal Straight-Time Weekly Earnings Rate) $
3. Hourly Payroll Classification: ☐ Salary Exempt ☐ Salary Non-Exempt ☐ Hourly
4. If this coverage has been canceled, give the date and reason
5. (a) Date last worked 19
   (b) Date returned to work 19
6. If Salaried Employee, give the date through which salary continuance is payable 19
7. If claim is being considered in connection with Workmen's Compensation coverage answer the following:
   (a) Workmen's Compensation Weekly Benefit Rate $
   (b) Period covered by Workmen's Compensation Benefits: From (Date) 19 to and including (Date) 19
8. Give information which might assist the Company in the consideration of this claim

17500 00 XXX 0

Pension Unit No. (Branch) GENERAL ELECTRIC COMPANY

Location

Date 19 By (Name) (Title)

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...ss or injury (Describe complications, if any) Pregnancy

...sickness or injury arise out of patient's employment? ☐ Yes ☒ No
If "Yes," explain

Is disability due to pregnancy? ☒ Yes ☐ No
If "Yes," what was the approximate date of commencement of pregnancy? Feb. 9 19 71

Nature of surgical or obstetrical procedure, if any (Describe fully)

Date performed 19

Give dates of treatments:
Office Prenatal visits
Home
Hospital

The patient has been continuously disabled (unable to work) from 19 through 19
If still disabled, when should patient be able to return to work? six to eight weeks following delivery EDC Nov. 16, 7

Remarks

Date Dec. 6 19 71

W. Robert Vinson

Name (Please Print) W. Robert Vinson, M.D.
(Attending Physician)

Address 1506 Franklin Rd., S.W.

Phone Number (Include area code) 345-8124

Signature

FOR USE BY METROPOLITAN LIFE

| DIAG. CODE | DIS. DATE | CALEND. WEEKS | DAYS WORKED | ACC. | LETTER NO. | DIAG. | SUPV. | CTL. | | APPR. INIT. | DATE OF REVIEW |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | YES ☐ | | | | | | | |
| | | | | NO ☐ | | | | | | | |

1315

WEEKLY SICKNESS AND ACCIDENT BENEFITS

**TO BE COMPLETED BY THE EMPLOYEE**
(Please answer all questions)

Work: Shift 2nd; Phone; Bldg.

1. Employee's name (Print): First Name EMMA; M. I. M; Last Name FURCH

Pay number 437959 Department 64L

2. Present address 12151 Englewood (Number) (Street) Tyler (City) Texas (State) (Zip Code)

Employee's description: ☐ Male ☒ Female Age ____ ☐ Single ☒ Married ☐ Widowed ☐ Divorced

3. Date you were first disabled by this sickness or injury 4-21 19 72

4. If you were Hospitalized as a bed patient, answer the following:
(a) Name and Address of Hospital Mother Frances Hospital
(b) Date Admitted 4-21-72 19 at 6:00 (A.M.) (P.M.) (c) Date Discharged 4-29- 19 72 at 7:00 (A.M.) (P.M.)

5. Was your disability caused by an accident? ☐ Yes ☒ No
If your answer is "Yes," answer the following:
(a) When did the accident happen? Date ____ 19 ____ at ____ (A.M.) (P.M.)
(b) Were you at work when the accident happened? ☐ Yes ☐ No
(c) Give a brief description of the accident ____

I hereby authorize the Physician to release any information requested with respect to this Claim.
I certify that the information furnished by me in support of this claim is true and correct.
Date 5-26-72 19 Employee's Signature Emma Furch

**TO BE COMPLETED BY THE EMPLOYER**
(Please answer all questions)

1. Employee's name ____ Social Security No. 457-60-3764
2. Amount of Weekly Benefits—(60% of Employee's Normal Straight-Time Weekly Earnings Rate) $ 93.72
3. Indicate Payroll Classification: ☐ Salary Exempt ☐ Salary Non-Exempt ☒ Hourly
4. If this coverage has been canceled, give the date and reason ____
5. (a) Date last worked ____ 19 ____
(b) Date returned to work ____ 19 ____
6. If Salaried Employee, give the date through which salary continuance is payable ____ 19 ____
7. If claim is being considered in connection with Workmen's Compensation coverage answer the following:
(a) Workmen's Compensation Weekly Benefit Rate $ ____
(b) Period covered by Workmen's Compensation Benefits: From ____ (Date) 19 ____ to and including ____ (Date) 19 ____
8. Give information which might assist the Company in the consideration of this claim ____

JUN 2 1972 Personnel

17500 00 XXX 0

Pension Unit No. (Branch) ____ GENERAL ELECTRIC COMPANY

Location ____

Date ____ 19 ____ By ____ (Signature) ____ (Title)

GE MEDICAL SYSTEMS U.S.A.

FH-695 A



Patient's name Mrs. Emma Furch Age 38

Nature of sickness or injury (Describe complications, if any) Pulmonary embolus

Did this sickness or injury arise out of patient's employment? ☐ Yes ☒ No
If "Yes," explain ____

Is disability due to pregnancy? ☐ Yes ☒ No
If "Yes," what was the approximate date of commencement of pregnancy? ____ 19 ____

Nature of surgical or obstetrical procedure, if any (Describe fully) ____

Date performed ____ 19 ____

Give dates of treatments:
Office ____
Home ____
Hospital 4/21/72 - 4/29/72

The patient has been continuously disabled (unable to work) from 4/21/72 19 ____ through 6/5/72 19 ____
If still disabled, when should patient be able to return to work? 6/5/72 19 ____

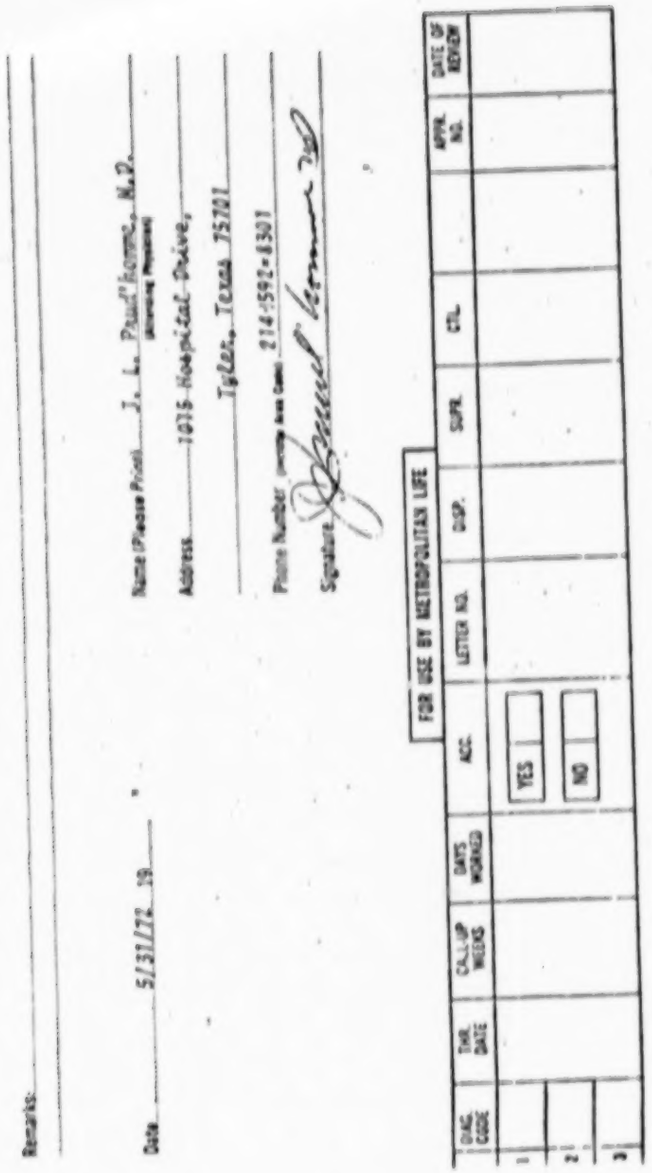





**EXHIBIT NO. YY to Pre-Trial Stipulation of Facts**
**Letter, S.J. Przywara to Emma Furch, dated 6-6-72.**

**GENERAL ELECTRIC**

CENTRAL
AIR CONDITIONING
PRODUCT DEPARTMENT

* * *

June 6, 1972

Mrs. Emma M. Furch
1215 N. Englewood
Tyler, Texas

Dear Mrs. Furch:

We are returning your claim for weekly sickness and accident benefits since such benefits have been discontinued in accordance with the provisions of the General Electric Insurance Plan.

The plan provides that "Weekly Sickness and Accident Insurance will be discontinued on the date you cease active work because of total disability or pregnancy, except that if you are entitled to Weekly Benefits for a disability existing on such date of cessation, Weekly Sickness and Accident Insurance will be continued until the expiration of the maximum period for which such benefits are payable for such disability in accordance with the provisions of the Plan. Such Insurance may be reinstated only upon your return to active work."

We hope that you have recovered from your current illness and will be able to return to work shortly.

Yours truly,

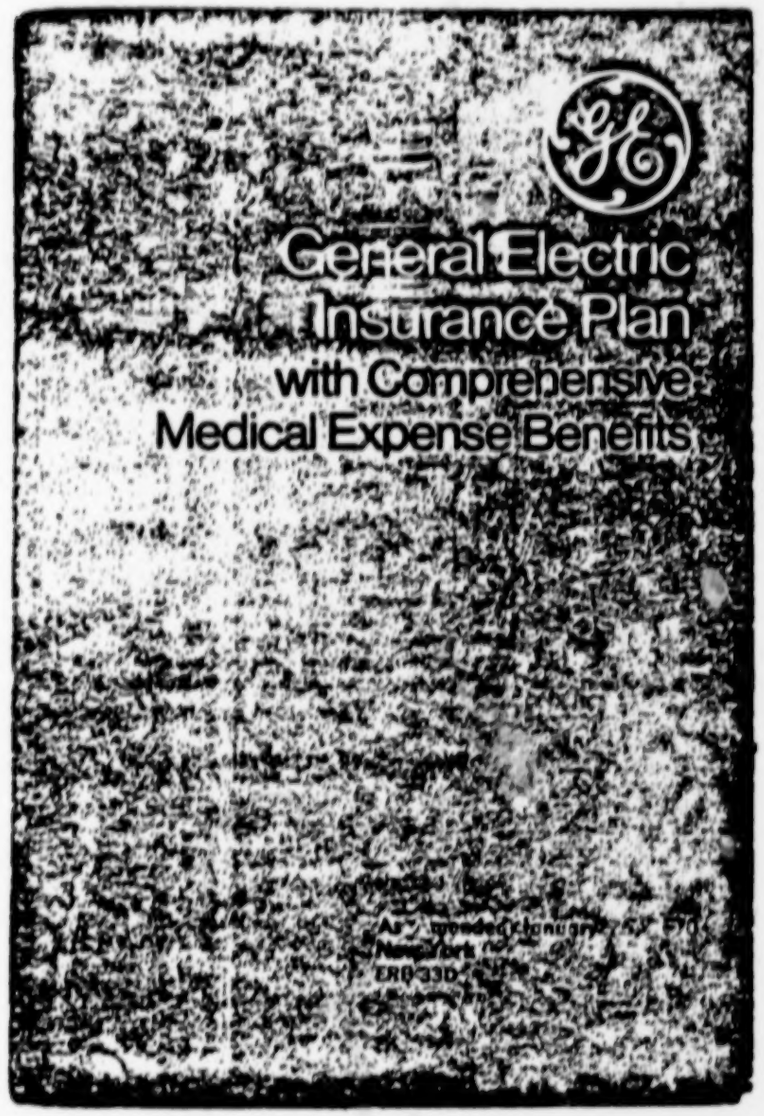
S. J. Przywara, Manager
Union Relations & Compensation

SJP/nw

Encl.

**PLAINTIFFS' EXHIBIT 6 (Exhibit No. C to Pre-Trial Stipulation of Facts) General Electric Insurance Plan with Comprehensive Medical Expense Benefits, as amended January 26, 1970 (ERB-32D)**

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**General Electric's Benefit Plans are designed to help employees help themselves in these major areas:**

**Pension Plan**

**Medical Care Plan for Pensioners**

**Savings and Security Program**

**Savings and Stock Bonus Plan**

**Savings Plan**

**Insurance Plan**

**Long Term Disability Plans**

**Personal Accident Insurance**

**Emergency Aid Plan**

**Suggestion Plan**

**Vacation Plan**

**Income Extension Aid Plan**

**Product Purchase Plan**

This Plan is designed to help you and your dependents meet the threats to security that are brought about by loss of wages through death or disability and the medical expenses which occur when you or ore of your dependents have a sickness or an accident.

This brief summary has been prepared to give you the highlights and to help you understand this Plan. It is not a full statement of the Plan. For a complete statement of its provisions and of the benefits available under it, you should read the Plan itself beginning at page 11 of this booklet.

** The effective dates for various provisions of the Plan are set forth in the Plan, except as may otherwise be provided in applicable collective bargaining agreements.*

If you participate through enrollment and by making the required contributions, this Plan provides Life Insurance, Accidental Death or Dismemberment Insurance, and Weekly Sickness and Accident Insurance for you, and Comprehensive Medical Expense Insurance for you and your covered dependents, including maternity benefits for participating female employees and for covered dependent wives of participating employees.

* * *

**WEEKLY SICKNESS AND ACCIDENT INSURANCE**

**see page 17**

If non-occupational sickness or accident keeps you away from your job, you will receive weekly an amount equal to sixty percent of your normal straight-time weekly earnings – up to a maximum of $150 – for as long as 26 weeks.



If you are a salaried employee, you will be paid $15 a week for the first 20 days or less during which you will receive salary continuance. You will receive thereafter the full benefits described above.

If you lose time because of on-the-job sickness or accident, the Plan will pay the amount by which benefits under the Insurance Plan for non-occupational sickness or accident exceeds Workmen's Compensation benefits to which you are entitled for time lost from work.

* * *

**MATERNITY BENEFITS**

**see page 20**

Maternity benefits payable for female employees and dependent wives will be determined in the same manner as for other covered medical expenses.

**CONTRIBUTIONS**

**see page 29**

If you participate in this Plan your contribution will be –

For your full employee coverage . . . 9/10 of 1% of your normal straight-time annual earnings, or

For your employee coverage without Comprehensive Medical Expense Insurance . . . 6/10 of 1% of such earnings.

However, on and after January 1, 1971, no further contributions will be required for your full employee coverage.

* * *

## GENERAL ELECTRIC INSURANCE PLAN

**(with Comprehensive Medical Expense Benefits)**
**As Amended January 26, 1970**

The provisions of this Plan, as stated in this booklet, are applicable to employees in all States except those employed in the States of California and New York who should refer to the Insurance Plan booklet for the State in which they are employed. For employees employed in the States of New Jersey, Rhode Island, and Hawaii and the Commonwealth of Puerto Rico, the Weekly Sickness and Accident Insurance described in this booklet will be adjusted to take into account any similar benefits provided for them pursuant to the laws of such jurisdictions. Such employees will receive an appropriate supplement to this booklet describing the benefits provided pursuant to said laws and the applicable modifications in the benefits and contributions set forth in this booklet.

* * *

## WEEKLY SICKNESS AND ACCIDENT INSURANCE
**(For Employees)**

**Benefits for Non Occupational Disabilities**

If you become totally disabled as a result of a non-occupational sickness or accident while you are participating in this Plan, you will be paid weekly an amount equal to sixty percent of your normal straight-time weekly earnings up to a maximum weekly benefit of $150.

The minimum weekly benefit is $35 for anyone with normal straight-time annual earnings of at least $3000.



Benefits will start with the eighth day you are totally disabled (or with the first day of your confinement in a hospital as a bed patient, if earlier) and will continue during your total disability up to a maximum of 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related cause or causes.

If you are a salaried employee, benefits of $15 a week will be payable during any period of salary continuance commencing with the eighth day of total disability (or with the first day of confinement in a hospital as a bed patient, if earlier), and ending with the day upon which you shall have received, during the preceding 12 months' period, twenty days of salary continuance for personal illness or ending when such salary continuance shall earlier cease. Thereafter, if you are still disabled, the regular benefits described in the initial paragraphs of this section will become payable and will be paid during the remainder of your total disability, but for not more than an additional period of 26 weeks.

If, after your return to work, you again become disabled (a) from the same cause following at least a continuous 90 day period at work or (b) from a different and unrelated cause, you again become eligible for full benefits.

Of course, to collect these benefits, you must be under the care of a physician for the treatment of your disability and your claim must be certified by a physician.

**Benefits for Occupational Disabilities**

You may be entitled to benefits under a Workmen's Compensation or Occupational Disease Statute for occu-

pational disabilities. However, if, during the period corresponding to that for which you would be paid Weekly Sickness and Accident benefits under this Plan if your disability were a non-occupational disability, the amount to which you are entitled under any Workmen's Compensation or Occupational Disease Statute for time lost from work is less than the amount of benefits to which you would be entitled under this Plan for non-occupational disabilities, you will be paid the difference.

. . . . . .

Benefits under Weekly Sickness and Accident Insurance will not be payable for any absence due to pregnancy or resulting childbirth or to complications in connection therewith. There are, however, Comprehensive Medical Expense benefits in the event of maternity if you are enrolled for such coerage.

* * *

Benefits under Comprehensive Medical Expense Insurance will be payable for expenses incurred by a participating employee or a covered dependent wife in connection with pregnancy, resulting childbirth or complications in connection therewith on the same basis as for any other disability provided the pregnancy commences while insurance on account of such person is in force under this Plan. No benefits are payable under this Plan for maternity expenses on account of any other dependent.

* * *



## YOUR CONTRIBUTIONS FOR THE INSURANCE PLAN

Your contributions upon your enrollment for participation in the Plan will be as follows:

1. If you enroll for insurance with respect to yourself as an employee – an amount equal to 9/10 of 1% of your normal straight-time annual earnings. (Without Comprehensive Medical Expense Insurance . . . 6/10 of 1% of such earnings.)

   However, effective January 1, 1971, no contributions will be required for the full benefits of the Plan with respect to your employee coverage.

2. If you enroll for Comprehensive Medical Expense Insurance with respect to your dependents – a separate amount equal to 2% of your normal straight-time annual earnings up to $5,000 of such earnings.

Any required contributions will be made by means of periodic payroll deductions from regular payments of compensation by the Company to you. If, on or after the date on which this Plan becomes effective as to you, you are laid off after you have three years of continuous service with the Company, you become totally disabled, or you begin an absence because of pregnancy, your contributions will be waived as described on pages 33 and 34. In the event you are laid off before you have three years of continuous service with the Company or are granted a leave of absence, contributions in an amount equal to the foregoing percentages of your normal straight-time annual earnings at the time of layoff or leave of absence, as the case may be, must be paid in monthly installments in advance to the Company in order that your insurance will be continued during such period.

If your normal straight-time annual earnings change so as to make you eligible for a different amount of insurance, your insurance and any required contributions under the Plan will increase or decrease in accordance with such change effective on the date such change is made if you are then actively at work or, if not, on the date you return to active work.

If you retire from the Company on pension prior to age 65, you may continue to participate in the Plan, either as to insurance with respect to yourself as an employee or as to insurance with respect to both yourself and your dependents, provided you continue to make any required contributions monthly up to the end of the month in which you reach age 65 on the basis of your normal straight-time annual earnings at the date of your retirement. However, if your retirement is on a Disability Pension under the General Electric Pension Plan, you will not, in any event, be required to make any further contributions for the employee portion of such insurance.

*The Company will pay the difference between the net cost of the Plan and the amount contributed by participating employees.*



* * *

**Provisions Applicable if You Are Absent from Work**

**1. Total Disability**

If you become totally disabled or if you cease work because of pregnancy on or after the date on which this Plan becomes effective as to you, your insurance, other than Weekly Sickness and Accident Insurance, will remain in force without further payment of contributions during a period of total disability of one week or more, up to a maximum period of one year (18 months in the case of occupational disabilities effective January 1, 1971), but only as long as your continuity of service with the Company is maintained, as determined by the Company's rules, subject to periodic proof of continuance of such disability. Insurance for your dependents will also continue in force under the conditions referred to in the preceding sentence.

Weekly Sickness and Accident Insurance will be discontinued on the date you cease active work because of total disability or pregnancy, except that if you are entitled to Weekly Benefits for a disability existing on such date of cessation. Weekly Sickness and Accident Insurance will be continued until the expiration of the maximum period for which such benefits are payable for such disability in accordance with the provisions of the Plan. Such Insurance may be reinstated only upon your return to active work.

At the end of the maximum period referred to in the second preceding paragraph above or the termination of your continuity of service, whichever is earlier, all of the insurance provided by this Plan will cease, except as provided in this paragraph and on page 36. If before age 60 and while insured under the Plan, you had become totally

disabled which, for the purposes of this paragraph only, means total disability as a result of bodily injury or disease so as to be wholly prevented thereby from engaging in any and every business or occupation and from performing any work for compensation or profit, your Life Insurance protection will be continued for the full amount until you reach age 65 provided you furnish proof satisfactory to the Insurance Company of the continuance of such total disability at least once each year. Commencing at age 65 the Life Insurance will be reduced gradually as provided on pages 13 and 14. No contributions for such Life Insurance will be required during the period of total disability.

**2. Layoff or Leave of Absence**

If you should be laid off on or after the date on which this Plan becomes effective as to you, and after you have three years or more of continuous service with the Company (at the time of layoff), your insurance, except for Weekly Sickness and Accident Insurance, and insurance for your covered dependents will be continued without payment of contributions (in layoffs of one week or more), up to a maximum period of one year, but only as long as your continuity of service is maintained as determined by the Company's rules. If you should be laid off before you have three years of continuous service with the Company or if you are granted a leave of absence (other than for military duty), prior to January 1, 1971, you may, upon payment of your regular contributions monthly in advance, continue all insurance for which you are enrolled, except your Weekly Sickness and Accident Insurance, up to a maximum period of one year in the case of layoff but only as long as your continuity of service



is maintained as determined by the Company's rules or for the duration of your leave of absence in case you are granted such a leave. Benefits with respect to your Weekly Sickness and Accident Insurance will not be payable for any period of disability which begins more than 31 days after such layoff or leave of absence commences. After January 1, 1971, you will not be required to make contributions with respect to employee coverage in the above circumstances.

If you leave for military duty, provision may be made with the Company for the continuation of the Life Insurance provided by this Plan for a limited period. Notice will be given from time to time of the Company's practice as to the continuation of insurance for dependents of employees who leave for military duty.

**3. Strike**

If you cease work because of a strike, your insurance coverage and insurance for your covered dependents automatically will terminate on the day immediately preceding the first full day's absence from active work because of the strike. However, the Company may, in its discretion, make appropriate arrangements to continue your coverage under this Plan during such strike.

In any event, Weekly Sickness and Accident Insurance will not be continued beyond 31 days from the date last worked and will not be reinstated until you return to active work.

* * *

**Claims for Benefits**

Benefits under the Plan are payable upon receipt of proof of claim. The Insurance Company is liable for all Life Insurance, Accidental Death or Dismemberment Insurance and Weekly Sickness and Accident Insurance benefits. Comprehensive Medical Expense benefits are primarily payable by the Company. The Insurance Company will be liable for any Comprehensive Medical Expense benefits which are not payable by the Company. The Insurance Company will determine all benefit payments made pursuant to this Plan.

You should file claims promptly through such office as may be designated locally, such as your personnel accounting or employee relations office, for any benefits to which you may be entitled under the Plan upon forms which may be obtained locally. Proof of claim must be filed not later than 90 days after the end of the calendar year in which the loss for which claim is made is incurred unless it is not reasonably possible to do so and proof is filed as soon as is reasonably possible. The Insurance Company reserves the right to medically examine an individual for whom claim is made.

* * *

**DEFINITIONS**

* * *

2. **"Non-Occupational"**

The term "non-occupational" means any sickness or injury not arising out of or in the course of employment and not entitling you or a covered dependent to benefits under any Workmen's Compensation or Occupational Disease Law.

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PLAINTIFFS' EXHIBIT NO. 7
(EXHIBIT NO. E to Pre-Trial Stipulation of Facts)

GE Long Term Disability Insurance Plan For Hourly Employees, effective Jan. 1, 1970 (ERB 135).

**Highlights of the Long Term Disability Insurance Plan for Hourly Employees**

**Why this plan?**

This Plan is designed to help give you an income if you cannot work because of a long-term, total disability.

**What are the benefits?**

The Plan provides benefits to age 65 so that your combined monthly income, taking into account other benefits payable in connection with your disability such as payments by the Company, including disability pension under the General Electric Pension Plan, plus benefits related to your employment under statutory plans such as Social Security and Workmen's Compensation, will be equal to one twenty-fourth of your normal straight-time annual earnings. Benefits under this Plan begin only after the period for which you are eligible to receive Weekly Sickness and Accident Insurance benefits for such disability under the General Electric Insurance Plan.

**How much does this protection cost?**

The current contribution for this Plan is as follows:

| | |
|---|---|
| Employees with less than 14 years of credited service under the General Electric Pension Plan. | five-tenths of one percent (0.5% of your normal straight-time weekly earnings. |

| | |
|---|---|
| Employees with 14 years or more of credited service under the General Electric Pension Plan. | 20 cents per week. |

The cost of this coverage is borne entirely by participating employees, except that General Electric Company will pay the cost of the administrative work it performs. Payment of benefits is the sole responsibility of the Insurance Company.

**Long Term Disability Insurance Plan for Hourly Employees**
(Effective January 1, 1970)

**1. Benefits for you in the case of long term disability**
As a participant, you will receive benefit payments as described below under this Plan for as long as you are absent due to total disability to the end of the month in which you reach age 65. They will begin after the expiration of the period of such disability for which you are eligible to receive Weekly Sickness and Accident Insurance benefits under the General Electric Insurance Plan. However, benefits will begin only after you have been absent from active work because of disability for at least 26 weeks, for any one continuous period of disability or successive periods of disability due to the same or related cause or causes.

For the purpose of this Plan, any similar benefits (provided for employees in certain States) under a plan established in conformity with a State law providing for disability or cash sickness benefits will be considered Weekly Sickness and Accident Insurance benefits under the General Electric Insurance Plan.



"Total disability" for the purpose of this Plan means that, because of illness or injury, you are unable to engage in any gainful occupation for which you are reasonably fitted by education, training or experience and are under the care of a



physician, if necessary, for any treatment of your disability. However, during the first 12 months of absence because of such disability, you will be considered totally disabled if you are unable, because of your illness or injury, to perform any and every duty of your occupation.

**2. Your benefits**
Your benefits to the end of the month in which you reach age 65 will be based on your normal straight-time annual earnings when you were last actively at work.

Benefits will be paid monthly and will be one twenty-fourth of your normal straight-time annual earnings reduced by (1) any disability pension benefits paid under the General Electric Pension Plan, provided such benefits are elected by you, (2) any primary Social Security benefits, (3) benefits under a Workmen's Compensation or occupational Disease Law, and (4) any benefits available inconfirmity with Federal, State, Commonwealth or Dominion laws of the United States or Canada. If the benefits referred to in (2), (3), or (4) above would have been payable to you upon timely application, you will be considered as receiving such benefits.

**3. Your contributions for this coverage**
Your contributions under this Plan start at the beginning of the payroll period following acceptance of your enrollment. They are based on years of credited service under the General Electric Pension Plan as of the end of the pay period for which deductions are made.

Contributions will be made by means of payroll deductions from regular payments of compensation by the Company to you.

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The contribution rate established by Metropolitan Life Insurance Company for those employees with less than 14 years of credited service under the General Electric Pension Plan is five-tenths of one percent (0.5%) of your normal straight-time weekly earnings. For those employees with 14 years or more of credited service, the contribution rate is 20 cents per week.

These rates are subject to change by the insurance company each year on January 1.

The cost of this coverage is borne entirely by participating employees, except that the General Electric Company will pay the cost of the administrative work it performs.

* * *

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*Your coverage in case of disability*

If you become disabled, your coverage under this Plan will remain in force until the expiration of the period for which you are eligible to receive Weekly Sickness and Accident Insurance benefits for such disability under the General Electric Insurance Plan. Contributions are not required during periods of disability lasting one week or more.

Although pregnancy is not considered a disability, if you are absent because of pregnancy your coverage under the Plan will remain in force during such absence, but only as long as your continuity of service is maintained as determined by Company rules, and, during any such absence of one week or more, no contribution is required.



* * *

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**5. Definitions**

***A. "Total disability"***

"Total disability" means that an employee is, because of ill-

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ness or injury, unable to engage in any gainfull occupation for which he is reasonably fitted by education, training or experience and is under the care of a physician, if necessary, for any treatment of his disability. However, during the first 12 months of absence because of disability, the employee will be considered totally disabled if he is unable, because of illness or injury, to perform any and every duty of his occupation.

PLAINTIFFS' EXHIBIT NO. 8
(EXHIBIT NO. F to Pre-Trial Stipulation of Facts)

GE Long Term Disability Income Plan for Salaried Employees, as amended Jan. 1, 1970.

2

**Who is eligible?**

You are eligible to participate in this Plan if you are a salaried employee with one or more years of continuous service and participate in both the General Electric Insurance and Pension Plans.

**Why this plan?**

This Plan is designed to help give you an income if you cannot work because of a long-term, total disability.

**What are the benefits?**

Benefits are provided under this Plan according to the schedules shown on the following pages. In brief:

The Plan provides benefits prior to age 65 in accordance with the schedule shown on page 7. These benefits have been established at a level so that your combined income, if you also receive disability benefits under Social Security, plus disability pension benefits under the General Electric Pension Plan when you qualify, will be about 55% of your normal salary. Benefits will begin after the expiration of the period of such disability for which you are eligible to receive Weekly Sickness and Accident Insurance benefits under the General Electric Insurance Plan. However, benefits will begin only after you have been absent from active work because of disability for at least 26 weeks, for any one continuous period of disability or successive periods of disability due to the same or related cause or causes.

For the purpose of this Plan, any similar benefits (provided for employees in certain States) under a plan established in conformity with a State law providing cash disability or cash sickness benefits will be considered Weekly Sickness and Accident benefits under the General Electric Insurance Plan.

The schedule of Plan benefits payable beginning at age 65 provides an amount approximating the pension that would



have been credited during the period of disability prior to age 60 under the General Electric Pension Plan if your disability had not occurred. You will receive these benefits only if you remain disabled and have continually received benefits under this Plan for a disability which began before age 60.



**How much does this protection cost?**
The current contribution rate for this Plan is 60¢ a month for each $100 of your monthly coverage.

The cost of this coverage is borne entirely by participating employees, except that the General Electric Company will pay certain administrative costs of the Plan. Payment of benefits is the sole responsibility of the insurance company.

5

**Long Term Disability Income Plan for Salaried Employees**
(As Amended January 1, 1970)

**1, Benefits for you in case of long term disability**
As a participant, you will receive benefit payments as described under this Plan for as long as you are absent due to total disability following the expiration of the period of such disability for which you are eligible to receive Weekly Sickness and Accident Insurance benefits under the General Electric Insurance Plan, but in no event will benefit payments under this Plan begin until you have been absent from active work because of disability for at least 26 weeks, for any one continuous period of disability or successive periods of disability due to the same or related cause or causes.

For the purpose of this Plan, any similar benefits (provided for employees in certain States and Puerto Rico) under a plan established in conformity with the Statutes of such jurisdiction which provide for disability or cash sickness benefits will be considered Weekly Sickness and Accident Insurance benefits under the General Electric Insurance Plan.

"Total Disability" for the purpose of this Plan means that, because of illness or injury, you are unable to engage in any gainful occupation for which you are reasonably fitted by education, training or experience and are under the care of a physician, if necessary, for any treatment of your disability.

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However, during the first 12 months of absence because of such disability, you will be considered totally disabled if you are unable, because of your illness or injury, to perform any and every duty of your occupation.

**2. Your benefits before age 65**

Your benefits to the end of the month in which you reach age 65 will be based on your normal straight-time annual earnings and years of credited service when you were last actively at work.

The Schedule of Benefits under this Plan is designed so that your income from the Plan plus any General Electric Pension Plan disability pension and any Social Security disability benefits which may be payable to you will equal approximately 55% of your normal straight-time annual earnings.

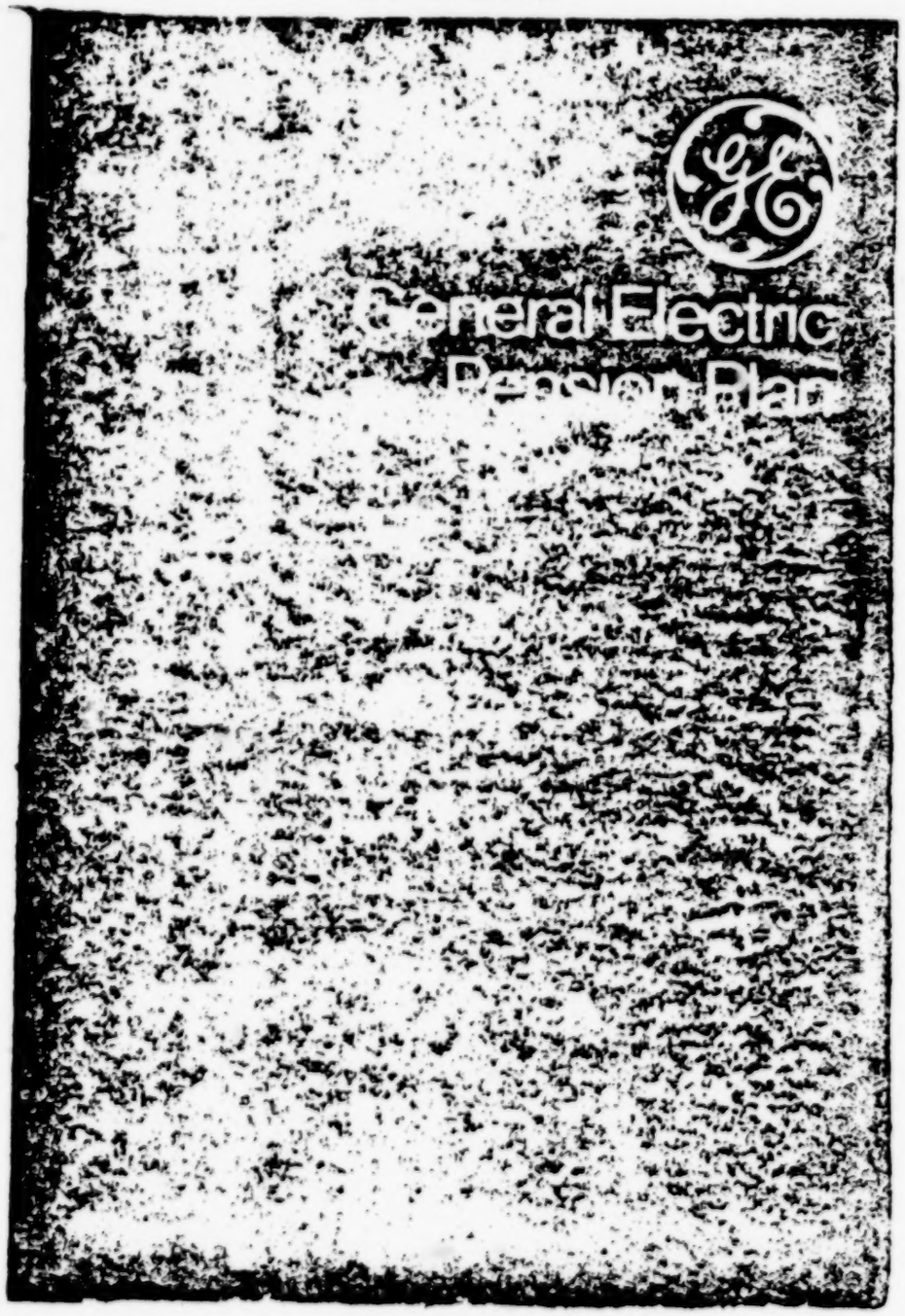
The only benefits payable under this Plan prior to age 65 are those specified in the Schedule of Benefits whether or not you receive Social Security disability benefits or a disability pension under the General Electric Pension Plan.

To determine your benefits under this Plan, refer to the following Schedule of Benefits Prior to Age 65. For example, if you had normal straight-time annual earnings of $12,000 and 12 years of credited service, you would be entitled, if totally disabled, to a benefit of 40% of such



PLAINTIFFS' EXHIBIT NO. 9
(EXHIBIT NO. G to Pre-Trial Stipulation of Facts)

GE Pension Plan as amended January 1, 1970
(ERB-42E)



earnings or an annual rate of $4,800. The Plan benefits are payable monthly which, in this example, would amount to $400.

**Summary**

The following brief outline of the basic features of the General Electric Pension Plan is set out for your convenience in understanding the provisions of the Plan. This summary is not a full statement of the Plan. For a complete statement of the terms, conditions and provisions of the Plan, and of the benefits available under it, you should read the Plan itself as reproduced beginning at page 12 of this booklet.

**General Electric Pension Plan**

is designed to help participating employees provide for financial security after retirement. One of the leaders in American industry, it offers

Normal retirement at age 65

Optional early retirement

Pensions that increase with total earnings under the Plan

Survivorship option

Return of contributions plus interest when the employee is not eligible for pension

Credit for first year of service

Five-year certain payments

And, for long-service employees:

Guaranteed minimums

Disability pensions

Vested rights

Supplemental payments

Surviving spouse payments

2

**Eligibility**

You may participate in the General Electric Pension Plan after one year's continuous service with the Company. To be eligible for benefits you must enroll in the Plan.

Your first year with the Company will be included in determining your credited service for disability pension, guaranteed minimums, survivor benefits, vesting and supplemental payments if you were a member of the Plan on August 14, 1955, or, in the event you were not eligible to participate in the Plan on that date, if you enroll in the Plan promptly after completing your first year of service.

If you had one or more years of continuous service on September 1, 1946, you may participate in the Plan to the extent of the benefits provided by it for service prior to that date if you remain continuously in the Company's service until retirement or until your right to such benefits has vested.

**How much do you contribute?**

You contribute nothing on the first $6600 of your compensation in a year; but you contribute 3% of your compensation above this amount.

If your compensation under the Plan is more than $6600 in a year, you will be required to make the 3% contribution on the excess in order to receive credit for compensation below this amount.

3

**Normal retirement**



The normal retirement date of any employee of the Company is the first day of the month following his or her attainment of age 65.

Your annual pension for service after December 31, 1966 will be:

1% of the first $6600 of your compensation in each calendar year after that date, plus 2.1% of your compensation above that amount.

Thus, if your compensation under the Plan after January 1, 1967 is $8,300 a year for 30 years, your pension for those 30 years would be $3,051 a year or $254.25 a month. Social Security would be on top of this. If your Social Security were $189.80 (the maximum available to men in 1970 under the law in effect as of January 1, 1970) your monthly income would be $444.05.

**Guaranteed minimum pensions for long-service employees**

If you retire after December 31, 1969 at age 65 with 15 or more years of full-time credited service, you are guaranteed a minimum pension for each year of such credited service based on your average annual compensation for the highest five consecutive calendar years during the last ten completed calendar years before your retirement, as shown in the table on page 4.

A guaranteed minimum of up to

$7.50

a month for each year of full-time credited service

PLAINTIFFS' EXHIBIT NO. 10
(EXHIBIT NO. H-1 to Pre-Trial Stipulation of Facts)

GE Medical Care Plan for Pensioners,
effective January 1, 1971 (ERB-107C)

3

**Summary of the
General Electric
Medical Care Plan
for Pensioners**
(With Amendments Effective January 1, 1971)

The General Electric Medical Care Plan for Pensioners is designed to help eligible retired employees and their spouses meet the cost of medical services incurred as a result of sickness or accident.

This brief summary has been prepared to give you the highlights of the Plan and to help you understand the benefits it provides when you need them. For a complete statement of the provisions, you should read the full text of the Plan beginning on page 7 of this booklet.

4

**Benefits Provided
Under this Plan**

**Benefit Payments**
Benefit provisions of this revised Plan apply to all eligible pensioners regardless of date of retirement or the General Electric Insurance Plan under which insured at the time of retirement.

If you are a pensioner and meet the eligibility requirements as described on page 8, you and your spouse are entitled to benefits under one of the following provisions:



**† A pensioner or spouse who is eligible for benefits under the Federal Government's Medicare Program**

(1) For hospital confinements commencing prior to January 1, 1971.
   (a) A payment of $8 will be made to you for each day of hospital confinement for which benefits are provided under the Government's Medicare Program (or would have been provided had the deductible been satisfied).
   (b) A payment of $30 will be made to you for each day of hospital confinement which extends beyond the period for which benefits are provided under the Government's Medicare Program, unless confined in a tuberculosis or psychiatric hospital owned or operated by any government or agency thereof in which case the payments in (3) below will be made.

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(2) For hospital confinements commencing on and after January 1, 1971.
   (a) A payment of $40 will be made to you for the first day of hospital confinement for which benefits are provided under the Government's Medicare Program (or would have been provided had the deductible been satisfied).
   (b) A payment of $10 will be made to you for each subsequent day of hospital confinement for which benefits are provided under the Government's Medicare Program (or would have been provided had the deductible been satisfied).
   (c) A payment of $40 will be made to you for each day of hospital confinement which extends beyond the period for which benefits are provided

under the Government's Medicare Program unless confined in a tuberculosis or psychiatric hospital owned or operated by any government or agency thereof in which case the payments in (3) below will be made.

(3) For confinements in a tuberculosis or psychiatric hospital owned or operated by any Government or agency thereof or a portion of an extended care facility which qualifies for benefits under Medicare.

(a) A payment of $10 will be made to you for each day of confinement which extends beyond the period for which benefits are provided under the Government's Medicare Program.



**† A pensioner or spouse who is not eligible for benefits under the Federal Government's Medicare Program because of residence or travel outside the United States or its possessions or because of age.**

Benefits will be payable for hospital room and board, special hospital services, surgical operations, anesthesia, ambulance service and diagnostic X-rays. There is no limit on the number of days of hospital confinement for which benefits are payable.

Benefits are determined separately for covered medical expenses incurred by each person eligible under this provision. You pay the first $25 of such expenses within any calendar year regardless of the number of different sicknesses or accidents. The Plan then pays, during the calendar year, the next $225 of covered medical expenses in full and 85% of the remainder.

**Maximum Benefits**

The aggregate maximum benefits payable to you and your spouse are:



**$8,000–** payable under this Plan.

**PLUS**

**$1,000–** payable under the General Electric Insurance Plan after the above amount has been exhausted (see page 16). As benefits are paid from this $1,000 a corresponding reduction will be made in the amount of your Life Insurance payable under the Insurance Plan.

**Protection for your surviving spouse**

If you should die while covered under this Plan, your surviving spouse will be entitled to any unused portion of the benefits described above, except those which would be paid from your Life Insurance.



**General Electric**
**Medical Care Plan**
**for Pensioners**
**(With Amendments Effective January 1, 1971)**

The benefits payable under the Plan with respect to medical expenses incurred before January 1, 1971 shall be determined by the terms and conditions of the Plan as previously in effect.



**Eligibility***

You are eligible for benefits if:

* *Widows* of eligible pensioners who died on or after October 2, 1960, but prior to January 1, 1971 will have the benefits provided by this Plan as amended except that they will be limited to the maximum benefit provisions of the Plan in effect when the pensioner died.

(1) You retired *on or after* December 1, 1950, *and*
   (a) You are a retired employee who has reached normal retirement date, which term as used in the Plan means your normal retirement date as specified under "Definitions" on page 22 (regardless of whether you may have retired before or after such date), and
   (b) You have completed at least 10 years of continuous service before your normal retirement date, and
   (c) You were insured for Medical Expense coverage under the Insurance Plan for as long as you were eligible during the 10-year period immediately prior to your normal retirement date, and
   (d) You either left the service of the Company or an affiliate on or after your normal retirement date, or if you left before that date, you were entitled to receive, commencing at the time you left, a pension under the Pension Plan or under the pension plan of an affiliate or a retirement allowance from the Company or an affiliate.

(2) *You retired before* December 1, 1950, *and*
   (a) You are a retired employee, who, prior to December 1, 1950, left the service of the Company or an affiliate which participates in the Pension Plan, and
   (b) You had completed at least 10 years of continuous service at the time you left, and
   (c) You were receiving a pension under the Pension Plan or a retirement allowance from the Company or an affiliate on December 1, 1950.





**BENEFITS FOR INDIVIDUALS ELIGIBLE FOR MEDICARE**

If you or your spouse qualify for coverage under the Federal Government's Medicare Program, benefits for that individual will be payable as described below, up to the maximum set forth under Maximum Benefits on page 16.

▲ ***Hospital Confinements Commencing Prior to January 1, 1971***

When confined as an inpatient in a legally constituted hospital and receiving services performed or prescribed by a physician or surgeon for the diagnosis, care or treatment of illness or injury:

- $8 will be payable for each day of confinement for which benefits are provided by Medicare, or would have been provided had the deductible been satisfied.
- $30 will be payable for each day of confinement which extends beyond the period for which benefits are provided by Medicare, unless confined in a tuberculosis or psychiatric hospital owned or operated by any government or agency thereof, in which case the benefits in the following paragraph will be payable.
- $10 will be payable for each day of confinement in a tuberculosis or psychiatric hospital owned or operated by any government or agency thereof which extends beyond the period for which benefits are provided by Medicare.
- $30 will be payable for each day of confinement for which benefits are not provided by Medicare solely because the confinement is for dental work or the hospital is not certified under the Federal Government's Medicare Program.

▲ ***Hospital Confinements Commencing On or After January 1, 1971***

When confined as an inpatient in a legally constituted hospital and receiving services performed or prescribed by a physician or surgeon for the diagnosis, care or treatment of illness or injury:

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- $40 will be payable for the first day of confinement for which benefits are provided by Medicare or would have been provided had the deductible been satisfied.
- $10 will be payable for each subsequent day of confinement for which benefits are provided by Medicare or would have been provided had the deductible been satisfied.
- $40 will be payable for each day of confinement which extends beyond the period for which benefits are provided by Medicare, unless confined in a tuberculosis or psychiatric hospital owned or operated by any government or agency thereof, in which case the benefits in the following paragraph will be payable.
- $10 will be payable for each day of confinement in a tuberculosis or psychiatric hospital owned or operated by any government or agency thereof which extends beyond the period for which benefits are provided by Medicare.
- $40 will be payable for each day of confinement for which benefits are not provided by Medicare solely because the confinement is for dental work or the hospital is not certified under the Federal Government's Medicare Program.

▲ *Extended Care Facility Confinements*

While confined as an inpatient in a portion of an extended care facility, which is certified under the Federal Government's Medicare Program, and receiving services performed or prescribed by a physician or surgeon for the



diagnosis, care or treatment of illness or injury:

- $10 will be payable for each day of confinement which extends beyond the period for which benefits are provided by Medicare.

▲ *Exclusions (Individuals Eligible for Medicare)*

Benefits will not be paid for confinement for which coverage is provided under the General Electric Insurance Plan.

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* * *

**BENEFITS FOR INDIVIDUALS NOT ELIGIBLE FOR MEDICARE**

If you or your spouse do not qualify for benefits under the Federal Government's Medicare Program because of residence or travel outside the United States or its possessions, or because of age, benefits for that individual will be payable as described below, up to the maximum set forth under Maximum Benefits on page 16.

▲ *1. Calculation of Benefits*

Benefits will be determined separately for each person eligible under this provision, and will be equal to:

(a) 100% of the first $225 of such Covered Medical Expenses which during any one calendar year are in excess of an initial amount of $25, and

(b) 85% of any additional Covered Medical Expenses incurred.

* * *

PLAINTIFFS' EXHIBIT NO. 11
(EXHIBIT NO. I)

GE Individual Development Program,
effective January 1, 1970 (ERB-161)

## A PROGRAM THAT CAN BE CUSTOM TAILORED TO MEET YOUR NEEDS

In this period of rapid change when entire occupations – and businesses – can become more complicated, or more simple, or just disappear, trained people often need to update their skills, or orient them to the new business needs. Still other people who have little or no training or education, must equip themselves with basic knowledge of reading, writing and mathematics and must learn skills that are needed by the businesses that seek employees.

This booklet describes a new self-improvement program, called the General Electric Individual Development Program. It is aimed at helping employees improve themselves, while helping General Electric businesses use each employee to his full potential.

As the title indicates, this Program is designed to be custom tailored to fit the individual needs of each hourly and non-exempt salaried employee, whether he or she is hgihly skilled or unskilled, a high school graduate or grammar school droput. The Program offers extremely flexible benefits in the form of tuition refunds for education courses while working, tuition refunds – and sometimes a training allowance – for training and education while on layoff, and Company-sponsored in-plant education and training courses.

If you are one of the individuals this program can help – that is, if your skills need reorienting or updating, or if



you need basic education or higher level knowledge–you will find it worthwhile to study this booklet.

## HIGHLIGHTS

The Individual Development Program covers three broad areas of education and training opportunities for General Electric hourly and non-exempt salaried employees:

**Part 1– Tuition Refund**

- 100 percent tuition refund, up to a maximum of $400 per year, for satisfactory completion of approved job-related or career-oriented courses.
- Courses that may be approved range from basic literacy to college level, including occupational and vocational courses intended to update an employee in his current trade or prepare for potential future openings.
- All full-time hourly and non-exempt salaried employees with six months of service are eligible to participate.

**Part 2– Training Opportunities for Employees on Layoff**

- Tuition refund benefits similar to those in Part 1.
- Training allowance, equal to 50 percent of weekly pay, for those enrolled in approved courses who are not entitled to receive state or federal unemployment compensation. All such eligible employees are entitled to a minimum of eight weeks at half pay, or longer depending on the formula of two weeks of half pay for each year of service.
- All hourly and non-exempt salaried employees with six months or more of service at time of layoff and who retain recall rights are eligible.

**Part 3– Company-Sponsored Programs**

- The Company will continue to offer local training programs in the plant, or in conjunction with local school systems, based on the needs of the business.
- No tuition payments involved.
- All hourly and non-exempt salaried employees are eligible to participate regardless of service.

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PLAINTIFFS' EXHIBIT NO. 22

STATEMENT OF CLAIM
FOR
ACCIDENT AND SICKNESS WEEKLY BENEFITS

PLAINTIFF'S EXHIBIT NO. 22

Statement of Claim for Accident and Sickness TO BE COMPLETED BY THE EMPLOYEE
Weekly Benefits of General Electric Company (Please answer all questions)

1 Employee's name (Print) First Name M I. Last Name Work Phone Bldg Shift

Pay number Department

2 Present address (Number) (Street) (City) (State) (Zip Code)

Employee's description: ☐ Male ☐ Female Age ☐ Single ☐ Married ☐ Widowed ☐ Divorced

3 Date you were first disabled by this sickness or injury 19

4 If you were Hospitalized as a bed patient, answer the following:
(a) Name and Address of Hospital
(b) Date Admitted 19 at (Hour) (a.m. /p.m.) (c) Date Discharged 19 at (Hour) (a.m. /p.m.

5 Was your disability caused by an accident? ☐ Yes ☐ No
If your answer is "Yes," answer the following:
(a) When did the accident happen? Date 19 at (Hour) (a.m. /p.m.
(b) Were you at work when the accident happened? ☐ Yes ☐ No
(c) Give a brief description of the accident

I hereby authorize the Physician to release any information requested with respect to this Claim.
I certify that the information furnished by me in support of this claim is true and correct.

Date 19 Employee's Signature

**TO BE COMPLETED BY THE EMPLOYER**

*(Please answer all questions)*

1. Employee's name Social Security No.
2. Amount of Weekly Benefits - (60% of Employee's Normal Straight-Time Weekly Earnings Rate) $
3. Indicate Payroll Classification ☐ Salary Exempt ☐ Salary Non-Exempt ☐ Hourly
4. If this coverage has been canceled, give the date and reason
5. (a) Date last worked 19
   (b) Date returned to work 19
6. If Salaried Employee, give the date through which salary continuance is payable 19
7. If claim is being considered in connection with Workmen's Compensation coverage answer the following:
   (a) Workmen's Compensation Weekly Benefit Rate $
   (b) Period covered by Workmen's Compensation Benefits: From 19 (Date) to and including 19 (Date)
8. Give information which might assist the Company in the consideration of this claim

17500 00 XXX 0

Pension Unit No. (Branch) **GENERAL ELECTRIC COMPANY**

Location

Date 19 By (Name) (Title)

FN-688 A

1096

**ATTENDING PHYSICIAN'S STATEMENT**

Patient's name Age

Nature of sickness or injury (Describe complications, if any)

Did this sickness or injury arise out of patient's employment? ☐ Yes ☐ No
If "Yes," explain

Is disability due to pregnancy? ☐ Yes ☐ No
If "Yes," what was the approximate date of commencement of pregnancy? 19

Nature of surgical or obstetrical procedure, if any (Describe fully)

Date performed 19

Give dates of treatments:

Office
Home
Hospital

The patient has been continuously disabled (unable to work) from 19 through 19
If still disabled, when should patient be able to return to work? 19

1097

Remarks: .....

Date ..... 19 .....

Signed .....
(Attending Physician)

Address .....

.....

Phone .....

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## REMARKS

APPENDIX - VOL. IV

Supreme Court, U. S.
FILED
NOV 24 1975
MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

OCTOBER TERM, 1974

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**No. 74-1589**

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GENERAL ELECTRIC COMPANY,
*Petitioner,*

v.

MARTHA V. GILBERT,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, *et al.*,
*Respondents.*

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**No. 74-1590**

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MARTHA V. GILBERT,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,
*Petitioners,*

v.

GENERAL ELECTRIC COMPANY,
*Respondent.*

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**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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**PETITIONS FOR CERTIORARI FILED JUNE 17, 1975**
**CERTIORARI GRANTED OCTOBER 6, 1975**

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| PLAINTIFFS' EXHIBIT NO. 88B | 1294 |
| PLAINTIFFS' EXHIBIT NO. 89 | 1309 |
| PLAINTIFFS' EXHIBIT NO. 90 | 1315 |
| PLAINTIFFS' EXHIBIT NO. 91 | 1316 |
| PLAINTIFFS' EXHIBIT NO. 92 | 1317 |
| PLAINTIFFS' EXHIBIT NO. 93 | 1319 |
| PLAINTIFFS' EXHIBIT NO. 95 | 1320 |
| PLAINTIFFS' EXHIBIT NO. 97 | 1322 |
| PLAINTIFFS' EXHIBIT NO. 98 | 1325 |
| PLAINTIFFS' EXHIBIT NO. 99 | 1332 |
| PLAINTIFFS' EXHIBIT NO. 100 | 1334 |
| PLAINTIFFS' EXHIBIT NO. 101 | 1336 |
| PLAINTIFFS' EXHIBIT NO. 102 | 1340 |
| PLAINTIFFS' EXHIBIT NO. 103 | 1347 |




## PLAINTIFFS' EXHIBIT NO. 43B

General Electric Insurance Plan–Additional Information 1972, Corporate Accounts and Reporting Operation 3/27/73, received by IUE May 3, 1973.

### GENERAL ELECTRIC INSURANCE PLAN ADDITIONAL INFORMATION–1972

May 3, 1973

During the calendar year an average of 311 421 employees had personal coverage, while an average of 219 337 employees also had coverage for their dependents.

The amounts shown on Exhibit I do not reflect the benefits of $2 590 998 paid during the year to pensioners and their spouses and surviving spouses under the General Electric Medical Care Plan for Pensioners.

The amount of $15 733 839 shown on Exhibit I as other charges consists of the following:

| | |
|---|---|
| Amount set aside to help provide life insurance coverage for pensioners | $16 061 000 |
| Taxes, expenses, adjustments of reserves, and all other purposes | 7 064 935 |
| Lee interest credited on reserves | (7 392 096) |
| | $15 733 839 |

The incurred claims of $200 667 995 shown on Exhibit I consist of:

| | |
|---|---|
| Benefits paid directly to or for employees and their beneficiaries | $197 055 563 |
| Increase in reserves to pay claims incurred in one year, but which are not reported until a year later | 3 612 432 |
| | $200 667 995 |

At the end of 1972, the Insurance Companies were holding reserves of $186.6 million to meet Plan obligations.

CORPORATE ACCOUNTING CONSOLIDATION & REPORTING OPERATION
JJP:DEA 3/27/73 EXHIBIT II

# GENERAL ELECTRIC INSURANCE PLAN
# COST AND PARTICIPATION DATA
# CALENDAR YEAR 1972

| Summary of Operation | Employee Coverage | Dependent Coverage | Total |
|---|---|---|---|
| Advance Deposits to Insurance Companies | | | |
| Life Insurance | $ 45 137 504 | $ | $ 45 137 504 |
| Accidental Death or Dismemberment | 1 381 873 | | 1 381 873 |
| Weekly Sickness and Accident | 26 110 217 | | 26 110 217 |
| Medical Expense Insurance | 8 114 027 | 9 432 386 | 17 546 413 |
| Total Advance Deposits to Insurance Companies | 80 743 621 | 9 432 386 | 90 176 007 |
| Refund of Excess Deposits | 71 489 | 280 430 | 351 919 |
| Cost of Plan - Insured Portion | 80 672 132 | 9 151 956 | 89 824 088 |
| Benefits Provided Directly by the Company | 58 641 724 | 67 936 022 | 126 577 746 |
| | 139 313 856 | 77 087 978 | 216 401 834 |
| Net Cost of Plan | | | |
| Employee Contributions | 137 347 | 21 400 064 | 21 537 411 |
| Net Cost to Company | $139 176 509 | $ 55 687 914 | $194 864 423 |
| Per Cent of Net Cost of Plan Paid by: | | | |
| Employees | .1% | 27.8% | |
| Company | 99.9 | 72.2 | |
| Total | 100.0% | 100.0% | |
| Participation at December 31, 1972 | | | |
| Number of Employees Participating | 312 837 | 220 124 | |
| Analysis of Net Cost of Plan | | | |
| Incurred Claims | | | |
| Life Insurance | $ 33 985 298 | | $ 33 985 298 |
| Accidental Death or Dismemberment | 1 610 018 | | 1 610 018 |
| Weekly Sickness and Accident | 25 672 401 | | 25 672 401 |
| Medical Expense Insurance | 64 232 375 | 75 167 903 | 139 400 278 |
| Total Incurred Claims | $125 500 092 | $ 75 167 903 | $200 667 995 |
| Commissions paid by Insurance Companies | | | -0- |
| Other charges for taxes, expenses, adjustments of reserves and all other purposes | | | 15 733 839 |
| Net Cost of Plan | | | $216 401 834 |

CORPORATE ACCOUNTING CONSOLIDATION & REPORTING OPERATION
JJP:DEA 3/27/73

EXHIBIT I



## ADDITIONAL INFORMATION – 1972

During the calendar year an average of 311 421 employees had personal coverage, while an average of 219 337 employees also had coverage for their dependents.

The amounts shown on Exhibit I do not reflect the benefits of $2 590 998 paid during the year to pensioners and their spouses and surviving spouses under the General Electric Medical Care Plan for Pensioners.

The amount of $15 733 839 shown on Exhibit I as other charges consists of the following:

| | |
|---|---|
| Amount set aside to help provide life insurance coverage for pensioners | $16 061 000 |
| Taxes, expenses, adjustments of reserves, and all other purposes | 7 064 935 |
| Less interest credited on reserves | (7 392 096) |
| | $15 733 839 |

The incurred claims of $200 667 995 shown on Exhibit I consist of:

| | |
|---|---|
| Benefits paid directly to or for employees and their beneficiaries | $197 055 563 |
| Increase in reserves to pay claims incurred in one year, but which are not reported until a year later | 3 612 432 |
| | $200 667 995 |

At the end of 1972, the Insurance Companies were holding reserves of $186.6 million to meet Plan obligations.

CORPORATE ACCOUNTING CONSOLIDATION & REPORTING OPERATION
JJP:DEA 3/27/73 EXHIBIT II

PLAINTIFFS' EXHIBIT NO. 58

Letter from John Shambo to John Baldwin of GE dated 2/24/72.

**NATIONAL GENERAL ELECTRIC CONFERENCE BOARD**
of the
International Union of Electrical, Radio and Machine Workers
AFL-CIO
15 East 41st Street
* * * New York, N. Y. 10017 * * *

February 24, 1972

Mr. John Baldwin
Manager of Consulting Services
General Electric Company
570 Lexington Avenue
New York, N.Y. 10022

Dear Mr. Baldwin:

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, requests that GE agree with the Union to correct the below described provisions in the 1970-1973 GE-IUE (AFL-CIO) National Agreement and General Electric Pension and Insurance Plans. Judged by the present state of court decisions and EEOC guidelines and decisions these provisions discriminate because of sex in violation of Title VII of the Civil Rights Act of 1964 and state legislation against such discrimination which is now in effect in 32 different states, including New York and most of the other states in which the GE-IUE National Agreement is applicable. Because GE is a federal contractor, by reason of the provisions of Section 60-2.21(d)(7), Revised Order No. 4, Affirmative Action Gudieline, GE is required, prior to April 2, 1972, to "review all contractual provisions to ensure that they are non-discriminatory."



* * * * *

With respect to loss of time from work by females due to disabilities arising from pregnancy, miscarriage or childbirth there are several respects in which the 1970-1973 GE IUE National Agreement, the General Electric Insurance Plan and practices thereunder, judged by the principles enumerated in court and EEOC decisions, discriminate unlawfully because of sex. The Court in *Cohen v. Chesterfield County School Board,* 326 F. Supp. 1159, 3 FEP Cases 525 (E.D. Va. 1971) held that it constituted unlawful sex discrimination by an employer to treat pregnancy of an employee any less advantageously to the female employee than other disabilities. To the same effect see *Schattman v. Texas Employment Commission,* 300 F. Supp. 328, 330, 3 FEP Cases 311, 468 (W.D. Texas). The EEOC has held that the failure of an employer to provide non-occupational sickness and accident benefits for disabilities due to pregnancy which are provided for all other non-occupational disabilities constitutes discrimination because of sex in violation of Title VII. EEOC Decision No. 71-1474 (March 19, 1971), 3 FEP Cases 588, CCH-EPG Par. 6221.

Accordingly we believe that the failure of GE to provide the same benefits under Weekly Sickness and Accident Insurance for absences due to disability from pregnancy as are provided for absences due to other non-occupational disabilities constitutes unlawful discrimination because of sex. The IUE therefore proposes that GE and IUE agree to delete from the insurance plan the next to last sentence appearing on page 18 of General Electric Insurance Plan, with Comprehensive Medical Expense Benefits, as amended January 26, 1970 ERB-32D reading as follows:

"Benefits under Weekly Sickness and Accident

> Insurance will not be payable for any absence due to pregnancy or resulting childbirth or to complications in connection therewith."

IUE proposes that in place of the foregoing sentence a sentence providing for the payment of benefits under Weekly Sickness and Accident Insurance for any and all absences due to disabilities caused by pregnancy, miscarriage or childbirth be inserted and the last sentence changed so that the last paragraph on said page 18 reads as follows:

> "Any employee absent because of disability arising from pregnancy, miscarriage or childbirth shall receive benefits under Weekly Sickness and Accident Insurance in the same amount, for the same period of time and on the same terms and conditions as if the employee had been absent for sickness. In addition there are Comprehensive Medical Expense Benefits in the event of maternity, miscarriage or childbirth if you are enrolled for such coverage."

We include as attached Exhibit C the foregoing proposed revision.

The provision in Article XIII, Section 1(e), p. 30, to the extent that it imposes the requirement that the foreman or other immediate supervisor be notified prior to the absence from work discriminates because of sex in that no such requirement of notice prior to absence from work is imposed with respect to other illnesses. IUE therefore proposes that the requirement of prior notice be deleted and the words miscarriage and childbirth be inserted so that Subsection (e), p. 30, shall read as follows:

> "(e) 'Illness' shall include pregnancy, miscarriage and childbirth."



We attach as Exhibit D to this letter the revisions in the GE-IUE National Agreement which we propose.

There are other provisions in the National Agreement which we believe should be deleted or modified in order to comply with the developing body of law under Title VII. We have *not* attempted an all-inclusive listing of such provisions, but we should point out that Article XV, 7(d) may be deemed discriminatory insofar as such provision excludes grievances arising under Article IV, 3 of the National Agreement from arbitration. We should further note that the Union has, during national negotiations, attempted unsuccessfully to have the Company agree to the elimination of many of these provisions from the National Agreement.

We urge an early meeting on the subject of effectuating the above proposals. We await your suggestions as to time and place.

Sincerely yours,

/s/ John H. Shambo, Chairman
IUE GE CONFERENCE BOARD

JHS:cds
Encls.

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[EXHIBIT C]

Revisions in General Electric Insurance Plan with Comprehensive Medical Expense Benefits, As Amended January 26, 1970 (ERB-32D) proposed by IUE by letter dated February 1972, to correct discrimination against female employees who are absent due to disability arising from pregnancy, miscarriage or childbirth.

In the following, the words which have been stricken now appear in the Plan and IUE proposes that they be deleted; the words which are underlined do not appear in the Plan and IUE proposes that they be inserted:

*Fourth full paragraph, p. 18*

~~Benefits under Weekly Sickness and Accident Insurance will not be payable for any absence due to pregnancy or resulting childbirth or to complications in connection therewith.~~ *Any employee absent because of disability arising from pregnancy, miscarriage or childbirth shall receive benefits under Weekly Sickness and Accident Insurance in the same amount, for the same period of time and on the same terms and conditions as if the employee had been absent for sickness. In addition* there are however, Comprehensive Medical Expense Benefits in the event of maternity, *miscarriage or childbirth* if you are enrolled for such coverage.

- - - - - - - - - - - - -

[EXHIBIT D]

Revisions in 1970-1973 GE-IUE (AFL-CIO) National Agreement proposed by IUE by letter dated February 24, 1972 to correct discrimination against female employees who are absent due to disability arising from pregnancy, miscarriage or childbirth

In the following, the words which have been stricken now appear in the Agreement and IUE proposes that they be deleted; the words which are underlined do not appear in the Agreement and IUE proposes that they be inserted:

*Article VIII, Section 1(e), p. 30*



~~(e) "Illness" shall include pregnancy, whenever the Foreman or other immediate supervisor is notified prior to absence from work,~~ *miscarriage and childbirth.*

*Article XV, 7(d), p. 66*

(d) Involve claims that Article I, ~~or Section 3 of Article IV~~ of this National Agreement has been violated.

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PLAINTIFFS' EXHIBIT NO. 66

Facts About Women's Absenteeism and Labor Turnover, U.S. Dept. of Labor, August, 1969.

Women workers have favorable records of attendance and labor turnover when compared with men employed at similar job levels and under similar circumstances. This conclusion is supported by a careful analysis of various impartially collected statistics on absenteeism and labor turnover which also indicates that the skill level of the job, the age of the worker, the worker's length of service with the employer, and the worker's record of job stability – all provide better clues to an understanding of differences in work performance than does the mere fact that the worker is a man or a woman.

These data contradict some generalizations about the comparative labor costs of men and women. However, such generalizations are based on studies which point to the sex of the worker as the major determining factor in situations where numerous other factors have much more influence.

Before examining details of studies that consider comparable characteristics of workers, however, it is pertinent to cite the overall averages of data compiled by official or independent agencies. Even these show smaller net differences in the work records of men and women than frequently are suggested.

### Overall Averages of Absenteeism

A Public Health Service study[1] of worktime lost by persons 17 years of age and over because of illness or injury shows an average of 5.6 days lost by women and 5.3 days lost by men during the calendar year 1967. Significant differences were noted between men and women in the amount of time lost because of acute or chronic illness. Women lost an average of 3.7 workdays because of acute illness, whereas men averaged just 3.3 days away from work for this reason. On the other hand, men were more likely than women to be absent because of chronic conditions such as heart trouble, arthritis, rheumatism, and orthopedic impairment.

Another analysis also has indicated that women's illnesses usually keep them away from work for shorter periods than men's illnesses do. The Health Information Foundation of the University of Chicago[2] studied the total loss to the American economy from work absences that occurred because of illness or injury between July 1959 and June 1960. Since women lost more worktime because of acute conditions and men because of chronic conditions,

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NOTE 1. – This report provides the latest data available as of June 1969.

NOTE 2. – Footnotes refer to sources listed on pages 8 and 9.



the study found that the total financial loss caused by women's absences was about the same as that caused by men's.

The Bureau of Labor Statistics, in its monthly survey of the labor force, records the incidence of illness but not its duration. During an average week in 1968, 1.7 percent of women workers and 1.5 percent of men workers were absent from work because of illness.[3] In addition, an average of 1.2 percent of the women and 1 percent of the men did not report to work for other reasons, excluding vacations. This survey does not give the full story, of course, since women have, on the average, shorter periods of absences than men.

### Overall Averages of Labor Turnover

Available statistics on labor turnover also indicate that the net differences in job-leaving of men and women are generally small – even when considered on an overall basis.

Labor turnover rates, which refer to the movement of employees among firms, consist of both hiring and separation rates. The average turnover rates for men and women factory workers in 1968, collected by the Bureau of Labor Statistics on a quarterly basis,[4] are:

| Type of labor turnover | Rate per 100 employees | |
|---|---|---|
| | Women | Men |
| Accessions (hires) | 5.3 | 4.4 |
| Separations (total) | 5.2 | 4.4 |
| Quits | 2.6 | 2.2 |
| Layoffs and other involuntary separations | 2.6 | 2.2 |

Comparison of these quit rates with those analyzed in an earlier study[5] shows a narrowing of the gap between

the rates of men and women. The fact that women have become relatively less inclined to quit their jobs than they were formerly is due probably to the higher proportion of older women in the work force and the increased interest of women in continuous employment.

A study of occupational mobility by the Bureau of Labor Statistics[6] indicates that men are more frequent occupation changers than women. According to that study, only 7 percent of the women but 10 percent of the men held a different occupation in January 1966 than in January 1965. Movement between occupations was greater among young workers than among mature ones. In the 18- and 19-year-old group, more than 1 out of 4 girls and almost 1 out of 3 boys had worked in more than one occupation in 1965. Among those workers 35 years or older, fewer than 4 percent of the women and 6 percent of the men had changed occupations.

The seeming inconsistency between the labor turnover rates and the occupational mobility percentages of the two studies made by the Bureau of Labor Statistics is explained by their different coverage. The study of turnover rates referred to job changes of factory workers only. The study of mobility rates, on the other hand, measured all occupational changes but not job changes within the same occupational classification. In addition, the latter figures exclude workers who left jobs in 1965, and had not obtained new ones by January 1966, either because they were unsuccessful in their jobhunting or had voluntarily left the labor force. Since there are relatively more women than men in this category, the figures for women's occupational mobility tend to be slightly understated.

Geographic labor mobility was also found to be somewhat less among women workers than men workers in a



study made by the Social Security Administration.[7] Between 1957 and 1960, an average of 6.3 percent of women workers but 7.7 percent of men workers changed the region of their main job. The extent of regional movement among white women workers (6.4 percent) and Negro women workers (5.3 percent) was exceeded by both white men workers (7.8 percent) and Negro men workers (7.3 percent).

Another indication of women's increasing stability in the work force is revealed in trend figures on the worklife expectancy of women, as compiled by the Department of Labor.[8] These figures show that the average number of years a woman works had more than tripled from 1900 to 1960 and had increased by almost one-third in the decade 1950-60. Worklife expectancy for those women born in 1900 averaged 6.3 years; in 1940, 12.1 years; in 1950, 15.2 years; and in 1960, 20.1 years. In each case, the percentage increase in women's average worklife expectancy far exceeded that of their average life expectancy.

The expected worklife of a woman is closely related to her marital status and the number of children she has.[9] In the large group of women who enter the labor force by age 20, the relatively small number who never marry have a worklife expectancy of 45 years. This is about 10 years longer than for those women in the group who marry but have no children and about 2 to 3 years longer than for those who become widowed or divorced. For the large number of married women with children, worklife expectancy declines with the higher number of children and the later timing of the last child. A woman marrying at age 20 has a worklife expectancy ranging from 25 years if she has just one child to 17 years if she has four or more children.

* * *

**Federal employees' absenteeism.** A Public Health Service analysis[16] of the number of absences reported because of illness by a sample of employees in one large Federal agency corroborated the theory that employees in high-level jobs generally had fewer absences than those at lower levels, regardless of the sex of the worker. Thus, the generalization made in the report that women employees had more absences than men employees was based on the overall data, which did not take account of the fact that relatively more women than men were employed in the low grades. In addition, it was found that women employees with children generally had a greater number of absences than those without children. As a result, differences in the incidence of illness absenteeism varied much more among the women employees than among the men employees.

Since this report did not include statistical data concerning the length of each absence period – generally found to be longer for men than women –it presented only a partial story of the illness absenteeism of Federal employees in one agency.

A U.S. Civil Service Commission study[17] of sick leave records in 1961 showed relatively small difference in the total amount of sick leave averaged by women and men Federal workers – 9.6 days for women and 7.9 days for men. But even this difference narrowed in most instances when comparisons were made of women and men with similar salaries, ages, or years of service.[18] For example, in 1961 among those earning $9,000 to $10,000 a year, 6.9 days of sick leave was the average for women and 6.3 days for men.

The highest average numbers of sick days occurred



among those in the lowest salary levels – the levels where women workers are concentrated. Two groups of women had less sick leave, on the average, than their male counterparts: those 60 years of age and over (10.5 days for women, 11 days for men) and those with more than 30 years of Federal service (10.7 days for women and 11.3 days for men).

**French workers' absenteeism.** The importance of considering job levels and other factors in any study of absenteeism is further emphasized in an international report[20] on women industrial workers in Paris, France. The following quotation is from that report:

> Detailed study of absentee figures for large numbers of employees of both sexes and at all levels of skill discloses that the comparatively high proportion of women at the lower levels of the occupational scale (even in countries where the employment of women is a long-standing tradition) goes a long way towards explaining their frequent irregularity at work. Highly trained women occupying responsible and skilled positions are seldom absent, even if they have several children to bring up.

**Conclusion.** Meaningful comparisons of absenteeism and labor turnover of women and men workers must take into consideration similar job levels as well as other factors such as age and length of service. Many of the critical generalities voiced not only exaggerate overall differences but also compare dissimilar groups of men and women.

* * *

Footnotes

[1] U.S. Department of Health, Education, and Welfare, Public Health Service. Vital and Health Statistics, Current Estimates From

the Health Interview Survey, United States, 1967. PHS Publication No. 1000-Series 10-No. 52, tables 8 and 16. May 1969.

[2] The University of Chicago, Graduate School of Business, Health Information Foundation. The Economic Costs of Absenteeism. *In* Progress in Health Services, March-April 1963.

[3] U.S. Department of Labor, Bureau of Labor Statistics. Employment and Earnings, January 1969. Annual averages table A-19.

[20] Isambert-Jamati, Viviane. Absenteeism Among Women Workers in Industry. *In* International Labor Review, March 1962.

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PLAINTIFFS' EXHIBIT NO. 67

Michael S. Backenheimer, Ph.D., Demographic and Job Characteristics As Variables In Absences for Illness.

## Demographic and Job Characteristics As Variables in Absences for Illness

MICHAEL S. BACKENHEIMER, Ph.D.

ATTEMPTING to understand and deal with absence because of illness has caused researchers to stress its cost to industry and to business. Two facets of cost, cost to the worker and cost to the organization employing him, have been strongly emphasized (*1, 2*). The medical approach to absence stresses the need to keep the worker healthy both on and off the job. This approach has included work safety programs, annual physical examinations, immunizations, and health insrance plans. In spite of this so-called

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*Dr. Backenheimer, a member of the Commissioned Corps of the Public Health Service, is a statistician with the Service's National Center for Health Statistics. Theppaper is based on a portion of his doctoral dissertation, "Some Sociological Correlates of Sick Absence Behavior," American University, 1966.*



global approach, little research is available on the social and cultural aspects of behavior surrounding absences because of illness. The term "absence" as used subsequently in this paper means absence from work which the employee attributes to illness.

I believe that absence behavior is, in considerable measure, a cultural and social phenomenon. This assumption does not deny that almost all people, from time to time, suffer from illnesses that are almost totally physiological, requiring them to restrict their usual activities; however, absence behavior is often influenced by many factors other than physical illness. Parsons (*3*) has defined illness as "a state of disturbance in the 'normal' functioning of the total human individual, including both the state of the organism as a biological system and of his personal and social adjustments."

Within Parsons' context, an employee may be said to be ill when he says that he is ill. The same degree of illness in two workers may keep one off the job and not impede the other in the least. Furthermore, a person's environment, both at home and in the office, may influence his decision as to whether or not he is ill. Should he decide that he is ill, he then embarks upon the "sick role."

The status of being ill (as opposed to the status of being well) is indeed vague. Illness is subjective in that it exists when a person says that he is ill, yet society clearly ascribes to persons with this status the obligation of attempting to get well and the privilege of not going to work, which can more or less be objectively observed. Thus absence behavior has many ramifications, and I shall attempt to deal with some of its sociological dimensions in this paper.

* * *

*Sex.* Women had more spells of absence than men. The assumption that such difference could be attributed to age differences between sexes was not substantiated since no significant differences in age were found between men and women. No clinical or physical evidence exists to support the assumption that women are more prone to illness or disease than are men; however, it has been found that women are frequently absent because of gynecologic problems (*6*). If comparative mortality of men and women of working age can be used as a measure of illness, women prove to be healthier than men (*7*).

Women, however, may have more episodes of absence than men because of the roles society assigns to them. Within our society women can, more easily than men, be ill because the idea of a woman "not feeling right, having a terrible headache," is socially sanctioned. Thus, women are "entitled" to be absent with greater frequency than men.

Analysis of the data also revealed that women with children were more likely to have a high frequency of absences than were women without children. This observation supports the contention that women's commitment to the family constellation results in higher frequencies of absence. Mothers are, at least theoretically, more often faced with role conflict than are women without children. Thus the roles of worker and mother come into conflict, and the result is the dominance of the mother role with the worker role supported by recourse to absence behavior.

*Marital status.* Marital status was controlled in this study; thus no original empirical research can be offered. However, there is ample evidence in the literature that marital status does influence absences and appears to do



so differentially by sex. Married men, perhaps because of their commitment and obligations to home and family life, are absent less frequently than their single counterparts (*5*). Probably because of the same commitment, and the resulting role conflict already discussed, married female employees are absent more frequently than their never married counterparts (*8*). Thus marital status appears to be an important variable in absence behavior.

*Education.* Education as a variable in absence behavior served to distinguish between men with high and low frequencies of absences; that is, those men who were seldom absent because of illness were generally better educated than those who were frequently absent. However, it is probable that the number of years of schooling cannot be considered a potent variable in influencing absences. Education is intricately related to both job responsibility and occupational status, and it is probably these factors rather than education which are the more important variables in absence behavior.

**Job Variables**

*Occupational status.* Within the study, Government Service (GS) level measures occupational status; that is, the higher the GS level, the higher the status. Occupational status is felt to be an accurate measure, since salaries increase as GS level goes up. The study hypothesis was that the higher an employee's status, the lower would be his frequency of absences. In some respects absence behavior can be viewed as an opportunity system, and the opportunity to take leave is not equally distributed throughout the range of GS levels. The higher the GS level, the less the opportunity for using leave for illness. High GS level entails increased job responsibilities and obligations.

The hypothesis was borne out by analysis of the data. Persons in the upper GS levels showed less frequency of absences than did those in lower GS levels. This relationship was true for both male and female employees. This observation refutes the hypothesis that male employees have fewer absences than female employees because they have higher job statuses (GS levels). Apparently the conceptualization of absence behavior as an opportunity system is valid for the study of such behavior.

* * *

For job variables, frequency of absence because of illness decreased as job status (as measured by service grade or salary level) increased. Neither occupational grouping nor length of service in the organization was significantly related to absence behavior.

* * *

**REFERENCES**

(*1*) Canfield, G.W., and Soash, D.G.: Presenteeism—a constructive view. Personnel J 34; 94-97, July-August 1955.
(*2*) Plummer, N.: Absenteeism in industry. Adv Management 25: 21-24, September 1960.
(*3*) Parsons, T.: The social system. Free Press, Glencoe, Ill., 1951, p. 431.



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PLAINTIFFS' EXHIBIT NO. 68A

Letter from Ruth Weyand to Ronald Wilson, National Center for Health Statistics dated April 16, 1973.

**International Union of Electrical, Radio and Machine Wokers AFL-CIO and CLC**

* * * * * * * *



April 16, 1973

Mr. Ronald W. Wilson, Chief
Analysis and Reports Branch
Division of Health Interview Statistics
National Center for Health Statistics
HSMHA
5600 Fishers Lane
Rockville, Maryland 20015

Dear Mr. Wilson,

As I indicated in our phone conversation last week, I am confused about the statistics concerning pregnancy and related conditions in three publications which use National Health Survey data: *Current Estimates,* United States 1971, Vital and Health Statistics Series 10, Number 79; *Disability Days,* United States 1968, Vital and Health Statistics Series 10 Number 67; and *Time Lost from Work Among the Currently Employed Population,* United States 1968, Vital and Health Statistics Series 10 Number 71. Could you please tell me:

(1) Whether the statistics used in these studies give an accurate account of the time lost from work due to pregnancy among the currently employed population? If not, why?

(2) How is pregnancy defined for purposes of the National Health Survey? Is it a sickness or a condition which restricts activity? Is the delivery period distinguished from the remainder of the pregnancy term? Are any of the complications arising from pregnancy, such as miscarriage, ectopic pregnancy, high blood pressure, or morning sickness considered a sickness?

(3) In collating data for statistics on the time lost

from work, does mandatory maternity leave at the end of the fifth or sixth month of pregnancy, required by many employers, distort statistical results?

(4) Are there any statistics which reflect the period of time which an employed woman, who is in no way restricted by her employer as to when she must stop work before the delivery and when she may return to work after the delivery, is absent from work because of her pregnancy?

Any additional information or observation you might have on the subject of disability and work absence due to pregnancy and related conditions will be most useful to me. Your prompt attention to this inquiry would be greatly appreciated. Thank you.

Sincerely,

Ruth Weyand
Associate General Counsel
International Union of Electrical Workers

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PLAINTIFFS' EXHIBIT NO. 68B

Letter from Ronald Wilson to Ruth Weyand dated May 7, 1973.

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**DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE**
**PUBLIC HEALTH SERVICE**
**HEALTH SERVICES AND MENTAL HEALTH ADMINISTRATION**
**Rockville, Maryland 20852**

**NATIONAL CENTER FOR HEALTH STATISTICS**



May 7, 1973

Miss Ruth Weyand
1126–16th Street, N.W.
Room 6-13
Washington, D.C. 20036

Dear Miss Weyand:

This is in response to your letter of April 16 and our earlier phone conversation concerning the reporting of work-loss days related to pregnancy.

I will answer your questions in the order you asked them in your letter.

Estimates of work-loss days based on data from the Health Interview Survey as published in our reports do not accurately reflect all of the time lost from work due to pregnancy. There are two basic limitations of the data which make it inadequate to estimate total work-loss due to pregnancy. First, the Health Interview Survey does not define routine pregnancy as an illness. However, complications arising from the pregnancy are considered as illness, provided there was some restricted activity (work-loss, bed, or other restricted activity day) or medical attention connected with the complication. The actual delivery is considered as an acute condition and any associated disability days would be included.

The second major limitation of Health Interview Survey data on work-loss resulting from pregnancy is that we count work-loss only for persons who are currently employed (persons who worked or had a job during the two weeks before interview, see page 67, question 44 of 1971 "Current Estimates"). Women who drop out of the labor force during pregnancy would be excluded from our estimates of work-loss, even if we were to define routine

pregnancy as illness. Women out of the labor force could report bed days or other restricted activity days due to complications of pregnancy or delivery, but not work-loss days.

Mandatory maternity leave would not be counted as work-loss, since the leave was not the result of "complications" due to the pregnancy.

I would suggest that you contact Mrs. Catherine East, Executive Secretary of the Citizen's Advisory Council on the Study of Women, Labor Department, (110-3791). She has been working in the area of disability payments for pregnancy.

I hope this information will be helpful. If you have any further questions, please call me.

Sincerely yours,

/s/ Ronald W. Wilson
Ronald W. Wilson
Chief, Analysis & Reports Branch
Division of Health Interview Statistics

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PLAINTIFFS' EXHIBIT NO. 69

Women's Bureau Pamphlet 17 (Rev.), Day Care Facts

Women's Bureau
Employment Standards Administration
U.S. DEPARTMENT OF LABOR
Pamphlet 16 (Rev.)
1973

## "DAY CARE FACTS"

## DAY CARE NEED



### Working Mothers and Their Children

The Employment of mothers, like the employment of all women, has been rising for several decades. This expansion is expected to continue, and as a result, the need for child care services will increase.

From 1940 to March 1972 the number of women in the labor force more than doubled– from 13.8 million to 32.9 million. However, the number of working mothers increased more than eightfold– from 1.5 million to 12.7 million. In March 1972, 12.7 million mothers with children under 18 years of age were working or seeking work. Of these mothers, 4.4 million, or about 1 out of 3, had children under age 6. More than 4 out of 10 mothers who had children under 18 years were in the labor force as compared with 3 out of 10 in 1960 and less than 1 out of 10 in 1940. Projections for 1985 indicate that 6.6 million mothers aged 20 to 44 with children under age 5 will be in the labor force. This will represent a 32-percent increase between 1975 and 1985.

The number of children with mothers in the labor force increased sharply during the last decade. Nearly 26 million children under 18 years old had mothers who were working or looking for work in March 1972. More than 5.5 million of these children were under 6 years old. In 1960, 15.7 million children under 18 had working mothers, and about 4 million of these children were under age 6.

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# PLAINTIFFS' EXHIBIT NO. 72

## Marital Status of Women in Labor Force, U.S. Dept. of Labor, March 1971-1972.

Table 1.--Marital Status of Women in the Labor Force, March 1972-71

(Women 16 years of age and over)

| Marital status | Number 1972 | Number 1971 | Percent distribution 1972 | Percent distribution 1971 | As percent of women in population 1972 | As percent of women in population 1971 |
|---|---|---|---|---|---|---|
| Total | 32,939,000 | 31,681,000 | 100.0 | 100.0 | 43.6 | 42.5 |
| Single | 7,477,000 | 7,187,000 | 22.7 | 22.7 | 54.9 | 52.7 |
| Married | 20,740,000 | 19,986,000 | 63.0 | 63.1 | 42.1 | 4.14 |
| Husband present | 19,249,000 | 18,530,000 | 58.4 | 58.5 | 41.5 | 40.2 |
| Husband absent | 1,500,000 | 1,456,000 | 4.6 | 4.6 | 52.2 | 50.4 |
| Widowed | 2,570,000 | 2,516,000 | 7.8 | 7.9 | 26.3 | 25.7 |
| Divorced | 2,143,000 | 1,992,000 | 6.5 | 6.3 | 70.1 | 70.4 |

Source: U.S. Department of Labor, Bureau of Labor Statistics: Summary - Special Labor Force Report, October 1972, Marital and Family Characteristics of Workers, March 1972, and Special Labor Force Report No. 144.



# PLAINTIFFS' EXHIBIT NO. 73

## Mothers in the Labor Force by Marital Status and Age of Children, March 1971-1972, U.S. Dept. of Labor

Table 2.--Mothers in the Labor Force, by Marital Status and Age of Children, March 1972-71

(Mothers 16 years of age and over)

| Marital status and age of children | Number 1972 | Number 1971 | Percent distribution 1972 | Percent distribution 1971 | As percent of women in population 1972 | As percent of women in population 1971 |
|---|---|---|---|---|---|---|
| Mothers with children under 18 years | 12,682,000 | 12,201,000 | 100.0 | 100.0 | 42.9 | 42.2 |
| Married, husband present | 10,452,000 | 10,098,000 | 82.4 | 82.7 | 40.5 | 39.7 |
| Other women ever married 1/ | 2,239,000 | 2,103,000 | 17.6 | 17.2 | 59.1 | 59.9 |
| Mothers with children 6 to 17 years only | 8,244,000 | 7,874,000 | 65.0 | 64.5 | 52.6 | 52.0 |
| Married, husband present | 6,706,000 | 6,424,000 | 52.9 | 52.7 | 50.2 | 49.4 |
| Other women ever married 1/ | 1,538,000 | 1,450,000 | 12.1 | 11.9 | 66.5 | 67.6 |
| Mothers with children under 6 years 1/ | 4,438,000 | 4,327,000 | 35.0 | 35.5 | 31.9 | 31.4 |
| Married, husband present | 3,746,000 | 3,674,000 | 29.5 | 30.1 | 30.1 | 29.6 |
| Other women ever married 1/ | 692,000 | 653,000 | 5.5 | 5.4 | 47.4 | 47.8 |
| Mothers with children 3 to 5 (none under 3) 2/ | 1,950,000 | 2,025,000 | 15.4 | 16.6 | 38.7 | 38.4 |
| Married, husband present | 1,590,000 | 1,680,000 | 12.5 | 13.8 | 36.1 | 36.1 |
| Other women ever married 1/ | 370,000 | 345,000 | 2.9 | 2.8 | 55.8 | 56.4 |
| Mothers with children under 3 years 2/ | 2,488,000 | 2,302,000 | 19.6 | 18.9 | 28.1 | 27.1 |
| Married, husband present | 2,166,000 | 1,994,000 | 17.1 | 16.3 | 26.9 | 25.7 |
| Other women ever married 1/ | 322,000 | 308,000 | 2.5 | 2.5 | 40.4 | 40.8 |

1/ Widowed, divorced, or separated.
2/ May also have older children.
Source: U.S. Department of Labor, Bureau of Labor Statistics: Summary - Special Labor Force Report, October 1972, Marital and Family Characteristics of Workers, March 1972, and Special Labor Force Report No. 144.

## PLAINTIFFS' EXHIBIT NO. 74

Labor Force Status of Ever Married Women, by Presence and age of Children, March 1972, U.S. Dept. of Labor.

Table 3.--Labor Force Status of Ever Married Women, by Presence and Age of Children, March 1972

| Race and presence and age of children | Population | Labor force: Number | Labor force: As percent of women in population |
|---|---|---|---|
| Women of all races | | | |
| Total | 61,896,000 | 25,462,000 | 41.1 |
| Mothers with children under 18 years | 29,577,000 | 12,682,000 | 42.9 |
| With children 6 to 17 years only | 15,677,000 | 8,244,000 | 52.6 |
| With children under 6 years 1/ | 13,900,000 | 4,438,000 | 31.9 |
| With no children under 3 years 1/ | 5,038,000 | 1,950,000 | 38.7 |
| With children under 3 years 1/ | 8,862,000 | 2,488,000 | 28.1 |
| Women without children under 18 years | 32,319,000 | 12,780,000 | 39.5 |
| Women of Minority Races | | | |
| Total | 6,590,000 | 3,256,000 | 49.4 |
| Mothers with children under 18 years | 3,439,000 | 1,842,000 | 53.6 |
| With children 6 to 17 years only | 1,754,000 | 1,037,000 | 59.1 |
| With children under 6 years 1/ | 1,685,000 | 805,000 | 47.8 |
| Women without children under 18 years | 3,151,000 | 1,414,000 | 44.9 |

1/ May also have older children.

Source: U.S. Department of Labor, Bureau of Labor Statistics: Summary - Special Labor Force Report October 1972, Marital and Family Characteristics of Workers, March 1972.

PLAINTIFFS' EXHIBIT NO. 74
Labor Force Status of Ever Married Women, by Presence and age of Children, March 1972, U.S. Dept. of Labor.



## PLAINTIFFS' EXHIBIT NO. 75

Labor Force Participation Roles and Percent Distribution of Mothers (Husand Present), by Income of Husband in 1971 and Ages of Children, March 1972, U.S. Dept. of Labor

Table 4.--Labor Force Participation Rates and Percent Distribution of Mothers (Husband Present), by Income of Husband in 1971 and Ages of Children, March 1972

| Income of husband | Labor force participation rates of mothers with children: Under 6 years 1/ | Labor force participation rates of mothers with children: Under 6 and 6-17 years | Percent distribution of mothers in the labor force with children: Under 18 years | Percent distribution of mothers in the labor force with children: Under 6 and 6-17 years 1/ | Number in the labor force with children: Under 18 years | Number in the labor force with children: Under 6 and 6-17 years 1/ | Number in the labor force with children: Under 6 years only |
|---|---|---|---|---|---|---|---|
| Number | -- | -- | 10,452,000 | 6,706,000 | 3,746,000 | | |
| Percent | 40.5 | 50.2 | 100.0 | 100.0 | 100.0 | | |
| Under $3,000 | 41.9 | 51.0 | 5.7 | 5.1 | 6.7 | | |
| $3,000 to $4,999 | 45.1 | 53.0 | 9.9 | 8.0 | 13.4 | | |
| $5,000 to $7,999 | 46.5 | 57.3 | 15.3 | 13.2 | 18.9 | | |
| $8,000 to $9,999 | 44.1 | 56.3 | 29.1 | 27.9 | 31.3 | | |
| $10,000 and over | 35.5 | 45.1 | 40.0 | 45.7 | 29.6 | | |

1/ May also have older children.

Source: U.S. Department of Labor, Bureau of Labor Statistics: Summary - Special Labor Force Report, October 1972, Marital and Family Characteristics of Workers, March 1972.

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# PLAINTIFFS' EXHIBIT NO. 76

## Women in the Labor Force 1972 and 1971, U.S. Dept. of Labor.

1383

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Women's Bureau
WASHINGTON, D.C. 20210

WOMEN IN THE LABOR FORCE
1972 AND 1971 (Annual Averages)

(Women 16 years of age and over)

| Labor Force Status (numbers in thousands) | 1972 | | 1971 | |
|---|---|---|---|---|
| | All women | Women of minority races* | All women | Women of minority races* |
| Total civilian population | 75,868 | 8,730 | 74,043 | 8,345 |
| In the labor force | 33,277 | 4,249 | 32,091 | 4,102 |
| 16 to 19 years of age | 3,587 | 361 | 3,292 | 334 |
| 20 years of age and over | 29,710 | 3,888 | 28,799 | 3,768 |
| Employed | 31,072 | 3,767 | 29,875 | 3,658 |
| 16 to 19 years of age | 2,972 | 222 | 2,725 | 215 |
| 20 years of age and over | 28,100 | 3,545 | 27,150 | 3,443 |



WOMEN IN THE LABOR FORCE
1972 AND 1971 (Annual Averages)--Continued

(Women 16 years of age and over)

| | 1972 | | 1971 | |
|---|---|---|---|---|
| | All women | Women of minority races* | All women | Women of minority races* |
| Occupations of Employed Women | | | | |
| Number (in thousands) | 31,072 | 3,767 | 29,875 | 3,658 |
| Percent | 100.0 | 100.0 | 100.0 | 100.0 |
| Professional and technical workers | 14.5 | 11.2 | 14.5 | 10.6 |
| Managers and administrators (except farm) | 4.5 | 2.3 | 5.0 | 2.4 |
| Sales workers | 7.2 | 2.8 | 7.2 | 2.7 |
| Clerical workers | 34.7 | 23.3 | 33.9 | 22.0 |
| Craftsmen and kindred workers | 1.2 | .9 | 1.3 | 1.0 |
| Operatives, except transport | 12.8 | 15.0 | (13.3 | 15.4) |
| Transport equipment operatives** | .4 | .3 | | |
| Nonfarm laborers | .9 | .9 | .8 | 1.0 |
| Private household workers | 4.5 | 15.2 | 4.9 | 16.5 |
| Service workers (except private household) | 17.5 | 26.8 | 17.4 | 27.0 |
| Farmers and farm managers | .3 | .1 | .3 | .1 |
| Farm laborers and foremen | 1.4 | 1.1 | 1.4 | 1.4 |
| Unemployment Rates (not seasonally adjusted) | | | | |
| Total 16 years and over | 6.6 | 11.3 | 6.9 | 10.0 |
| 16 to 19 years | 16.7 | 38.6 | 17.2 | 35.5 |
| 20 years and over | 5.4 | 8.8 | 5.7 | 8.7 |
| Percent of unemployed seeking part-time work | 26.5 | 20.6 | 25.9 | -- |
| Full-Time/Part-Time Work (nonagriculture) | | | | |
| Percent on full-time schedules | 72.0 | 73.9 | 71.8 | 73.8 |
| Percent on part-time schedules | 28.0 | 26.1 | 28.2 | 26.2 |

*Includes all races other than white; Spanish-speaking persons are included in the white population.

**Not shown separately prior to January 1972.

Data distributed by Woman's Bureau, U.S. Department of Labor, January 1973.

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PLAINTIFFS' EXHIBIT NO. 77

Report of the Commission on Population Growth
and the American Future
(Gov't Print. Off., March 1972), pp. 97-98

**Chapter 11: Human Reproduction**

Contemporary American couples are planning to have an average of between two and three children. Given the fact of youthful marriage, far-from-perfect means of fertility control, and varying motivation, many of these couples will have children before they want them and a significant fraction will ultimately exceed the number they want.

Recent research[1] has disclosed a substantial incidence of such unplanned pregnancies and unwanted births in the United States. According to estimates developed in the 1970 National Fertility Study conducted by the Office of Population Research at Princeton University, 44 percent of all births to currently married women during the five years between 1966 and 1970 were unplanned; 15 percent were reported by the parents as having never been wanted. (See Table 11.1.) Only one percent of first births were never wanted, but nearly two-thirds of all sixth or higher order births were so reported. In theory, this incidence of unwanted births implies that 2.65 million births occurring in that five-year period would never have occurred had the complete availability of perfect fertility control permitted couples to realize their preferences. And these estimates are all conservative.

Unwanted fertility is highest among those whose levels of education and income are lowest. For example, in 1970, women with no high-school education reported that



31 percent of their births in the preceding five years were unwanted at the time they were conceived; the figure for women college graduates was seven percent. Mainly because of differences in education and income—and a general exclusion from the socioeconomic mainstream – unwanted fertility weighs most heavily on certain minority groups in our population. We have relevant data for blacks only, but this is probably true for Mexican-Americans, Puerto Ricans, Indians, and others as well.

For example, if blacks could have the number of children they want and no more, their fertility and that of the majority white population would be very similar. These figures about our black population illustrate the inequality of access of our minority populations to the various means of fertility control, as well as to the education and income which is so closely connected with that access.

Not all unwanted births become unwanted children. Many, perhaps most, are eventually accepted and loved indistinguishably from earlier births that were deliberately planned. But many are not; and the costs to them, to their siblings and parents, and to society at large are considerable, though not easy to measure.

**Table 11.1**
**Unwanted Fertility in the United States, 1970[a]**

| Race and Education | Most Likely Number of Births per Woman | Percent of Births 1966-70 Unwanted | Percent of Births 1966-70 Unplanned[b] | Theoretical Births per Woman without Unwanted Births |
|---|---|---|---|---|
| All Women | 3.0 | 15 | 44 | 2.7 |
| College 4+ | 2.5 | 7 | 32 | 2.4 |
| College 1-3 | 2.8 | 11 | 39 | 2.6 |
| High School 4 | 2.8 | 14 | 44 | 2.6 |
| High School 1-3 | 3.4 | 20 | 48 | 2.9 |
| Less | 3.9 | 31 | 56 | 3.0 |
| White Women | 2.9 | 13 | 42 | 2.6 |
| College 4+ | 2.5 | 7 | 32 | 2.4 |
| College 1-3 | 2.8 | 10 | 39 | 2.6 |
| High School 4 | 2.8 | 13 | 42 | 2.6 |
| High School 1-3 | 3.2 | 18 | 44 | 2.8 |
| Less | 3.5 | 25 | 53 | 2.9 |
| Black Women | 3.7 | 27 | 61 | 2.9 |
| College 4+ | 2.3 | 3 | 21 | 2.2 |
| College 1-3 | 2.5 | 21 | 46 | 2.3 |
| High School 4 | 3.3 | 19 | 62 | 2.8 |
| High School 1-3 | 4.2 | 31 | 66 | 3.2 |
| Less | 5.2 | 55 | 68 | 3.1 |

[a] Based on data from the 1970 National Fertility Study for currently married women under 45 years of age.
[b] Unplanned births include unwanted births.

Most of the costs of unwanted fertility are not visible in the dramatic instances of abandonment or child abuse, but rather in the more prosaic problems of everyday family life. Family budgets can be seriously strained by the unexpected and unwanted birth of a child. And those who can least afford such additional burdens most often experience them. The incidence of unwanted births is



twice as great among couples whose annual incomes fall below $4,000 as it is among those with incomes of $10,000 and higher. Since most unwanted births experienced by married couples occur late in the childbearing years, the woman who had been waiting for her youngest child to be in school before returning to work can find her plans abruptly frustrated.

There are also health costs involved. As President Nixon observed:

> . . . involuntary childbearing often results in poor physical and emotional health for all members of the family. It is one of the factors which contributes to our distressingly high infant mortality, the unacceptable level of manlutrition. . .[3]

These health problems result, in part, from the fact that most unwanted births occur to women in the later years of childbearing. And these are the ages at which there are considerably greater risks to maternity. For example, although maternal mortality has declined by 94 percent over the past 30 years to a rate of 24 maternal deaths per 100,000 live births, the risks increase sharply at the older ages. Compared with the rate at age 20 to 24 when the risk is lowest, the rate is four times greater at ages 35 to 39, almost eight times greater at ages 40 to 44, and nearly 20 times greater at older ages.[4]

The risk to the infant's life is also associated with the mother's age; the infant mortality rate runs almost one-third higher among women 35 years of age and over, than among women aged 20 to 24.[5]

Because of the strong association between maternal age and the appearance of certain hereditary diseases, the prevention of births of women over 35 would reduce the

incidence of such diseases. For example, the incidence of Down's syndrome, which accounts for 95 percent of mongolism, would be reduced significantly by the avoidance of childbearing in the older ages.

How far down the road toward population stabilization would the prevention of unwanted births take us? Since fertility has been changing so rapidly in recent years, such an estimate is difficult to make. The record of women who are approaching the end of their childbearing, those 35 to 44 years old in 1970, indicates that 27 percent had at least one unwanted birth, a total of one in every six births. The prevention of the unwanted births in this group would have carried them about three-fifths of the way to the replacement level. But women in those age groups were the main participants in the post-war baby boom and have had the highest fertility of any women in modern time. And there has been a significant change downward in the family-size expectations of young couples.

* * *



**PLAINTIFFS' EXHIBIT NO. 78**
**Prentice-Hall, Personnel Management-Policies and Practices, Report Bulletin 25, June 6, 1972, P-H Survey Maternity Leave Policies Due For A Change.**

Personnel Management—
Policies and Practices
*Report Bulletin 25*
Volume XIX June 6, 1972
Englewood Cliffs Prentice-Hall New Jersey

**P-H Survey: Maternity Leave Policies Due for a Change?**

• • •

*How does this affect employers?* To learn the answers, the P-H Research Staff surveyed typical plants, offices and hospitals. While the majority of these firms now grant maternity leaves, more than half of them will need to review and revise their policies before they'll be in compliance with the new guidelines.

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**P-H Survey: Maternity Leave Policies Due for a Change?**

[¶230] Almost 3 out of 4 companies surveyed by the P-H research staff have a formal policy for providing maternity leaves. Another 20% will give a woman a leave of absence–but this decision is made on a case-by-case basis. (For instance, some firms have different policies for their plant and for their office workers.) And 5% of the respondents haven't granted any maternity leaves up to now.

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⋙ 7-YEAR PROGRESS REPORT → Shortly after Title VII took effect, in 1965, P-H surveyed over 1,000 employers on this subject. The picture was quite different: Only two-fifths of the offices granted maternity leaves; three-fourths of the plants (mostly unionized) granted leaves. But they tended to require early "retirement" from the working scene–sometimes as soon as a pregnancy was "obvious." Few employers–less than 20%–allowed the pregnant employee herself to decide how long she wanted to continue working. And in many companies, if a woman wanted to return to work after the birth of her baby, she was considered a "new hire"–with no seniority rights.

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Eligibility requirements. More than one-third of respondents (but nearly 2 out of 3 hospitals) set length-of-service requirements for employees wishing maternity leaves. Commonly, they require at least 6 months' service, with one year's service the next most frequently mentioned. (Hospitals, however, most commonly require one year's service.)

Other service requirements (3 months or less) generally appear to follow companies' normal arrangements for probationary employees who may not yet be participating in other company benefit programs. On the other end of the scale, a few companies set a 9-month or 10-month service requirement (i.e., the employee could not have been pregnant when she was *hired;* this question is discussed in more detail below). No respondent required longer than 2 years' service, for a woman to qualify.

Several companies said only permanent, full-time employees were eligible for maternity leaves. And one company (where determinations have up to now been made on a case-by-case basis) said granting of leaves depended on "quality of work and personality." (If a leave was *denied*, this would appear to be a constructive discharge.)

• • •

How long can she continue working? Generally, it's the employee - or the employee with her doctor's O.K. - who decides. Over 60% of respondents recognize that jobs and people differ, the pregnant woman decides for herself when she needs a leave for her "temporary disability."

But in 35% of responding companies, the policies spell out how long a pregnant employee can continue working. Of those firms, 6 months is the most commonly-mentioned cut-off date, with 7 to 7-1/2 months a close second. Several office firms set an 8-month deadline. A number of plants say 4-5 months. Other special cases:

- 4 months [plant doctor advised against lifting, walking up stairs]
- 6 months for production employees; no limit for office employees
- 4 months if employee has no dispensation from her doctor; 8 months if her doctor says it's O.K. [office firm]
- 7 months, if employee is exposed to radiation [hospital]

How do you know whether it's safe for her to work? Most companies—no matter what their policy on how long a pregnant employee may continue on the job—want assurance that the woman is physically able to work. Thus 3 out of 4 firms ask her to bring an O.K. from her personal doctor, with the expected date of birth noted. One company asks the employee to bring in an O.K. at 2-month intervals. About 1 in 8 companies require an O.K. from the company doctor; and 10% don't require a medical statement.

A small percentage of firms (10%) require an O.K. only if the employee is ill or works in a hazardous job. And 1 out of 6 companies have occasionally arranged transfers for pregnant employees to safer or easier jobs, if this was feasible.

What about pay for absences of employees during their pregnancy? Two out of three companies apply the same rules to pregnant employees as they apply to anyone else. However, about one-fourth of the firms will pay only for illnesses not connected with pregnancy. (One company pays for absences resulting from "complications"—but not for illnesses associated with a "normal" pregnancy.) The remaining firms don't pay for absences due to illness, whatever their cause. Do companies ask pregnant employees to stop work earlier than originally planned, if their attendance record is poor? Some 13% of respondents say Yes. Again, this decision may be made after consultation with the employee's doctor, to ensure that the job isn't endangering the employee's health.

Benefits and insurance. Two out of three respondents have temporary disability benefits plans. Of these, 54% provide coverage for pregnant employees.



What about medical and hospital insurance benefits covering maternity? Over 90% of respondents said their female employees were entitled to the same maternity benefits as the wives of male employees (provided of course that they carried a plan providing family-type coverage). Several exceptions were noted: If the female employee wasn't covered by a plan provided by her husband's employer (that is, there can be no duplication of coverage); unless she was head of household; and one firm said the protection was not offered to an individual who was unmarried. (A number of companies expected to be making changes in this area, probably in response to the new guidelines.)

☞ WHAT ABOUT ABUSES? → About 10% of respondents said they had problems with pregnant employees who claimed unemployment benefits, when their employers considered them "unavailable for work." Most of the firms that found this a problem considered it worthwhile to contest such claims. The others apparently consider the claims justified, or they pay them, as the lesser of two nuisances. (*NOTE:* Of course, those companies allowing employees to work as long as they wish, rather than setting an arbitrary quitting date, aren't generally troubled with U.C. benefit claims.)

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☞ WORKMEN'S COMPENSATION CLAIMS MAY NOT BE A PROBLEM → Although 10% of respondents have expressed concern about pregnant employees' filing claims because of a miscarriage or other injury suffered in the course of employment, this fear may not have much basis in fact. Here's why: We asked respondents whether such claims had ever come up, in their experience. And, if so, was their company held liable? Surprisingly, none of the 108 respondents said they knew of a single case!

• • •

How long a leave do they need? How long do maternity leaves extend *after* childbirth? More than half the responding companies set some sort of limit. Either they set the earliest and the latest time after childbirth that the employee can or must return to work (or lose her right to reinstatement). Or, they spell out a limit on the *total* length of a maternity leave (including before and after childbirth). Some firms set a variety of limits, as explained below. Just over one-fifth of the companies - 22% - let the employee decide how soon she wishes to return to work after childbirth.

➢ *Earliest returns:* Of the companies setting a limit on when employees may resume work following childbirth, the most common requirement is 4 weeks or, more usually, 6 weeks after childbirth. (Note: A number of states formerly had rules prohibiting employment of women within 4-6 weeks after childbirth; a number of these laws, along with much other protective legislation tending to conflict with Title VII, have since been repealed. Check your state law on this point.)

➢ *Latest returns:* About half the companies setting limits say employees should return to work no later than 3 months after childbirth, or at least report in at that time to arrange for an extension of their leave, if desired. A few set the limit at 2 months, 6 weeks or 30 days. Others set the limit at 9 months or 1 year following childbirth.

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☞ MOST OF THE WOMEN WHO TAKE MATERNITY LEAVES COME BACK TO WORK → We asked survey respondents to tell us what proportion of their employees who were pregnant in 1971 quit their jobs and what proportion took a leave. Considering just those companies that had statistics available, half the plants, one-third of the office firms, and two-thirds of the hospitals said that 75% or more of the employees who were pregnant elected to take a leave. (In many of these cases, 100% of the employees took a leave.) And of this group, more than half reported a perfect score on "returns"—that is, all the employees who elected a leave actually returned to work as scheduled. On the other hand, some companies reported that only a fraction of employees actually returned after their babies were born (in some cases, they would have liked to return, if a suitable job opening existed).

Whether your company's experience is worse or better—depending on your point of view—you will surely have to reckon with maternity leaves from now on. And you'll have to consider ways to minimize the impact on your staff operations.



**PLAINTIFFS' EXHIBIT NO. 79**
**Carol Greenwald, Maternity Leave Policy,**
**New England Economic Review, January-February 1973.**



FEDERAL RESERVE BANK OF BOSTO

# NEW ENGLAND ECONOMIC REVIEW

## MATERNITY LEAVE POLICY

by Carol Greenwald

### Maternity Leave Practices

According to a survey of 219 companies conducted by the Administrative Management Society, most firms' personnel policies in 1971 toward pregnant employees differed radically from the new Federal guidelines which took effect early in 1972.[5] The new Federal guideline states that it is up to the woman employee to determine, in consultation with her doctor, when to terminate her employment. Most firms replying to the survey had a set termination date for a pregnant employee. While answers varied widely, the largest group of firms (67) said that women employees were required to leave before reaching their sixth month of pregnancy.

The new guidelines require employers to let women employees use sick leave pay during a maternity absence as well as requiring that a woman on maternity leave receive the same payments as any other temporarily disabled employee. While 172 firms said that absences due to illness while pregnant were paid for under the company's sick leave plan, 174 companies in the survey indicated that they granted maternity leave of absence *without any pay.*

In fact, 33 firms indicated that they did not even grant maternity leaves without pay, a policy in violation of a 1968 EEOC guideline which stated that a leave of absence should be granted for pregnancy whether or not it is granted for illness. The new EEOC guideline strengthens the 1968 ruling by stating that firing employees because of absences exceeding allowed leave time may be unlawful if this practice has disproportionate impact on one sex.[6] Basically,



this means that an employer permitting employees five days leave time a year may be in violation of the law if he fires a woman who, because of pregnancy, missed several weeks of work. Employers with unreasonably short leaves have thus been put on notice that their policies may be illegal.

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**Table 1**

**THE STRUCTURE OF THE WORK FORCE**

**Federal Reserve Bank of Boston**

| | *No. of Employees* | *No. of Female Employees* | *Women as % of Total* | *Women Under Age 34 as % of All Women* | *No. of Women Resigning due to Pregnancy or taking Maternity Leaves* |
|---|---|---|---|---|---|
| Dec. 1971 | 1568 | 955 | 61 | 50 | 22 |
| Aug. 1972 | 1550 | 918 | 59 | 49 | 8 |

* * *

### The Cost of Paid Maternity Leaves
### A Case Study

To answer this question the staff of the Federal Reserve Bank of Boston was used as a case study to determine the costs the Bank would have incurred if it had implemented the new EEOC guidelines during a 20 month period from January 1971 to August 1972. Since the Bank has both a large, fairly young female staff and a generous sick leave policy, an analysis of the Bank's costs should provide a fair example of the costs employers generally could expect from the liberalization of benefits.

As Table 1 shows, the Federal Reserve Bank of Boston had approximately 1560 employees in 1971 and 1972, 60 percent of whom were women.[7] Half of the female employees were under 34 years old and were thus in the prime childbearing years. About 30 percent of the women workers were under 25 and single when hired.

Turnover was quite high among the female staff under age 34 (32 percent in 1971 and 25 percent in 1972), with pregnancy being a significant factor. Pregnancy accounted for 12 percent of the turnover in this age group in 1971 and 4.5 percent of the turnover in 1972.

At the Bank employees accumulate 18 days of sick pay a year at full pay for each year of employment, and 18 days a year at half pay, to be used after their full-day sick benefits run out. Employees may accumulate up to 270 days of sick leave at full pay. Most firms offer a less generous sick leave policy by severely limiting the accumulation of sick leave and covering longer illnesses under temporary disability insurance plans which generally pay only half to two-thirds of the employee's wages. Most disability plans generally exclude pregnancy-related ills from coverage, but under the new EEOC guidelines these restrictions must be removed. As a result of the Bank's sick leave policy, in this case study it is assumed that pregnancy leaves would be paid under accumulated sick leaves rather than under temporary disability insurance. Since this contains a large proportion of days at full pay, the analysis overstates somewhat the costs of firms which would cover maternity leaves under disability plans.

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[7] Officers of the Bank, part-time employees and very short term employees who are not eligible for medical benefits have been excluded from all data.



Since it is impossible to determine beforehand how many days a pregnant employee will be unable to work due to pregnancy-related disabilities, we used two different assumptions in the analysis. In Case A, we assumed that pregnant women would work until the end of the eighth month of pregnancy and then take one month of sick leave at full pay (if they had accumulated that many sick days). After the baby's birth, the women would take a six-week maternity leave while continuing to receive accumulated sick pay benefits. In Case B, we assumed that pregnant employees would take all their accumulated sick days either during their pregnancy or during their maternity leave. On average, employees taking maternity leaves had accumulated 5½ weeks of sick pay at full pay and 8½ weeks at half pay in 1971 and 10½ weeks at half pay in 1972. On average then, women in Case B took a maternity leave of 14 to 16 weeks at 70 percent of full pay over the entire period. In both Cases A and B it should be remembered that a doctor must certify that a woman cannot work for medical reasons for the employee to be entitled to any medical benefits. An insignificant number of women could be expected to take longer maternity leaves for medical reasons than is assumed in Case B.

Table 2

COSTS OF PAYING ACCUMULATED SICK LEAVE PAY DURING MATERNITY LEAVES

Federal Reserve Bank of Boston

| | *Case A* *Assumes woman works through 8th mo. and then takes 6 wk. maternity leave. (Maximum 10 wk. leave.)* | *Case B* *Assumes woman collects all accumulated sick pay. (14-16 week average leave.)*[1] | *Women Under Age 35* *Average Hourly Wages, Women Under Age 35*[2] | *Increase in Hourly Wage Due to Maternity Benefits* A | B | *Percentage Increase in Hourly Wages* A | B | *Increase in Total Bank Sick Pay Benefits* A | B |
|---|---|---|---|---|---|---|---|---|---|
| 1971 | $16,945 | $32,731 | $3.29 | $0.02 | $0.04 | 0.6% | 1.2% | 4.6% | 8.9% |
| Jan-Aug 1972 | $6,907[3] | $11,382 | $3.25 | 0.01 | 0.02 | 0.3 | 0.6 | 2.9 | 4.8 |
| 1972 (annual rate) | ($10,361) | ($17,073) | | (0.01) | (0.02) | (0.3) | (0.6) | | |

[1] Maximum of 9 months of full and half days.

[2] The wage data used were basic wages, excluding overtime, in August 1972. These wages were also used for computing costs as of December 1971, except for 1971 terminations where we used 1971 wages. The use of 1972 data should not appreciably bias 1971 costs since the only Bank-wide review of salaries during this 20 month period occurred in November 1971 and we are using end of period data rather than annual averages. Some persons will have received merit increases between November 1971 and August 1972 and by using 1972 data we are biasing 1971 costs upward somewhat.



Table 3

IMPACT OF LIBERALIZED MATERNITY BENEFITS ON HOURLY LABOR COSTS: ACCUMULATED SICK PAY

Federal Reserve Bank of Boston

| | *Average Hourly Wage, Total Bank Labor Force* | *Increase in Hourly Wage Due to New Maternity Benefits* *Case A* | *Case B* | *Percentage Increase in Hourly Wages* *Case A* | *Case B* |
|---|---|---|---|---|---|
| 1971 | $4.15 | $.006 | $. 01 | 0.1% | 0.2% |
| Jan-Aug 1972 | 4.15 | .004 | .006 | 0.1 | 0.1 |

**Paying Accumulated Sick Pay**

Table 2 indicates the costs of the liberalized benefits. In 1971, under the reasonable but modest assumptions of Case A, payroll costs would have been raised by $16,945 in 1971 and by $6,907 in the first eight months of 1972. Under the more liberal assumption of Case B, $32,700 would have been added to payroll costs and in the first eight months of 1972, $11,400 would have been added (or $17,100 at an annual rate). The difference in the annual costs is due in part to chance (there were 22 pregnancies in 1971 compared to 8 in 1972) and in part to the fact that in 1971 one quite high wage employee, who had a large number of accumulated sick days, took a maternity leave. These liberalized benefits would have increased the cost of sick pay benefits in 1971 by 4.6 percent in Case A and by 8.9 percent in Case B.

To put these additional benefit costs into perspective, they are compared with the total wage bill for women under age 35 to indicate how much these additional benefits increase the hourly wage of women in this age group.

As Table 2 clearly shows, on an hourly basis, even in Case B, these increased costs averaged out to a 4 cent rise in hourly wages in 1971 and a 2 cent rise in 1972, or an increase of 1.2 percent in hourly wage costs in 1971 and 0.6 percent in 1972. In Case A, the increase in hourly costs was about half as much.

We have used women under age 35 as our base rather than all women employees or all employees, in order to confront the question of whether the cost of these maternity benefits is so great that employers would discriminate against hiring young women. Our analysis indicates that this should not be the case. This is especially true since the institution of these benefits is a one-time adjustment in levels of compensation, rather than continuing increases. That is, wage levels would rise in the year these benefits were introduced to a base, at the very most, 1.2 percent higher.

Since higher labor costs generally lead to higher prices, it is of interest to determine how much these liberalized benefits raise total labor costs. In this case, the relevant wage base for calculations is the total labor force, male and female. As Table 3 shows, labor costs per worker hour would have risen in 1971 only one cent an hour under assumption B, and by ½ cent an hour under assumption A. The 1972 costs averaged about half as much. Thus, the instititon of these liberalized benefits would have very little inflationary impact.

Table 4 indicates the actual costs incurred by the Bank for sick pay and disability benefits by age and sex of workers. For male workers over 35, these medical benefits averaged 17 cents an hour per worker in 1971 and 20 cents in 1972, while for women workers over age 35, they cost 19 cents an hour in 1971 and 17 cents an hour in 1972.



**Table 4**

**SICK PAY AND DISABILITY BENEFITS AS A PROPORTION OF COSTS, BY AGE AND SEX OF WORKER**

**Federal Reserve Bank of Boston**

| | *Men* | | | *Women* | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | | *1971* | | | | |
| *Age* | *Average Hourly Pay* | *Medical Benefits, Hourly Basis* | *As % of Average Hourly Pay* | *Average Hourly Pay* | *Medical Benefits, Hourly Basis* | *As % of Average Hourly Pay* | *Cost with Liberalized Benefits, Per Hour* A | B |
| Under 25 | $3.86 | $0.08 | 2.1% | $3.09 | $0.09 | 2.9% | $0.12 | $0.13 |
| 25 – 34 | 5.40 | 0.10 | 1.9 | 3.71 | 0.11 | 3.0 | | |
| 35 – 54 | 5.45 | 0.13 | 2.4 | 3.92 | 0.18 | 4.6 | | |
| 55 & over | 5.11 | 0.24 | 4.7 | 3.89 | 0.19 | 4.9 | | |
| | | | | *Jan-Aug. 1972* | | | | |
| Under 25 | 3.67 | 0.07 | 1.9 | 2.93 | 0.09 | 3.1 | $0.11 | $0.12 |
| 25 – 34 | 5.16 | 0.09 | 1.7 | 3.83 | 0.13 | 3.4 | | |
| 35 – 54 | 5.55 | 0.16 | 2.9 | 3.87 | 0.16 | 4.1 | | |
| 55 & over | 5.09 | 0.28 | 5.5 | 3.96 | 0.20 | 5.1 | | |

For men under 35, the costs were 9 cents an hour in 1971, and 8 cents an hour in 1972. For women under 35, these actual medical costs were 10 cents an hour in both years. After liberalizing benefits to include paid maternity leaves, as Table 4 shows, hourly costs for women under age 35 could have risen in 1971 to 12 cents an hour under assumption A and to 13 cents an hour under assumption B. Even in Case B, the cost of these medical payments to women under age 35 would still be less than that to women over 35 and to men over age 55.

**Conclusion**

This examination of the costs of implementing the new EEOC guidelines clearly indicates that the costs would have a negligible impact on overall labor costs and would not raise the effective wages of young women workers enough to injure them in the job market.

**PLAINTIFFS' EXHIBIT NO. 80**
**Citizens Advisory Council on the Status of Women, Job Related Maternity Benefits, November, 1970.**

# JOB-RELATED MATERNITY BENEFITS

**November 1970**

**CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN**
**U.S. Department of Labor, Room 4211**
**Washington, D. C. 20210**



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Sr. Director & Executive Officer
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Warren Petroleum Corp.

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Mrs. Catherine East
Executive Secretary

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**CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN**
**Washington, D. C. 20210**

**CHAIRMAN**
**Mrs. Jacqueline G. Gutwillig**
**Arizona**

## JOB-RELATED MATERNITY BENEFITS

The Council adopted the following Statement of Principles on October 29, 1970:

> Childbirth and complications of pregnancy are, for all job-related purposes, temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, union, or fraternal society. Any policies or practices of an employer or union, written or unwritten, applied to instances of temporary disability other than pregnancy should be applied to incapacity due to pregnancy or childbirth, including policies or practices relating to leave of absence, restoration or recall to duty, and seniority.
>
> No additional or different benefits or restrictions should be applied to disability because of pregnancy or childbirth, and no pregnant woman employee should be in a better position in relation to job-related practices or benefits than an employee similarly situated suffering from other disability.

### General Background

1. There is now no uniformity of treatment for disability because of pregnancy under existing job-related insurance and leave with pay systems providing protection against medical costs and/or loss of income due to

temporary disability. In the United States absences from employment necessitated by childbirth or complications of pregnancy are sometimes covered by job-related temporary disability insurance and/or sick leave plans. Sometimes such absences are excluded from such plans or included with special limits. Job-related health insurance plans may cover hospital and/or other medical costs associated with pregnancy; may cover such costs with special limitations; or may not cover maternity medical costs at all. Sometimes employees have reemployment rights after absence of a given number of weeks due to pregnancy; sometimes pregnancy is reason for discharge.

Considerable interest has been evidenced in this subject by public and private employers and unions in recent months. The Council hopes, in answer to requests, that it may be of service by suggesting what seems to us to be the most equitable and reasonable approach under our present system of private and government social benefits.

2. There are no Government data available on the extent to which medical costs of childbirth are covered in private health insurance programs; nor are there any data available on the extent to which loss of income due to absence because of childbirth is covered by private sick leave or temporary disability insurance programs.

Federal Social Security System

3. The Federal social security system of the United States does not have a national health program or insurance against loss of income for employed persons who are unable to work because of temporary disability. European countries provide maternity benefits within such



a framework. In no European country does an employer pay a higher contribution for female employees than for male employees.[1]

Federal Government Employees

4. The Federal government has for its own employees, a sick leave system providing 13 days of sick leave at full pay per year, which may be accumulated without limit. Sick leave, vacation leave, and leave without pay may be used for absences due to pregnancy. Government employees have the option, with the Government sharing in the cost, of subscribing to a variety of health insurance plans, all of which include costs of delivery and pre-natal care in their family plan coverage.

   Some State governments have sick leave systems, which may or may not cover absences because of childbirth.

Temporary Disability Insurance

5. Insurance against loss of income for employed persons unable to work temporarily because of disability is usually called "temporary disability insurance;" it may be government-sponsored or provided by employers, unions, or fraternal groups. Temporary disability insurance usually provides for less than full pay for maximum periods of about 26 weeks. Sick leave plans ordinarily provide full pay for short periods each year, with some plans permitting accumulations of unused leave from year to year.

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[1] U.S. Department of Health, Education, and Welfare, Social Security Administration: Social Security Programs throughout the World–1969, Research Report No. 31, pp. 10, 14, 22, 58, 62, 72, 74, 80, 86, 98, 110, 114, 136, 154, 164, 176, 178, 180, 196, 202, 204, 218, 226, and 242.

6. Government-sponsored temporary disability insurance systems exist in California, Hawaii, New Jersey, New York, Rhode Island, and Puerto Rico. The railroad industry also has a temporary disability insurance system administered by the Railroad Retirement Board. These systems are financed solely by employee contributions or by joint employer-employee contributions.

   Of the State laws, only those of New Jersey and Rhode Island require payment of benefits for a normal delivery, and they put limitations on these benefits which are not applicable to other disabilities.[2] Cases of abnormal delivery are usually covered.

7. Some employers and some State temporary disability systems treat childbirth as a temporary disability and some consider it a "normal physiological condition." The Council concluded that for purposes of employment it is a temporary disability. Economically it makes no difference whether an employee is unable to work at his regular job because of pregnancy or because of hernia, ulcers, or any other illness or accident; in any case he or she suffers loss of pay and has extra medical expenses.

   The notion that pregnancy is a "normal physiological condition" has been advanced as a reason for denying women benefits provided for temporary disabilities and

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[2] Those interested in further details on temporary disability insurance in the U.S. should see the Citizens' Advisory Council on the Status of Women, Report of the Task Force on Social Insurance and Taxes, p. 8 et seq. and p. 45 et seq.; also U.S. Department of Labor, "Comparison of State Unemployment Insurance Laws," BES No. U-141, Rev. August 1970.



occasionally as a reason for providing leaves of absence not provided for other disabilities. Since there are no existing systems or guides for giving leave of absence or insurance benefits for "normal physiological conditions," a variety of policies for this special category result. Some of these create an inequity between benefits because of disability due to pregnancy and benefits because of all other temporary disabilities. A woman about to give birth is temporarily disabled for work, is under the care of a physician, and is usually hospitalized.

**Special Benefits**

8. The Council considered whether special benefits for maternity not provided for other temporary disabilities are ever justified. Since women are subject to all the other disabilities of mankind, it can be argued that additional benefits are needed for pregnancy. This line of reasoning treats women as a class and ignores individual differences. The essence of the fair employment concept is individual rather than class treatment.

   Individual women who are not pregnant and individual men may be absent more in a given period of time because of temporary disabilities than women who are having babies during that period. The 1961 survey of the Civil Service Commission of sick leave usage by Federal employees shows small differences in the percentages of men and women having zero sick leave balances and negative sick leave balances (those who have been advanced sick leave), indicating that the present system is inadequate for a small percentage of both men and women.

   Annual Public Health Service Surveys show that women and men lose about the same amount of time

from work because of acute disabilities, including childbirth and complications of pregnancy. In 1968, men averaged 5.2 days per year and women 5.9 days per year; in 1967 it was 5.3 and 5.6 days per year.

Giving special treatment for pregnancy will inevitably lead to situations in which men and other women who are suffering from disabilities other than pregnancy will have less benefits than pregnant women. This is not sociologically or economically justified and would be divisive. In addition, in the United States where the employer frequently pays all or part of the cost of such benefits, such policies could very well result in reluctance to hire women of childbearing age.

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**PLAINTIFFS' EXHIBIT NO. 81**

Citizens Advisory Council on the Status of Women, Information from Insurance Industry Relating to Coverage of Childbirth in Health Insurance and Temporary Disability Insurance.

CITIZENS' ADVISORY COUNCIL
ON THE STATUS OF WOMEN
Room 4211, Department of Labor Building
Washington, D.C. 20210
202-961-3791

**Information from Insurance Industry Relating to Coverage of Childbirth in Health Insurance and Temporary Disability Insurance**
(Employment-Related Group Policies)

Information from a representative of the Aetna Insurance and Casualty Company, which writes a goodly percentage



of health insurance and temporary disability insurance policies, shows that the difference in cost between health insurance coverage that includes care for pregnancy and childbirth and that which does not is small. Likewise, the cost of including a maternity benefit in temporary disability insurance is small. Most employment-related group health insurance policies include pregnancy as do an estimated one-half of the temporary disability insurance policies.

Aetna has given the Council *estimated* premiums for a work group that is made up of 31 to 40 percent of female employees. The estimated rates are the rates before discount for size; larger employers would pay less. For a typical good hospital, surgical and major medical package, the cost for coverage for a family would be $42.11 per month if pregnancy were not included. If maternity benefits are included for female employees only (not for wives of male employees) the cost would be 92¢ per month more per employee. If the wives of employees are included this would add $4.07 per employee to the cost.

Aetna pointed out that these figures are averages. Variations in medical costs among regions of the country and among types of industry would influence actual premiums, as well as discounts for size. The proportionate increases for pregnancy coverage, however, would be about the same whatever the basic cost.

The Aetna experts estimated that for a typical employer of 500 employees, with 31 to 40 percent female employees of an average age and marital status mix, a good hospital, surgical, major medical package without maternity coverage would have a total cost of $194,400 per year. With full coverage for both female employees and wives of male

employees, the cost would be about $212,900, or a 9 percent difference, most of the difference being for coverage of the wives of male employees.

A surprisingly high percentage of health insurance policies cover the spouses of male employees for maternity benefits but exclude the female employees. A Health Insurance Association study of employment-related group policies issued in 1969 showed that 61 percent covered maternity benefits for wives *and* female employees, *9 percent* had coverage of wives of male employees only, and 1 percent had coverage for the female employees only. The remaining 29 percent of policies written did not cover maternity.

The Council has also been given estimates on cost of including maternity leave in a typical temporary disability insurance policy for an employer who has 31 to 40 percent female employees. The Aetna experts state that a $60.00 a week benefit beginning the 8th day after an accident or the onset of illness and payable for a maximum of 26 weeks, would cost $5.70 per month per employee without a benefit for maternity leave. Aetna has had experience only with coverage of maternity benefits for a maximum of 6 weeks. Such a benefit would add 60¢ per month per employee to the cost – approximately a 10 percent increase. It was not clear as to why Aetna policies include only a 6-week benefit.

A 1969 study by the Society of Actuaries of temporary disability insurance policies issued by 11 large insurance companies showed that 9,700 policies issued had some maternity benefit, whereas 10,700 did not. In other words, a little less than one-half of these group policies issued included coverage for maternity. This study did



not include policies issued under State temporary disability insurance laws.

In summary, the economic data available concerning cost and the extent of present coverage indicates that it is entirely feasible for employers to provide the same economic benefits for absence due to childbirth as for absence due to other temporary disabilities.

June 9, 1971

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**PLAINTIFFS' EXHIBIT NO. 82**
Jacqueline Gutwillig, Chairman, Citizens Advisory Council on the Status of Women, Address before Conference of Interstate Association of Commissions on the Status of Women, St. Louis, Missouri, June 19, 1971.

Address by
Jacqueline G. Gutwillig, Chairman
Citizens' Advisory Council on the Status of Women
June 19, 1971
Conference of Interstate Association of Commissions
on the Status of Women
St. Louis, Missouri

* * *

A word about the Council for those of you who are not familiar with us. In 1963 President Kennedy's Commission on the Status of Women in its report, *American Women*, recommended the establishment of a Council along with an Interdepartmental Committee on the Status of Women. These two groups were established immediately by Executive Order. The Interdepartmental Committee is composed of Cabinet officers and Directors of special

agencies. The Council members are private citizens appointed directly by the President and serve for an indeterminate period.

* * *

In May 1970 the Interdepartmental Committee on the Status of Women asked the Council to evaluate a report prepared by a subcommittee of the Interdepartmental Committee appointed by the previous Administration. The report included a proposal for additional leave at part pay for maternity purposes for Federal employees. (Federal employees can use sick leave and annual leave for purposes of childbirth and can take leave without pay as necessary to supplement earned leave.)

A project group of three Council members was assigned to prepare a working paper which the entire Council discussed during its subsequent meeting. It was clear from that discussion that the Council felt it was very important not to provide benefits that would discourage Federal agencies from hiring women of childbearing age. We did not want to damage women's opportunities for employment under the guise of protecting them. Furthermore, the members felt that the essence of equal opportunity was to treat women and men as individuals, not as classes.

Among the background materials considered by the Council members at that meeting were an excerpt from a statement presented by Dorothy Haener of the United Automobile Workers Women's Department to the White House Conference on Food, Nutrition, and Health; the recommendations of the 1963 President's Commission on the Status of Women; and the 1968 Council Task Force Report on Social Insurance and Taxes. Our examination of their recommendations indicated that these groups had the same concerns as we do today. We also reviewed



provisions for maternity leave in Western European countries.

Following the request for the Interdepartmental Committee to look at the Federal Government system for its own employees, there were several developments that led us to broaden the scope of our consideration to cover maternity leave generally. A number of requests for technical advice on the subject came to the Council from private employers and unions, including unions representing airline stewardesses, who only recently had won the right to continue employment after marriage. In addition, the Equal Employment Opportunity Commission was reviewing its case decisions on maternity preparatory to issuing formal guidelines. The Council, therefore, decided to try to develop a general policy recommendation suitable for private and public employers.

We found in our review and discussion that some semantic confusion exists because maternity leave has been a broad term to encompass not only leave for childbirth but in some contexts for the total period of pregnancy, and subsequent leave for child care. This confusion no doubt arose because in earlier years many women were required to stop work as soon as they knew they were pregnant. There are still some public school systems with this kind of requirement. *Most* school systems require that a teacher begin "maternity leave" at the end of the 4th or 5th month. Furthermore a few school systems still require that teachers cannot return to teach for a full year following the birth of a child. All these various kinds of leave have been referred to as maternity leave. I suspect that some of the reactions we get from employers when discussing this subject arise from this confusion.

The Council decided that for *job-related purposes* maternity leave should be that period of time a woman is unable to work because of childbirth or complications of pregnancy. We saw no rationality in requirements that pregnant women take leave while they are still physically able to work. Such policies no doubt are a hangover from the days, not so ancient, when pregnant women were shut up at home – when pregnancy was considered obscene. Naturally we held no brief for such views.

The subject of child rearing we felt was a separate topic that required separate treatment as both men and women have the responsibility to rear children. Therefore rearing of children is not considered in our paper on maternity benefits.

The Council's policy relates only to the period of time a woman is unable to work because of childbirth or complications of pregnancy. I believe this is one of the most important contributions of our consideration of this issue – that is, the semantic separation of leave for childbirth from leave for child rearing.

We also found in our review of background materials that absence due to childbirth is sometimes treated as a temporary disability and sometimes as a special condition warranting special arrangements.

The Council concluded that childbirth and complications of pregnancy are temporary disabilities *for employment purposes* because they have all the significant characteristics of temporary disabilities – (1) loss of income due to temporary inability to perform normal job duties, and (2) medical expenses. Additionally, childbirth has two clear characteristics which are associated with only the



more severe temporary disabilities – hospitalization and possible death.

The theory that pregnancy is a "normal physiological condition" has been advanced as a reason for treating pregnancy as a special condition warranting special arrangements. I don't know what "normal physiological condition" means; the more one analyzes the words, the more confusing they become, but I'm sure of one thing – medical care, hospitalization, and death are not normally associated with this phrase. I also know as a fact that the *results* of applying this concept has generally been to deny women benefits to which they are justly entitled.

Another reason that is advanced for denying women the benefits provided for other temporary disabilities is that pregnancy is "voluntary". We all know this is a weak rationalization. Pregnancy is very frequently not voluntary and besides temporary disability benefits *are* provided for other equally voluntary conditions – such as attempted suicide. Pregnancy is no more voluntary than injuries from an automobile accident while driving intoxicated and no more voluntary than the conditions associated with long term smoking.

Since we were naturally concerned with the economic impact on employers of our conclusion that childbirth is a temporary disability, we gathered all the data we could find indicating economic consequences.

We found from the annual health interview survey conducted by the Public Health Service, that in 1968 men lost on the average 5.2 days per year because of disabilities and women lost 5.9 days. In 1967, the figures were 5.3 and 5.6 days per year. In 1966, men lost more time

from work than women – 5.9 days for men and 5.6 days for women. These figures include time lost from work because of delivery and complications of pregnancy and the post-childbirth period.

The Public Health Service has done a special tabulation for us with a finer breakdown of disability conditions than is published in their regular material, which shows the relatively minor amount of time lost from work because of deliveries and disorders of pregnancy and the post-childbirth period. In the year July 1966 to June 1967 an average of *two-tenths* (.2) of a day per employed woman was lost from work for this reason. By contrast almost eight-tenths (.8) of a day was lost by women because of injuries and 1.0 day by men because of injuries. Women lost 1.3 days per year because of respiratory conditions and men lost 1.2 days. In other words, time lost from work for childbirth is only a fraction of the time lost because of other conditions.

We had a representative of the Aetna Insurance and Casualty Company, which writes a high proportion of health insurance and temporary disability insurance policies, present at our second discussion on maternity leave. The Aetna company prepared estimates for us in considerable detail but I shall give you only those data and highlights that will help you understand better how we arrived at our conclusion.

Information from that company shows that the difference in cost between health insurance coverage that includes care for pregnancy and childbirth and that which does not is very small. Likewise the cost of including a maternity benefit in temporary disability insurance is small. Interestingly enough most employment-related group health



insurance policies include pregnancy benefits, but pregnancy benefits are included in approximately only one-half of the temporary disability insurance policies.

A 1969 study by the Society of Actuaries of temporary disability insurance policies issued by 11 large insurance companies showed that 9,700 policies issued had some maternity benefit, whereas 10,700 did not. In other words, a little less than one-half of these group policies issued included coverage for maternity. This study did not include policies issued under State temporary disability insurance laws.

However, we were surprised to learn of the number of health insurance policies that cover the spouses of male employees for maternity benefits but exclude the female employees. A health insurance association study of employment-related group policies issued in 1969 showed that 61 percent covered maternity benefits for wives *and* female employees, *9 percent* had coverage of wives of male employees only, and 1 percent had coverage for the female employees only. The remaining 29 percent of policies written did not cover maternity.

In recent discussions about our recommendations, we have been asked whether insurance companies will write health insurance and temporary disability insurance policies covering maternity. The answer is categorically yes. The national experts we have been in touch with have never heard of an insurance company that would not. The general rule is that insurance companies will write any coverage the group wants. We did learn that all the temporary disability insurance policies written by Aetna have had a maximum coverage of six weeks for maternity, which seems unduly short and would not be in line with our recommendation unless comparable maximum periods

were set for other disabilities. We were not able to find out whether this was Aetna policy or whether no employer or union had wanted a longer coverage.

We have also been asked whether our policy would adversely affect an employer with respect to workmen's compensation laws. The experts at the Federal Labor Department tell us that there would be no effect unless pregnant women have a higher accident rate than other employees and even then only larger employers would be affected. The cost of workmen's compensation coverage for the largest employers (about one-fourth of the total employers, employing about three-fourths of covered employees) is based in part on an experience rating, or actual costs of covering that employer. There are no known data indicating any higher accident rate for pregnant women.

In summary, the economic data we gathered concerning cost and the extent of present coverage indicated that it is entirely feasible for employers to provide the same economic benefits for absence due to childbirth as for absence due to other temporary disabilities.

After these findings we adopted the Statement of Principle. A draft of a back-up paper was then prepared and sent to Council members by mail for comment. We distributed the finished paper as widely as our resources permitted, sending it to Chairmen of State commissions, persons on our mailing list who had specifically requested our publications, and a limited list of reporters who had authored positive stories in the past. A number of newspapers did stories, and one – the Louisville Courier-Journal – did a survey of practices of local employers.

Since the paper was issued, several teachers have brought court actions to try to change the practices of school boards. In both of the cases where we have secured full



information – Chesterfield County, Virginia and Cleveland, Ohio – the Council's recommendations were cited in the plaintiffs' briefs. In the Chesterfield County case, Judge Robert R. Merhige, Jr. adopted the Council's position in the following excerpt from his opinion:

> The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment.

In an almost identical case in Cleveland, Ohio, a Federal district court judge ruled that such a provision was not a violation of the Fourteenth Amendment. This case is being appealed.

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**PLAINTIFFS' EXHIBIT NO. 83A**
**Elizabeth Duncan Koontz, Childbirth and Child Rearing Leave: Job Related Benefits, 17 N.Y. Law Forum No. 2 (1971)**

# CHILDBIRTH AND CHILD REARING LEAVE: JOB-RELATED BENEFITS

ELIZABETH DUNCAN KOONTZ*

## I. DEFINITION OF TERMS

Discussions of maternity leave in the United States have been characterized by semantic confusion, much emotion, and few facts. Maternity leave is sometimes used to refer to leave for a period encompassing all of pregnancy and six months to a year following childbirth. To some the term means a period of four months or so prior to childbirth and six months to a year following childbirth.[1] Others use the phrase to include only the period during which a woman is actually disabled by childbirth for paid employment outside the home – a very short period for most women.[2] To some it means a period during which

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1 *See* Address by Jacqueline G. Gutwillig, Chairman of the Citizens' Advisory Council on the Status of Women, at the Conference of Interstate Association of Commissions on the Status of Women, in St. Louis, June 19, 1971 [hereinafter cited as Gutwillig Address].

2 This is a standard often applied in state legislation providing for maternity coverage under temporary disability programs. *See* text and accompanying footnotes pp. 484-86 *infra:* U.S. Dep't of

(cont'd)



the employee is paid; others are referring to leave without pay.[3] Most persons concerned with women's rights include in their concept of maternity leave some right to reemployment without loss of seniority.[4]

The confusion arose, no doubt, because in earlier years many women were required by employers to stop work as soon as they knew they were pregnant and were not permitted to return for a year or two following childbirth, if they were permitted to return at all.[5] Thus, liberalization of limits on the pregnant woman's right to work has varied according to the views of legislators and private employers.

The Citizens' Advisory Council on the Status of Women[6] studied the subject and concluded that for job-related

(Footnote 2 cont'd)

Labor, Growth of Labor in the United States 294 (1967); U.S. Dep't of Labor, 1969 Handbook on Women Workers 276-77. A number of states prohibit employment of women in one or more occupations for several weeks preceding and following childbirth. *Id.* at 276.

3 *See generally* Citizens' Advisory Council on the Status of Women, Repott of the Task Force on Labor Standards 32 (1968).

4 *E.g.*, Citizens' Advisory Council on the Status of Women, Job Related Maternity Benefits (Statement of Principles adopted on Oct. 29, 1970), *reprinted in* Citizens' Advisory Council on the Status of Woman, Job Related Maternity Benefits 1 (Nov. 1970); National Organization For Women, What It's All About (goals) (undated).

5 Gutwillig Address, *supra* note 1, at 4.

6 The Council was established on Nov. 1, 1963, by Exec. Order No. 11,126, 3 C.F.R. 971 (1964), by President John F. Kennedy on the advice of the President's Commission on the Status of Women and is composed of twenty private citizens who are appointed by the President for indeterminate terms. U.S. Dep't of Labor, 1969 Handbook on Women Workers, *supra* note 2, at 294.

purposes, maternity leave should be defined as that period (or periods) of time a woman is unable to perform her job because of childbirth or complications of pregnancy.[7] The Council concluded that it is irrational to require pregnant women to take leaves of absence while they are still able to work. Such policies are left over from the days, extending into this century, when pregnant women were forced to remain at home–when pregnancy was viewed as "obscene".[8] This feeling is still widespread, frequently disguised as concern for the protection of women's interests.[9] Perhaps it would help to alleviate the semantic confusion if a new term were adopted to refer to leave for childbirth and complications of pregnancy–a term such as *childbirth leave.*

The subject of *child rearing* is a separate topic, requiring separate consideration and treatment. Only women can bear children, but both men and women are capable of rearing children. The conceptual framework of childbearing and child rearing fits both present and future reality better than a conceptual framework that assumes that childbearing and child rearing are both solely the responsibility of women. The young women feminists insist, quite logically, that assumption by men of a full share in the rearing of children would contribute to the welfare of the whole family.[10]

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7 Citizens' Advisory Council on the Status of Women, Women in 1970, at 4 (1971).

8 Gutwillig Address, *supra* note 1, at 5.

9 *See* U.S. Dep't of Labor, Laws on Sex Discrimination in Employment 7 (1970).

10 *See* Transmittal Memorandum on Job-Related Maternity Benefits from Jacqueline G. Gutwillig, Chairman to Citizens' Advisory Council on the Status of Woemn (undated).



## II. RECOMMENDATION OF THE CITIZENS' COUNCIL ON THE STATUS OF WOMEN

In 1970, the Citizens' Advisory Council, after extensive study, adopted a forceful Statement of Principles, suggesting that childbirth and incapacity due to pregnancy be treated by employers and health insurers as any other temporary disability. The Council eschews discriminatorily favorable treatment for pregnant women, as well as discrimination against these workers.[11] The recommendation is especially important in view of the many state laws and judicial decisions relating to maternity and employment. There is presently a trend in both of these areas to permit women to continue to work closer to the time of childbirth, but legislative progress particularly has been sluggish.

* * *

*State Temporary Disability Insurance Laws*

Rhode Island in 1942 was the first state to adopt a compulsory temporary disability insurance program.[28] It was financed entirely by employee contributions of one percent of wages to a monopolistic state-administered fund. Rhode Island had few guides to follow, and its legislation was quickly drawn. The original definition of sickness provided as follows: "An individual shall be deemed sick in any week during which, because of his physical or mental condition, he is unable to perform any service for wages."[29] In 1946 the definition was changed

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28 Ch. 1200. § 1. [1942] R.I. Pub. 1..

29 Ch. 1200. § 2. [1942] R.I. Pub. 1..

to read: "An individual shall be deemed to be sick in any week in which because of his physical or mental condition, he is unable to perform his regular or customary work." [30]

The Unemployment Compensation Board held that pregnancy came within this definition and was, therefore, compensable under the law.[31] Unfortunately, however, the board did not treat pregnancy like other physical conditions. Eligibility for benefits in cases of pregnancy did *not* depend on actual inability to work as required in the law, but was based upon the existence of the condition of pregnancy. In effect, any time a woman was not working during the entire period of pregnancy, regardless of the reason, she could draw benefits (provided, of course, she met the basic requirements for eligibility.)[32]

In addition, the basic requirements for eligibility generally were so loosely drawn that a woman who voluntarily withdrew from the labor market in January, 1943, after earning fifty dollars a week for the first two weeks of the month, and who became pregnant in January, 1945, could receive benefits of $7.25 a week for 4.6 weeks in January-March 1945, two years after she had withdrawn from the labor market.[33] Under these conditions the payments for pregnancy were a heavy drain on the system. By the benefit year 1949-1950, the pregnancy claims

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30 Ch. 1744. § 2. [1946] R.I. Pub. 1..

31 G. Osborn, *infra* note 40, at 11.5

32 U.S. Dep't of Labor, Bureau of Employment Security, Rhode Island Disability Insurance Program 41 (July 1954).

33 *Id.*



constituted 22.62 percent of all claims and 30.4 percent of all benefits paid.[34]

Rhode Island has since drafted more stringent basis eligibility requirements, and has moved from its unduly loose interpretation of inability to work during pregnancy to placing greater restrictions on pregnancy benefits than are placed on benefits for other disabilities. A flat dollar limit of $250 is allowed for pregnancy. For the calendar year 1970, about ten percent of the eligible claims and seven percent of the amounts paid were for pregnancy.[35]

Since Rhode Island was the first state to adopt a temporary disability insurance system, its experience was scrutinized by other states. Its initial costly experience with pregnancy probably led to the exclusion of pregnancy in existing temporary disability insurance programs.[36]

New Jersey, which established its system in 1948, did provide in 1961 for coverage of pregnancy for a period beginning four weeks before the expected date of childbirth and ending four weeks after childbirth.[37] Complications of pregnancy before and after this period are not

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34 *Id.* at 65.

35 Dep't of Employment Security, 1970 Statistical & Fiscal Digest 38 (1971); Letter from Dep't of Employment Security to Citizens' Advisory Council on the Status of Women, Aug. 4, 1971.

36 U.S. Dep't of Labor, Womens' Bureau, Maternity Protection of Employed Women, Bull. No. 240, at 9 (1952). *See also* N. Sinai, Disability Compensation for the Disabled Sick 59 (1949).

37 N. J. Stat. Ann., tit. 43, ch. 21. § 25 (1962).

compensable.[38] About twelve percent of New Jersey's total benefit payments in 1970 were for pregnancy.[39]

Grant Osborn, in a study of temporary disability insurance, states the advantages and disadvantages of including benefits for pregnancy.[40] He points out that many women fail to return to the labor force after pregnancy and states that "many believe that payment of disability benefits to nonpermanent members of the labor force does not further the purpose of the program and should be prohibited."[41] In advancing the contrary view, he points out that "to deny benefits in all cases of pregnancy constitutes discrimination against a significant group in the labor force."[42] According to Osborn, employer groups and the insurance industry seem to be indifferent to the issue of pregnancy benefits; labor is divided, but the consensus is that higher weekly basic benefits would be preferable to granting benefits for pregnancy.[43]

*State Unemployment Insurance Laws*

Thirty-eight states have special pregnancy disqualifications in their unemployment insurance laws.[44] A comprehensive statement concerning unemployment insurance

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38 N.J. Stat. Ann., tit. 43, ch. 21. §39(c) (1962).

39 N.J. Dep't of Labor & Indus., Div. of Planning & Research, Temporary Disability Insurance Statistics for New Jersey 1949-1970 tables 25 & 30 (May 1971).

40 G. Osborn. Compulsory Temporary Disability Insurance in the United States (1958).

41 *Id.*

42 *Id.*

43 *Id.*

44 *See* Manpower Admin., U.S. Dep't of Labor, Comparison of State Unemployment Insurance Laws. Comparison Revision, ser. 2, No. 4 (Jan. 5, 1970).



and pregnancy is included in the 1968 report of the Task Force on Social Insurance and Taxes of the Citizens' Advisory Council on the Status of Women. The Task Force points out that women are usually physically able to work during part of their pregnancies and thus fail to meet basic eligibility requirements for the entire period. The report also notes that women who are required by pregnancy to leave their jobs encounter obstacles to reemployment.[45]

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45 The Task Force stated:

> the special provisions arise out of the difficulties of determining the benefit eligibility of pregnancy women. Since, under all our unemployment insurance laws, benefits are payable only to those unemployed workers who are able to work and available for work, a pregnant woman who is physically unable to work or does not want to work is not eligible for benefits under the normal 9 months of their pregnancy, even though they would all have some period of inability to work, at least at the time of childbirth. How long before confinement a woman becomes unable to work depends also on the nature and physical demands of that job.
>
> If a pregnant woman loses her job, her pregnancy presents an obstacle to reemployment. There are, however, serious policy implications involved in measuring an individual's availability for work in terms of employer willingness to hire individuals in that category whether the category is pregnant women, workers over 55, the physically or mentally handicapped, or members of minority groups.
>
> Although the special provisions may have administrative advantages, they are not without their own difficulties. More important, they are inequitable to many women, particularly those who have lost their jobs because of lack of work while pregnant.

Citizens' Advisory Council on the Status of Women, Report of the Task Force on Social Insurance and Taxes 24 (1968).

For example, under Minnesota law a woman "laid off" by her employer at the end of the fifth month of pregnancy would not be entitled to unemployment insurance for any part of the pregnancy, even though she were able and eager to work. Furthermore, after she returned to work, she would not be eligible for unemployment insurance in the event of a lay-off until she had been employed six weeks.[46]

In view of constitutional challenges in the courts and the likelihood of passage of the Equal Rights Amendment and other legislation extending prohibitions against discrimination because of sex, the Labor Department in December of 1970 urged and warned states to eliminate sex-discriminatory provisions, specifically mentioning the pregnancy provisions.[47] Results have been negligible.

## IV. FEDERAL GUIDELINES FOR MATERNITY LEAVE

The Office of Federal Contract Compliance, which administers Executive Order 1246,[48] prohibiting discrimination by federal contractors has issued guidelines prohibiting

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46 Minn. Stat. Ann. §268.09 (1959), *as amended* (Supp. 1971).

47 U.S. Dep't of Labor, Unemployment Insurance Letter No. 1097 (Dec. 31, 1970). An up to date list of pregnancy disqualification provisions appears in Manpower Admin., Comparison of State Unemployment Insurance Laws, *supra* note 44.

48 Exec. Order No. 11.246.3 C.F.R. 339 (1965) enunciated a policy of equal employment opportunity in government employment and included federal contractors, subcontractors, and federally assisted construction contracts in regard to race, creed, color and national origin. This order was amended in 1967 by Exec. Order No. 11.375.32 Fed. Reg. 14303 (1967), to expressly include sex-discrimination.



discriminatory treatment in regard to reinstatement and seniority of women taking maternity leave. The Compliance Office dictates that employers must permit leaves of absence for reasons of pregnancy, even where the employer has formulated no general policy permitting such leaves.[49] While these guidelines do not prohibit an employer from requiring a woman to take leave when she is able to work, the Office of Federal Contract Compliance has stated on another occasion that the determination of when maternity leave is to commence ordinarily is to be made by the employee and her physician.[50]

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50 The O.F.C.C. Guideline reads in pertinent part:

> (1) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female employee meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. The conditions applicable to her leave (other than the length thereof) and to her return to employment, shall be in accordance with the employer's leave policy.
>
> (2) If the employer has no leave policy, childbearing must be considered by the employer to be a justification for a leave of absence for a female employee for a reasonable period of time. Following childbirth, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her original job or to a position of like status and pay, without loss of service credits.

Job Policies and Practices, 41 C.F.R. §60-20.3(g)(1)-(2) (1971).

The Equal Employment Opportunity Commission (E.E.O.C.)[51] has not issued guidelines specifically dealing with maternity leave, but has established certain principles

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50 On November 12, 1970, the Office of Federal Contract Compliance issued the following question and answer to its agency compliance officers:

> Q. May a contractor specify the time when maternity leave shall begin?
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> A. Not normally. This is primarily a medical decision which is not reasonable for a contractor to make in terms of a blanket policy. The time when a woman leaves before childbearing is normally a matter between the pregnant employee and her doctor.

Memorandum to heads of Agencies from John L. Wilkes, Director, Office of Contract Compliance, Dep't of Labor, Questions and Answers Concerning Sex Discrimination Guidelines, Nov. 12, 1970.

51 The Equal Employment Opportunity Commission, created pursuant to §705 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* (1964), is charged with administering and enforcing Title VII. Generally, E.E.O.C. investigations are initiated by the filing of a charge by a person alleging employment discrimination. This charge must be filed within ninety days of the alleged unlawful practice, except that if the state or locality where the practice occurred has a law dealing with the subject, the charge must be filed within two hundred and ten days or within thirty days of termination of the state or local proceedings. If the alleged unlawful employment practice has occurred in a state or locality which has a law prohibiting the practice alleged, the E.E.O.C. must defer the charge to that state or local agency for sixty days (unless that agency terminates earlier) before the Commission can assume jurisdiction. After a full investigation of the issues raised in the charge, the Commission issues a Finding of Fact on the allegations. The parties involved then have an opportunity to file objections and cross-objections to the Finding of Fact. The Finding of Fact is used as the basis for the issuance

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regarding rehiring policy through its decisions.[52] Sonia Pressman Fuentes, Director of the Legislative Counsel Division of the Office of the General Counsel, E.E.O.C., has expressed the Commission's opinion that employers must make reasonable provisions for childbirth leave. She feels that the Commission's principles require that employers permit maternity leaves with a right to reinstatement for married and unmarried women.[53]

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(Footnote 51 cont'd)

of a Commission decision. If the decision holds that reasonable cause exists to believe that the respondent has violated Title VII as alleged, the E.E.O.C. attempts to negotiate an informal conciliation agreement. Failing settlement through conciliation, the Commission will issue a Notice of Right to Sue which authorizes the charging party to institute a civil action in the appropriate United States district court. A Notice of Right to Sue can be requested thirty days after the charge has been filed or at any time thereafter during the proceedings. Without first filing a charge with the Commission and receiving a notice of right to sue authorization, the complaining party may not institute suit under Title VII, 42 U.S.C. §§2000e *et seq.* (1964).

52 E.E.O.C. Decision No. 71-562, CCH Employment Practices Guide, ¶6184, at 4312 (Dec. 4, 1969); E.E.O.C. Decision No. 71-413, CCH Employment Practices Guide, ¶6204, at 4346 (Nov. 5, 1970); E.E.O.C. Decision No. 71-308, CCH Employment Practices Guide, ¶6170, at 4286 (Sept. 17, 1970; E.E.O.C. Decision No. 70-600, CCH Employment Practices Guide, ¶6122, at 4217 (Mar. 5, 1970); E.E.O.C. Decision No. 70-360, CCH Employment Practices Guide, ¶6084, at 4130 (Dec. 16, 1969).

53 Mrs. Fuentes stated:

> The Commission has established the principle that, as a general rule, an employer may not terminate an employee who is compelled to cease work because of pregnancy without offering her, alternatively, a leave of absence

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The Equal Employment Opportunity Commission, appeared as amicus curiae in *Schattman v. Texas Employment Commission,*[54] arguing that an employer's policy of compelling female employees to resign after reaching a certain month of pregnancy constitutes a violation of Title VII of the Civil Rights Act of 1964. The Commission took the position that such a policy would be acceptable under Title VII only where it could be shown that all or substantially all women were unable to perform safely and efficiently the duties of their particular jobs upon reaching the time established by the employer.[55]

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(Footnote 53 cont'd)

> with the right of reinstatement to the position vacated at no loss of seniority or any of the other benefits and privileges of employment. While the employee is out on maternity leave, the employer should attempt to keep her job open or filled on a temporary basis. The Commission has found that, absent a showing of business necessity, an employer's conditioning of maternity leave on two years of employment violated the Act where leaves of absence and disability leaves were not subject to any similar requirement, that an employer's policy of granting maternity leave only to married female employees violated the Act in the absence of a provision for the termination of unmarried fathers, and that, absent a showing of business necessity, an employer's refusal to credit an employee for time spent on maternity leave taken prior to the effective date of the Act constituted an unlawful present effect of past discrimination.

Fuentes, *Federal Remedial Sanctions: Focus on Title VII,* 5 Valp. U.L. Rev. 390-91 (1971).

54 330 F. Supp. 328 (W.D. Tex. 1971).

55 Brief for E.E.O.C. as amicus curiae, Schattman v. Texas Employment Comm'n, *id.*



The Equal Employment Opportunity Commission has also held in violation of Title VII an employer's insurance plan affording maternity benefits only to those employees who have head-of-household status,[56] as well as a group health insurance plan providing immediate maternity benefits for wives of male employees but conditioning the eligibility of female employees on two years of employment.[57] More recently, the Commission has found that women employees were unlawfully discriminated against by an employer's insurance program which specifically excluded pregnancy from the list of physical disabilities for which weekly benefits were paid.[58]

## V. LEAVES OF ABSENCE AND INSURANCE COVERAGE

There is very little data on the extent to which women employees have any job protection following childbirth or the extent to which health insurance, temporary disability insurance, and sick leave plans exclude childbirth. The Bureau of Labor Statistics in a 1970 study of 252 collective bargaining agreements covering five thousand workers or more, found that seventy-four (about twenty-nine per cent) of the agreements had some leave-of-absence provision for maternity. These seventy-four agreements extended coverage to almost one-fourth of the total number

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56 E.E.O.C. Decision No. 70-495, CCH Employment Practices Guide, ¶6110, at 4162 (Jan. 29, 1970).

57 E.E.O.C. Decision No. 71-1100, CCH Employment Practices Guide, ¶6197, at 4333 (Dec. 31, 1970).

58 E.E.O.C. Decision No. 71-1474, CCH Employment Practices Guide, ¶6221, at 4382 (Mar. 19, 1971).

of employees covered by such plans. The data does not indicate whether the plans provided compensation during leaves of absence.[59] The same study shows that eighty-two of the agreements provided for sick leave, but does not state how many of the plans permit use of sick days for childbirth.[60]

An estimated eighty-one percent of all persons under age sixty-five are covered by insurance for hospital care and 78.8 per cent for surgical services, according to statistics compiled by the Social Security Administration.[61] A study by the Health Insurance Institute of new policies issued in the first quarter of 1970 indicated that about sixty-one per cent of the employees covered had maternity coverage – for employees and spouses of employees – usually with a special maximum.[62] Almost two-thirds of all wage and salary workers are covered by some form of protection against loss of income due to temporary disability, and 33.7 per cent of all wages lost for this reason in 1969 were replaced, according to estimates by the Social Security Administration.[63]

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59 U.S. Dep't of Labor, Bureau of Labor Statistics, Characteristics of Agreements Covering 5,000 Workers or More, Bull. No. 1686 (1970).

60 *Id.* at 48.

61 Mueller, *Private Health Insurance in 1969: A Review*, Social Security Bulletin 3-4 (Feb. 1971).

62 Health Insurance Institute, New Group Health Insurance 10 (1971).

63 Price, *Cash Benefits for Short-Term Sickness 1948-69*, Social Security Bulletin 19 (Jan. 1971).



Since many of the plans protecting against loss of income exclude childbirth, there is no reliable information on the number of women employees covered. A 1969 study by the Society of Actuaries of temporary disability insurance policies issued by eleven large insurance companies showed that 9,700 of the policies issued had some maternity benefit, whereas 10,700 did not. This study did not include policies issued under state temporary disability insurance laws.[64] In a digest of one hundred health and insurance plans under collective bargaining, compiled by the Labor Department in early 1966, all health insurance plans included some provision for maternity, but most had special limitations.[65] Some provided total allowances as low as $75, $130, and $150 for maternity.[66] The same study indicated that sixty of the plans included some protection against loss of income for childbirth, most frequently with a six week limitation. All of the plans had protection against loss of income for other disabilities.[67] This study is not representative, since it included only plans that were negotiated by collective bargaining and included health and insurance provisions. Some employers unilaterally and some collective bargaining agreements require that women resign or begin leave at some special period before anticipated childbirth – most commonly at the end of the

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64 Society of Actuaries, 1969 Reports of Mortality and Morbidity Experience No. 2, at 168 (1970).

65 U.S. Dep't of Labor, Bureau of Labor Statistics, Digest of 100 Selected Health Insurance Plans Under Collective Bargaining, Early 1966, Bull. No. 1502 (Sept. 1966).

66 *Id.* at 12, 40, and 32.

67 *Id.*

fourth or fifth month of pregnancy.[68] For example, according to a survey of the National Educational Association in 1965, most school systems require that teachers take leave beginning at the end of the fourth or fifth month;[69] some school systems require a teacher to remain on leave for a full year following the birth of a child, and some give her no reemployment rights at all.[70] In others, she is reemployed only if there is a suitable vacancy.

The extent of this practice is hard to gauge. Some rough idea of the extent of the practice in New Jersey is available from data compiled by the New Jersey Department of Labor and Industry.[71] Because of its financing arrangements, New Jersey has separate data on claims arising within fourteen days of leaving employment and claims arising during employment. In 1970, 17.8 per cent of all claims were claims arising during unemployment, whereas over 71 per cent of all pregnancy claims arose during unemployment.[72] The department explains the difference: "Since the practice of many employers had been to lay off the employee significantly earlier than four weeks prior to expected birth, the bulk of payments for pregnancy

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68 *See* Larkin, *Policies Vary on Maternity Leave,* Louisville Courier-Journal, Jan. 4, 1971, Women's News at 1, col. 1; Letter from R.I. Dep't of Employment Security to Citizens' Advisory Council on the Status of Women, *supra* note 35.

69 National Educ. Ass'n. Educational Research Service Circular No. 3 (Mar. 1966) (out of print).

70 *Id.*

71 N.J. Dep't of Labor & Indus., Div. of Planning & Research, *supra* note 39.

72 N.J. Dep't of Labor & Indus., Div. of Planning & Research, *supra* note 39, at tables 23 & 30.



were paid through the disability-during-unemployment program."[73] This practice certainly results in unnecessary expenditure of unemployment insurance funds, raises the rates of many employers, and creates pressures to establish the kinds of arbitrary disqualifications referred to above. It is another example of how irrational factors determine the treatment of women employees, even when economic factors would dictate otherwise. The New Jersey data also indicate that the average number of weeks compensated for pregnancy claimants who have recently been in the labor force is 6.9; for claimants who are unemployed, the period is 7.4 weeks.[74]

## VI. LABOR UNION POLICIES

Unions have generally advocated maternity leave, but the extent to which contracts provide reemployment or other benefits is still difficult to gauge. The AFL-CIO resolutions adopted at its 1969 convention included support of "adequate maternity leave and benefit plans."[75] Similarly, the United Auto Workers, in a 1970 convention, resolved that a nationwide system be developed to insure that temporary disability plans include pregnancy

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73 N.J. Dep't of Labor & Indus., Div. of Planning & Research, Two Decades of Temporary Disability Insurance in New Jersey 15 (Mar. 1970).

74 N.J. Dep't of Labor & Indus., Div. of Planning & Research, *supra* note 39, at table 33.

75 AFL-CIO, 8th Constitutional Convention, Resolution No. 236 (Oct. 1969).

coverage.[76] United Auto Workers representatives have stated that most of their contracts provide for six weeks of temporary disability insurance coverage for pregnancy.[77]

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[76] The UAW Resolution reads in pertinent part:

> *Maternity benefits, in the form of cash payments to replace the lost wages of women workers, are a logical part of a broader program of replacement of wages lost because of short-term illness.* . . . Most states have arbitrary time limits in regard to collecting unemployment compensation before and after childbirth which do not reflect the variation in physical ability of women workers, their health, or the demands of the job. *Federal standards, should be enacted permitting women to collect unemployment compensation before and after childbirth whenever they are physically able to work and to guarantee job protection for women who desire to return to work after pregnancy.* . . .
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> . . . .
>
> 5. That a general system of basic statutory protection for men and women against wage loss due to temporary disability, including illness, pregnancy and maternity, be provided in one insurance program.
>
> 6. That statutory regulations be enacted and in the meantime contract clauses be negotiated establishing job security during maternity leave, with standards that encompass reasonable tests for the ability and capacity of the individual to work, recognize the physical health of the woman and the nature of her occupation, and which would not deny either employment, or unemployment compensation, when these standards are met.

22nd Constitutional Convention, 1970 UAW Resolutions, reprinted in UAW Women's Dep't, Women in Society and the 50th Anniversary of Woman's Right to Vote 5-8 (1970) (emphasis added).

[77] Interview with Dorothy Haener, International Representative, UAW Women's Dep't, in Washington, D.C., Oct. 8, 1971.



A survey of Detroit employers conducted by the Detroit News in May, 1971 indicated that American Motors Corporation, Ford Motor Company, and Chrysler Corporation (all bargaining with the UAW) do not require employees to leave or return at a specified time and that returning employees could "bump" employees with less seniority if necessary to effect reemployment.[78] The UAW has a model maternity clause antedating 1946, which recommends that contracts provide for a maximum of one year's leave of absence during which time the employee would retain and accrue seniority.[79]

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[78] Detroit News, 16 *Companies Report Their Maternity Leave Policies*, May 23, 1971.

[79] UAW Women's Dep't, UAW Policy Established by Convention Resolutions Relative to Women Workers' Rights 21 (undated) (includes resolutions adopted at 1942-1968 conventions). The American Newspaper Guild Model Contract includes the following:

> Art. V(a) Maternity leave of at least six months shall be granted upon request, with pay for at least ? weeks. No employee shall be required to take a leave of absence, nor shall an employee's job duties or working conditions be altered without her consent, on account of pregnancy; nor shall there be any penalty for pregnancy. An employee who at the end of maternity leave decides not to return to work shall be paid the amount of severance pay which would have been due less the amount of maternity pay.

American Newspaper Guild, Equality Now! A Report to the 1970 ANG Conference on Sex Discrimination and Women's Rights in the Industry at CB8 (1970). However, seventy-nine of 114 contracts surveyed in November 1970 either specified no compensation for maternity leave or were silent on the subject. *Id.* at M2.

* * *

The International Union of Electrical, Radio, and Machine Workers has been attempting in the last few years to extend the benefits attached to other temporary disabilities to childbirth and to cut back arbitrary periods of leave.[83] The IUE has recently advised its locals of the E.E.O.C. decision holding that exclusion of maternity from temporary disability insurance coverage constitutes a violation of Title VII and has instructed the locals to instruct female employees going on maternity leave to claim benefits even though the contract does not so provide. If benefits are not paid, the employees have been instructed to file an appropriate grievance or protest and failing satisfactory settlement, to file a charge with the E.E.O.C.[84] The current IUE contract with General Electric defines illness to "include pregnancy whenever the foreman or other immediate supervisor is notified prior to absence from work."[85] The current contract with Westinghouse provides for maternity leave without pay but does include reemployment rights and does not contain an enforced period of absence.[86]

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83 Interview with Ruth Weyand, Counsel for IUE, in Washington, D.C., Oct. 8, 1971.

84 IUE, Keeping up with the law 117-18 (May-June 1971).

85 1970-73 G.E.-IUE National Agreement, art. VIII(1)(e).

86 Agreement and Pension and Insurance Agreement between Westinghouse Electric Corp. and IUE, AFL-CIO-C.L.C., XVII, Feb. 28, 1970.



## VII. RECOMMENDATIONS OF FEDERAL WOMEN'S ADVISORY GROUPS

The recommendations of federal women's advisory groups have generally assumed that pregnancy is a temporary disability and should be treated as such. They have differed on means of reaching this goal.

The Citizens' Advisory Council on the Status of Women is one of the first organizations to treat the subject in depth and has addressed its recommendation to immediate change within the present framework of fringe benefits in the United States, rather than long-range solutions through proposed federal legislation. The Council has also consciously separated the concepts of childbearing and child rearing.[87]

The Chairman, Mrs. Jacqueline G. Gutwillig, stated in a recent address that the Citizens' Advisory Council views childbirth as a temporary disability for that period during which the woman is actually unable to work. The Council

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87 Jacqueline Gutwillig clearly presents the Council position:

> The subject of child rearing we felt was a separate topic that required a separate treatment, as both men and women have the responsibility to rear children. Therefore rearing of children is not considered in our paper on maternity benefits.
>
> The Council's policy relates only to the period of time a woman is unable to work because of childbirth or complications of pregnancy. I believe this is one of the most important contributions of our consideration of this issue, that is, the semantic separation of leave for childbirth from leave for child rearing.

Gutwillig Address, *supra* note 1.

recommends inclusion of maternity coverage in all group health and temporary disability insurance plans.[88] Council Chairman Gutwillig also stated, however, that the Citizens' Advisory Council felt it was very important not to

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[88] Chairman Gutwillig stated:

> We also found in our review of background materials that absence due to childbirth is sometimes treated as a temporary disability and sometimes as a special condition warranting special arrangements.
>
> The Council concluded that childbirth and complications of pregnancy are temporary disabilities *for employment purposes* because they have all the significant characteristics of temporary disabilities – (1) loss of income due to temporary inability to perform normal job duties, and (2) medical expenses. Additionally, childbirth has two other characteristics which are associated with only the more severe temporary disabilities – hospitalization and possible death.
>
> The theory that pregnancy is a "normal physiological condition" has been advanced as a reason for treating pregnancy as a special condition warranting special arrangements. I don't know what "normal physiological condition" means; the more one analyzes the words, the more confusing they become, but I'm sure of one thing – medical care, hospitalization, and death are not normally associated with this phrase. I also know as a fact that the *result* of applying this concept has generally been to deny women benefits to which they are justly entitled.
>
> Another reason that is advanced for denying women the benefits provided for other temporary disabilities is that pregnancy is "voluntary." We all know this is a weak rationalization. Pregnancy is very frequently not voluntary, and besides temporary disability benefits *are*

(cont'd)

provide benefits that would discourage employers from hiring women of childbearing age.

> We did not want to damage women's opportunities for employment under the guise of protecting them. Furthermore, the members felt that the essence of equal opportunity was to treat women and men as individuals, not as classes.[89]

* * *

## IX. CHILD REARING LEAVE

So far this article has been generally limited to absences related to childbirth – the frequent denial or restriction of customary job benefits and arbitrary separations unrelated to a woman's desires or ability to do the job. Before going on to means of correction, let us consider briefly child rearing leave, which is a very new concept.[107]

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(Footnote 88 cont'd)

> provided for other equally voluntary conditions – such as attempted suicide. Pregnancy is no more voluntary than injuries from an automobile accident while driving intoxicated and no more voluntary than the conditions associated with long term smoking. . . .
>
> In recent discussions about our recommendations, we have been asked whether insurance companies will write health insurance and temporary disability insurance policies covering maternity. The answer is categorically yes. The national experts we have been in touch with have never heard of an insurance company that would not. The general rule is that insurance companies will write any coverage the group wants.

[107] Child rearing leave was discussed by the Women's Caucus of the American Sociological Association in September 1969. The Caucus's formal proposals recommended that American universities grant parenthood leave. *See* American Sociologist, Feb. 1969.



While those school boards and employers who have required new mothers to take long leaves of absence following childbirth with no right to reemployment may have considered this "child rearing" leave, it is not a proper definition of the term. Child rearing leave should be with reemployment rights, optional with the employee, and available to both mothers and fathers.

There are many reasons why a working mother or father with a firm attachment to the labor force might wish or be forced to take full-time care of an infant for a temporary period. For example, a mother might want to nurse the baby; or a parent might need to care for the infant until other arrangements could be made; some young couples are planning to alternate periods at home for child rearing; or the death of a mother might require the full time presence of the father until child care arrangements could be made.

Most employers provide for other types of unpaid leave for no more important purposes, such as continuation of education and personal emergencies. It would seem that an employer who permits unpaid leaves of absence for other purposes should be willing and able to include leave of absence for child rearing.

## X. THE FUTURE

Title VII of the Civil Rights Act of 1964,[108] state human relations laws, and the fourteenth amendment are clearly weapons for attacking the exclusion of, or special limitations on, pregnancy in public and private plans for

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[108] 42 U.S.C. §§2000e *et seq.* (1964).

economic assistance to the temporarily disabled. It seems certain that the courts, after full consideration, will adopt the obvious conclusion that pregnancy is a temporary disability and that women are entitled to the same autonomy and economic benefits in dealing with it that employees have in dealing with other temporary disabilities.

* * *

The prompt removal of inequities in existing systems is a high priority goal, as many low-income women workers are suffering great hardship through unjust denial of economic benefits and arbitrary restrictions on employment. With the median earnings of white women working year-round, full-time at a little over five thousand dollars per year and black women at four thousand dollars per year,[109] it is clear that most women workers cannot afford any unnecessary loss of wages or loss of coverage of medical bills.

Groups concerned with human rights should make full use of the courts and human relations agencies to challenge employers' special requirements regarding length of absence for childbirth, exclusion of childbirth from health insurance and temporary disability insurance coverage, special disqualifications for pregnancy in unemployment insurance laws, and the exclusion of pregnancy from state temporary disability insurance laws.

* * *

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[109] U.S. Dep't of Commerce, Bureau of the Census, Income in 1969 of Families and Persons in the United States, at table 50 (Current Population Reports: Consumer Income P-60, No. 75, 1970). *See also Hearings on H.R. 16098 before the Special Subcomm. on Education of the House Comm. on Education and Labor,* 91st Cong., 2d Sess., pt. 2, at 1107-18 (1970).



**PLAINTIFFS' EXHIBIT NO. 83B**
**Addendum for Childbirth and Child Rearing Leave: Job-Related Benefits by Elizabeth Duncan Koontz, N.Y. Law Forum, Vol. 17, No. 2, 1971.**

Addendum for "Childbirth and Child Rearing Leave: Job-Related Benefits" by Elizabeth Duncan Koontz, *New York Law Forum,* Vol. 17, No. 2, 1971.

Page 486, first paragraph, add:

Because of New Jersey's unusual funding arrangements, this does not mean that pregnancy benefits amount to twelve percent of the total costs of temporary disability insurance. Forty-seven percent of covered employees are covered under private insurance or employer self-insurance, which meets State standards. The others are covered by the State plan. However, *all* payments for temporary disability arising more than 14 days after the employee is laid off come out of the State Disability-During-Unemployment Fund. Seventy-one percent of *all* pregnancy claims are paid out of this fund (primarily because of the employer's practice in laying women off significantly earlier than four weeks prior to expected birth). There are no data available on total payments from private plans for maternity so it is not possible to get an accurate figure on maternity costs for New Jersey's system. It is reasonable to assume that approximately 47 percent of all the payments from the Disability-During-Unemployment Fund and approximately 47 percent of the maternity cases are for employees covered under private plans. With this assumption 8.5 percent of the costs of State plans are for maternity.

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PLAINTIFFS' EXHIBIT NO. 84
Donna Allen, Fringe Benefits, Wages or
Social Obligation? Rev. Ed. Cornell Univ. 1969.

# FRINGE BENEFITS:

## *Wages or Social Obligation?*

## An Analysis with Historical Perspectives from Paid Vacations

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# Introduction

THIS is the second edition of a book on the conceptual nature of fringe benefits. Except in two significant respects, little has changed since the book first appeared in 1964.

Unchanged is the character of the fringe benefit movement—essentially management. Despite the unions' long postwar effort to challenge management's hegemony, the fringe benefit movement developed along the lines management wanted.

Unchanged, too, is the controversy over whether fringe benefits are wage payments for an employee's actual work or a non-wage obligation to cover certain off-the-job social costs of the employee. This controversy is the negotiating parties' public battleground for control of the fringe benefit money. The employer wants qualifying provisions that will protect his financial return in providing the benefit; the employee seeks as clear a title to the fringe benefit money as he would have had if the money had gone into a wage increase, which he (mistakenly) believes it could have done.

* * *

The two significant changes since 1964 are: first, the unions have lost and given up their attempt to control the fringe benefit money; second, a new political reaction to the very success of the fringe benefit movement as a substitute for social legislation may be building up. There are signs of possible trouble ahead from the very poor, on the one hand, and from the very rich—a handful of banks—on the other (Chapter 10).

In giving up the fight for control of the fringe benefit money, the employees are returning to their historical attitude toward employee benefit programs designed to increase productivity. Although to management these programs undoubtedly were well worth their cost, just as they are today, employees and their unions have always preferred wages and, from the earliest days, have met employer welfare programs with monumental disinterest (Chapters 3 and 4).

During World War II, when wage increases were "out for the duration," employees took the only thing they could get under government rules: fringe benefits—as the War Labor Board called them. More in-

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terested in the reality of "something for the workers" than in theories, the union representatives on the tripartite War Labor Board did not object when employer and public members agreed to base the government's wartime policy on the employer's productivity-increase rationale —as long as that theory justified more, and more liberal, benefits (Chapter 5). After all, in their past experience, this had always been the purpose of employee benefits.

Before the war was over, however, employees did begin to show an interest in fringe benefits and theories (Chapter 6). The fringe benefits represented a large and a growing part of their collective bargains, and, having given up sizable wage increases for them, the unions protested when at employment termination a worker lost the benefits he had not yet taken. It was here and on the issue of paid vacations that the fallacious wage concept was born—to be spread not many years later to all fringe benefits. The battle for control of the fringe benefits, begun then, continued throughout the postwar period.

Immediately after the war, when freed from wartime wage restraints in 1946, the unions concentrated on a large wage increase at the bargaining table and sought their social gains in Congress. But this return to labor's traditional position was short-lived. Both their "inflationary" wage demands and their political action came under attack, and, by the second round of postwar negotiations, the unions were accepting "package" settlements that combined fringe benefits and a more modest wage rate increase. In securing themselves from attack, however, the unions had yielded the political power they needed to back up their economic power. Without the possibility of an alternative in legislated social gains, the unions had no choice but to succumb to the blandishments of employers who annually found certain fringe benefits far preferable to adding that same amount to wage rates.

* * *

Management still had its traditional reasons for pushing the employee benefit programs. The 1950's and 1960's were an echo of the 1920's as management described the miracles that social benefits could accomplish in making the work force more productive—provided, of course, that the employer kept firm control over the fringe benefit money and the conditions for eligibility to the benefit.

Another advantage to the employer of granting fringe benefits over wages arose from the postwar tax policies which led the way especially to the fringe benefits provided through trust funds. So generous were



the tax regulations (at a Treasury-estimated revenue loss of up to $3 billion a year) that if employers had not had their other sound reasons for staying close to the fringes, the tax advantage alone would have created a fringe benefit movement.

In addition, there was a new postwar advantage in fringe benefits over wages: employees whose social needs were met privately did not have to seek social gains through legislation. What employers saved in taxes to support such legislation could provide larger benefits when spread over only one's own employees, a fact that the employees and their unions also appreciated.

* * *

## CHAPTER 1

# The Problem: Are Fringe Benefits Wages?

* * *

Many of the social benefits which unions and liberal groups have failed to win in the form of legislation have been quietly but continually adopted privately by unions and employers in collective bargaining agreements. And employers, in the absence of unions, have been adopting many of these benefits voluntarily. For example, despite the failure of state unemployment insurance laws to come close to benefit standards proposed by both the Eisenhower and Kennedy-Johnson Administrations, this income gap has been closed for over two million workers by private supplementary unemployment benefit plans. Private pension plans to supplement Social Security benefits now cover an estimated twenty-six million workers. And, whereas Congress rejected national health insurance, private health and welfare plans now cover over a hundred million workers and their dependents.

* * *

In the last two decades, the fringe benefit movement has quietly transformed our concepts of the employer-employee relationship by its imposition of new, *social* obligations upon those who hire the service of others. But if this is a social revolution privately imposing a new kind of obligation upon employers, it is the best-kept secret of modern times. Both parties and all third parties take turns seeing who can deny it with the most convincing arguments.

### *The Confusion*

Had this movement for fringe benefits been taking place through legislation, there would be little question of its social nature. But these benefits have come to workers as income from private employers. What, then, is the nature of this income? Is it part of the pay for their service? Is it wages? Or is it something to be called "non-wages"?

Those who use the term, non-wages, imply that there is a distinction between various forms of employee income payments. But when one looks for a basis for making such a distinction, he finds that no one is sure what either wages or non-wages is. Not the worker nor his employer, nor the economist, nor even the government agencies and other third parties who make decisions based upon the nature of this income can provide a consistent and unwavering distinction.

If you ask the worker himself what his non-wage benefits are, he will respond by enumerating various fringe benefits he receives at his work place. But then if you ask him what his weekly wages are, he will give you a figure which includes payments stemming from many of the non-wage benefits, such as pay for a holiday that fell during the week.

If you ask the economist, you find the same type of confusion. Although much has been written about wages and their function in the economy, there is very little in the literature about non-wage benefits and what these payments represent. The economist tends to lump all payments to labor together as wages. Some economists do speak of the growth of non-wage payments in reporting on various wage studies; but, after this use of the expression, they proceed to compare average weekly "wages," which include many fringe payments such as holiday and vacation pay, call-in pay, premiums of one kind or another. What does "non-wage" mean to them?

Sometimes wages refers to the employer's labor cost, at other times to the employee's income, though the two are not the same figure since the employer counts as labor costs certain items that are not income to the employee. It is not uncommon to find the labor economist using the word, wages, in one and the same study to mean labor cost, employee income, basic wage rates per hour, or wage rates plus some fringe benefit payments. Economists are aware of the problem, and some have called for enlightenment on this question, as, for example: "Clearly the many facets of non-wage compensation need



to be explored and integrated with wage theory and economic analysis."[1] But there have been too few responses.

Employers also have questions about these payments that are still unanswered. The U. S. Chamber of Commerce, in its 1957 study of fringe costs, noted:

> Differences of opinion regarding what constitutes fringe benefits and how they should be computed indicate the need for a generally accepted definition of fringe benefits, and for a uniform method of comparing fringe benefits with employee compensation.[2]

The legislators, too, who write and revise the many laws using the word wages, evidence the general lack of a clear meaning for the term.[3]

The problem is one both of understanding the nature of these payments and, then, of having useful definitions for the terms "wage" and "non-wage" that reflect that understanding.

Does it matter?

It matters very much where important decisions affecting workers income and welfare, and employers' costs and taxes, hang upon the question of what wages are and whether fringe benefits are wages or something else. Interpretations of the word, wages, determine eligibility to unemployment compensation benefits for millions of workers on layoff, or how much former workers of a bankrupt firm will receive, or what prevailing wage will be paid for work on government contracts. For the employer, the difference means higher or lower labor costs and taxes. Third parties in industrial relations—arbitrators and administrators of state and federal labor laws, as well as the courts called upon to uphold or reverse their decisions—need to know which payments are wages, which if any are non-wages, and why.

The word, wages, is defined or used in the Bankruptcy Act, the Labor-Management Relations Act, the Social Security Act, state un-

[1] Richard Lester, *As Unions Mature* (Princeton: Princeton University Press, 1958), p. 157.

[2] U.S. Chamber of Commerce, *Fringe Benefits 1957* (Washington: Chamber of Commerce of the U.S.A., 1958), p. 25.

[3] See, for example, U. S. Congress, House, Committee on Education and Labor, *Report on H.R. 10946, Amendments to the Davis-Bacon Act*, 87th Cong., 2nd sess., pp. 4, 5. The amendment reported proposed to include fringe benefits in the act's definition of wages, an amendment which became law in 1964. The committee called fringe benefits "much needed welfare programs" that are "bargained for, in lieu of wages," and therefore should be "included as wages...." But a few sentences later, the report says, "they now represent a very significant portion of wages" and then comments that the "worker receives his 'real' wages not only in the pay envelope after necessary deductions, but also in the form of these fringe benefits...."

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employment insurance laws, and the Fair Labor Standards Act. The Bureau of Internal Revenue lives and breathes the word, wages. It is found also in the Davis-Bacon Act, the Walsh-Healey Public Contracts Act, and other laws both state and federal. As presently interpreted, however, the definitions of wages in these laws are in conflict with each other, sometimes even within a single state and under a single law.

* * *

Unable to get political support for social legislation, the unions sought their social gains in the only way open to them. The money which the long period of increasing productivity was making available for such gains did not lie in the tax revenue columns of the federal budget but in the profit columns of the companies the unions dealt with. Their social benefits were negotiated into private contracts.[2]

### *Social Obligations Privately Imposed on Industry*

In these private contracts, workers secured from the very industries which most persistently opposed social legislation the same kind of obligation to provide social benefits that public measures would have fixed upon those industries.[3] The differences were differences only in extent, as a few comparisons will illustrate.

The Supreme Court decision that pensions were negotiable gave the stamp of approval to the unions' concept of employer responsibility for keeping former employees financially secure in their old age. It had already been recognized in the social security legislation, but on a shared basis for workers as a group and industry as a whole. The private pension plans imposed this same social obligation on individual employers for their individual workers and not always on a shared basis—the move for non-contributory pension plans places the obligation entirely upon the employer.

[2]This is not to say that these organized employers did not have some good reasons of their own for yielding to the private demands in preference to legislated social gains, as will be discussed later in this chapter and more fully in Chapter 10. Using their profits from the increasing productivity for their own employees was, of course, more advantageous to them than paying it in taxes for social benefits that would go to workers in other industries, particularly to those in low-productivity industries or even to the unemployed, with perhaps very few of their own relatively high-paid workers receiving any of the benefits directly.

[3]Of course, not all of the fringe benefits privately negotiated would have received public attention in any case. The comparison here is only with those which might have been legislated.



In the case of health and welfare plans, the privately negotiated benefits have established an industry social obligation, not yet imposed publicly (except for the elderly and very poor), to pay part of the costs of the illnesses of its individual workers. Workmen's compensation had previously fixed industry's responsibility for protecting its employees only from the economic hazard of job-connected injuries or illnesses. Supplementary unemployment benefits extend an industry obligation already publicly recognized.

Social in origin and in concept, the fringe benefit movement was being advanced in the postwar period by employees and their unions for the social benefit it provided. The demand for social benefits was strong enough to cause as long a strike as the 103-day UAW–Chrysler strike for pensions and legal actions pressed to the highest courts, as in the case of the Steelworkers for pensions.

Underlying the demand for social benefits was the growing belief that the employer had two obligations attendant upon his use of the workers' services: first, to compensate workers adequately for the actual service they rendered, at the rate of so much per hour; and then, beyond this, to assume certain obligations of a social nature essentially unrelated to production but existing because of the employment relationship. Those who hired the labor of others took on some social responsibilities pertaining to the needs of the man in his life off the job and in the society of which he was part.[4]

The social nature of fringe benefits becomes most apparent upon close examination of them.

### *Non-Wages to Provide Social Benefit*

In examining these fringe benefit payments, our criterion is the *purpose* for the payment. To learn what the parties intended in negotiating them, we take first those payments which have most often been the result of employee or union demands. Later we shall consider labor cost items which the employer voluntarily incurs.

* * *

#### *Time off*

In the second category of social benefits are those which make provision for time away from work for some purpose that is social in nature without the worker's suffering loss of income because of his

absence. An employee asks for holidays because they are special historical or religious days that he wants to spend with his family, often engaging in community activities. An annual vacation is for the purpose of providing an extensive period away from work to recuperate from the preceding year's continuous service and to enjoy rest and recreation with his family and friends. Sick leave has the obvious social purpose, not only of enabling the worker to take proper care of himself without the financial loss to his family which otherwise occurs when illness disables the breadwinner, but also to enable him to stay home instead of exposing others during his illness. Time off for voting and for jury duty are other examples of provision of time off for social use. Personal leave of a given amount and absence from work when there is a death in the family also relate to the worker's life off the job and are thus social in nature.

It seems quite obvious that "regular wages" is usually provided in these payments, though often called wages for that reason, simply as the best way to effectuate their purpose of providing the time off without loss of regular income. A lump sum or average earnings or a figure calculated by some other method would do as well, provided it approximated customary income.

The fixed relationship between the amount of time off and the full year of service, such as eight holidays per year or so many days of sick leave or vacation time per year, merely expresses the agreed-upon concept of a normal or average need for such an allowance, i.e. the negotiated standard of the social benefit. Beyond setting the standard or extent of the benefit, the payment is quite unrelated to service. Jury duty, voting time, or sickness may or may not occur even though service is given. Thus, the payment may have some or no relation to service, depending upon what may be necessary to effectuate the purpose of the fringe.

There are certain periods of paid time off, often called fringe benefits, that do not have a social purpose and are, in fact, part of wages. The Chamber of Commerce and others list, in a category they call "pay for time not worked," such items as paid coffee breaks, meal periods, wash-up time, and travel time. Despite a superficial appearance that these payments are time-off provisions of the kind just described, they pertain to "on-the-job" conditions rather than to workers' more strictly social needs. Since the time off is in the form of short periods to enable the employee to rest briefly or perform some necessary function often related to or required by the work itself, but in any case now considered



necessary to the performance of each day's work, the time periods are more accurately to be considered "work" and their payment "wages."

Negotiation of pay for these on-the-job activities is simply part of the continuing process of redefining what constitutes "service" for which wages are to be paid. Certain minor activities that are not directly productive, from preparatory activities to visiting the rest room, have generally been considered as part of service covered by the basic rate per hour. The expanded concept of service may now include trips to the rest room, travel inside the plant portal to portal as well as from one machine to another during the day, wash-up time as well as time for checking out, sharpening or putting away tools. The difference is a matter of degree. Time-study men have seen many such changes over the years and, however they analyze and label the parts, have come to include as an allowance factor whatever is accepted by the parties as constituting paid service.

A distinction may be made between these and other part-of-a-day, time-off provisions such as those for jury duty or voting, which are not required by the work itself or in any way related to it but, rather, clearly provide time off the job for a social use. The regular hourly rate is paid in the one case because these breaks in productive work are part of "service" for which wages are to be paid and, in the other, because the worker is to be assured he may perform these off-the-job functions of a social nature without loss of customary income.

*Protection against economic hazards*

This third type of social benefit makes an outright payment to alleviate the economic hazards of illness, unemployment, old age, and the like. The non-wage, and social, character of this last group of fringes, sometimes extending benefits to cover a worker's dependents, is the most apparent. It is scarcely necessary to elaborate on their social nature and purpose beyond the mention in earlier pages of their similarities to legislated social benefits which they so closely parallel—even though all of these fringes at one time or another have been called wages.

The payments in this group also occur only as the social need for them arises, and they are paid according to the agreed-upon standard of how much economic hazard will be met with what level of benefits without reference to service rendered. The amount to be put into or paid out of funds established for these fringes, however, may have some relationship to service, but these decisions depend upon the social

purpose for which each fund was established. The amounts contributed to the funds are determined by the necessity to make the funds actuarially sound in order to meet a given and agreed-upon standard of benefits, i.e. in order to effectuate the social purpose of the benefit. Health and welfare, supplemental unemployment, and pension funds are neither invariably built up nor always paid out in relation to employees' past service. SUB funds might build up on this basis to a certain point after which payments into the fund are discontinued. All of the funds are drawn on by some employees but not by others, and by some to a different extent than by others. An employee, in fact, might live many working years and die without receiving a penny from any of the funds, though he may have worked under a contract providing all three of these social benefits.

In these respects, too, the fringe benefits of this third type differ little from their public counterparts. For example, in the case of social security benefits provided employees (in contrast to public assistance, or old-age assistance, provided others), the requirements of so many units of past work merely defines which employees are eligible for benefits and is like the minimum service requirement which exists in most private pension plans to determine eligibility. It may be raised or lowered in either case, depending upon what individuals the law or fringe benefit intends to cover.

Even the public benefits are expressed, in rough measure, in terms of earnings. They may seek to represent, as originally conceived, a percentage of average or normal earnings or they may reflect individual differences in past income level. The amount of the benefit, whether it is to be a minimum subsistence standard or to recognize a past standard of living or even perhaps to recognize financial obligations such as dependents, is also dictated by the specific social purpose.

If these non-wage fringe payments of the three types we have been discussing are negotiated by the unions to provide social benefits to the workers as a new kind of obligation of the employer, then for what purpose does the employer himself voluntarily make such payments in the absence of a union?

### *Non-Wages to Increase Work-Force Productivity*

Under our "purpose" criterion for distinguishing between wages and non-wages, we must now ask why the employer makes the fringe payments and incurs the labor costs he does. Since not all labor cost items represent income to the employee, and yet an employer's total labor



cost is sometimes given as a definition of wages, we shall begin at this broadest point. Keeping to our same standard for what constitutes wages, we shall here, too, exclude those payments which all, including the employer, agree to be wages paid for the purpose of compensating for actual personal service rendered.

Setting aside for discussion shortly the payments of a social nature that we have just examined, let us consider the remaining labor cost items which employers customarily incur voluntarily and which unions only infrequently ask for in negotiations. These items generally do not represent income to the employee and are rarely called either fringe benefits or social benefits. They are considered labor overhead costs, frequently called or included in the term, employment costs. Although employers themselves differ as to what they would include, some of the more common are costs involving personnel administration, training, health and safety programs, a company doctor, nurse and sometimes counsellors, and in some cases (where not understood and agreed to be part of payment for service) special employee gratuities, bonuses, and privileges such as discounts, passes, meals, prizes and awards, ball teams, clubrooms, and other recreational facilities.

These labor costs are clearly non-wage in nature. They are not compensation for actual service, even where they may represent income to the employee directly or indirectly. Their purpose is to maintain an efficient work force in operation, as in the case of the personnel costs, or to increase employee productivity more specifically, as in the case of training and safety programs.

It will be noticed that these costs for the most part pertain to the needs of employees on the job, in contrast to the costs in the social benefit groups, which pertain generally to off-the-job and more strictly social costs. A company doctor and nurse, for example, may care for illnesses that arise or that become acute on the job; sick leave or health and welfare plans, sometimes covering dependents, pertain to off-the-job illnesses.

This distinction is not a hard and fast one, however. A number of the labor overhead costs for the purpose of maintaining an efficient work force may be social in nature, as in the case of recreational facilities for use off the job, counseling programs, and the like.

But their social nature does not change the fact that the employer incurs the cost to increase productivity. Quite the contrary. *He is particularly interested in them precisely because of their social effects.* The employee who can stay home and take care of his cold because he has

a sick leave plan returns to work with more energy and without having exposed his fellow workers in the meantime. Other fringes have similar advantages, and, in general, the greater freedom from insecurity and worry about the financial problems of old age, unemployment, catastrophic illness, or accidents is felt by some employers to affect production favorably. Fringe benefits, particularly those that require employees to build up seniority in order to be eligible for them, are adopted to keep, or to attract, labor—in other words, for the purpose indirectly of increasing productivity by reducing turnover costs.

Others envision improvements in morale and loyality to result from the voluntary provision of fringe benefits. Seeking out new parts of the whole man is a time-honored effort to increase productivity. Paternalism is an ancient word in industrial relations, and company social welfare programs have a long history. Ever since industrial psychology became fashionable, the adventures of counseling programs have been famous and their miracles often described in the industrial relations literature. Or the granting of social benefits which unions have won elsewhere is thought useful by some in persuading workers that having a union in the plant is not necessary.

There are still other advantages to the employer in fringe benefits. From most fringes the employer receives a specific quid pro quo, as in the case of severance payments, which relieve the employer of all further responsibility to the employee, or in-lieu-of-notice, reporting, or other premium payments which free the employer to exercise greater flexibility in work planning without stirring up resentments among his employees.

All these advantages of fringe benefits (and others discussed in Chapter 10) enable the employer to increase the over-all productivity of his work force and are more or less closely calculated in the decision to grant one benefit or another.

Having taken all labor costs—in order to test the validity of our basic wage and non-wage distinction—and classified them (chart, p. 36) by our criterion of seeking the purpose of the payment or cost, according to the party initiating the action for it, we must also recognize that where the union is involved there may be an area of mutual advantage. A bargain is struck, and who is to say how much results from the employees' desire for the benefit and how much from a compensating benefit the employer sees accruing to himself? We can say only that fringes which are union-initiated are for the *primary* purpose of providing the particular social benefit as such, while in fringes initiated



by the employer, the provision of social benefit is a *secondary*, though essential, consideration. His primary purpose in voluntarily incurring the cost is to increase work-force productivity directly or indirectly.[7]

*Chart.* Common Labor Costs Classified by Purpose

| *Classification* | *Purpose of Labor Cost as Intended by Initiator* |
|---|---|
| *Wages* | To pay for actual service rendered:<br>Hourly rate, piece rate, incentive earnings, production bonuses, commissions, other payments in money or kind based directly or indirectly upon production or productive service and understood and agreed to be payment for that service.[8] |
| *Non-Wages* | 1. To provide social benefit as such:<br>a. Penalty-premiums: overtime, night-shift differentials, Sunday and holiday work premiums, vacation pay in lieu of vacation, reporting or call-in pay, in-lieu-of-notice payments.<br>b. Time off: vacations, holidays, sick leave, voting time, jury duty, funeral leave, maternity leave.<br>c. Economic-hazard protections: health and welfare plans, pensions, SUB, life insurance, severance and other dismissal payments; also unemployment insurance, workmen's compensation, and OASDI. |
| *Non-Wages* | 2. To increase productivity of the labor force:<br>a. Social benefits listed above when voluntarily provided by the employer.<br>b. Personnel administration, training, health and safety programs, company doctor, nurse, counsellors and equipment, special employee gratuities, bonuses, and privileges such as discounts, passes, ball teams, other recreational facilities, prizes, and awards. |

[7]An exception to the text above which should be noted here is the employer who, out of a genuine social sense and concern for his fellow in whatever relationship, voluntarily incurs the cost of a social benefit solely or primarily for its benefit to the employee. This is particularly true in small firms where he knows his employees best. There is also the occasional union which has sought social benefits primarily

When the states emphasized the social purpose of SUB, however, they described all fringe benefits the best. Missouri, for instance, said of SUB:

> The features of the Plan appear to be quite in keeping with the aforementioned public policy. Certainly such supplemented benefits are no less for the public good and the general welfare of the people of this state when voluntarily provided by contract than when provided by the state. . . .[10]

In saying this, it was suggesting standards by which all fringe benefits might be considered non-wage payments. Health and welfare plans, paid vacations, and others certainly are "no less for the public good and the general welfare of the people." Paid holidays to free working people to celebrate the American Revolution and other historical and religious days together with the community could be held a laudable purpose. Certainly the various types of dismissal payments, like SUB and unemployment compensation, enable the worker to be more mobile in seeking other employment; and any fringe benefit adds to purchasing power at a time when it is needed. Sick leave and sickness benefits that raise the health level of the country could be found to deserve as much encouragement as private benefits that supplement legislation already in existence. This was especially true if, as was often said in SUB cases, private provision for economic hazards was to be encouraged "to meet the needs of our people." If SUB was non-wages because it voluntarily provided by contract what legislation had determined was public policy, then pensions, too, could be non-wages as they supplement and implement public policy expressed in the Social Security legislation.

Scarcely a fringe benefit exists that could not have been included in Montana's gratification that "big business will concern itself with the security of its employees and their families" and "assist workers to insure themselves against hazards of many kinds" and that "business and labor together can preserve the dignity of the worker in his job."

* * *

Similarly, sick leave plans showed no change in qualifying conditions from 1958 to 1966, but coverage shifted to trusteed plans where more employees received better coverage.[11] The earned right idea of paying for unused sick leave was nowhere in evidence—unless it came from management which occasionally suggested that it buy back unused sick leave at a reduced rate, which would save money over having employees take the time when not ill.[12]



PLAINTIFFS' EXHIBIT NO. 85
Social Security Programs Throughout The World,
1971, U.S. Dept. of HEW.

## DISCRIPTION OF PROGRAMS

THIS RESEARCH REPORT highlights the principal features of social security systems in all countries having such systems. Only fully independent countries are covered; other jurisdictions have been excluded because of space limitations. The report includes information for 125 nations—two more than in the last edition published for 1969. Each of these has enacted statutes concerning at least one of the main social security branches.

The data reported here reflect the status of the various national social security systems at the beginning of 1971.

* * *

## FORMAT OF COUNTRY SUMMARIES

The information on national social security systems is presented here in the form of a tabular summary for each country. All charts extend across two pages and are organized identically. They contain eight vertical columns with the same headings for all countries, and five horizontal rows corresponding to the major social security branches.

* * *

*Horizontal rows.*—Wherever one of these rows which correspond to the five main branches of social security has been left blank, it signifies that the country in question does not have a program in force for the branch concerned.

The top row of each country chart covers programs concerned with the contingencies of *old age, invalidity, and*

*death*. Benefits provided upon the occurrence of these risks ordinarily take the form of pensions payable for life, or at least for a considerable number of years; hence they are usually referred to as benefits for "long-term risks." Ordinarily, these programs are administered jointly and have a pooled source of financing as well as interrelated qualifying conditions and benefit formulas. It is therefore logical to group them together.

* * *

The second type of long-term risk for which pensions are provided under social security programs is invalidity. This may be generally defined as permanent or long-continuing and more or less total disablement resulting from a nonoccupational injury or disease. (Disability caused by a work injury or occupational disease is usually compensated under separate benefit programs or provisions, rather than under the general invalidity provisions; these benefits are dealt with in the third row of each summary.) The third type of pensions listed in the top row are those payable to dependents of insured workers or pensioners who die. Pensions for survivors of work-accident victims are usually provided under separate programs.

The second row of each country summary deals with programs concerning the risks of *sickness and maternity*. Programs covered include those providing one or more of the following: (1) cash benefits to replace wages lost as a result of relatively short-term sickness of nonoccupational origin, (2) cash benefits to replace wages lost during maternity leave, and (3) medical benefits or services provided in the event of either of these contingencies. Again, the cash benefits and medical care provided during the temporary disability resulting from a work injury or occupational disease are not dealt with in this row, but in the third.



One reason for grouping in a single branch the several kinds of benefits shown together in the second row is that each deals in one way or another with the risk of temporary incapacity. Moreover, in most countries where such benefits are provided, all of them are usually furnished as part of a single system with common financing and administration. The majority of countries provide medical-care services for sickness and maternity as an integral part of their sickness insurance system, and link such benefits directly with the provision of cash benefits. In a few countries, however, medical-care services are provided under a public service program independent of the social insurance system. Where this dual approach is followed, it has been indicated in the summaries.

* * *

## MEASURES COVERED BY REPORT

The individual countries may differ considerably in the programs they classify under the term "social security." To ensure intercountry comparability in this survey, it is necessary to single out those fundamental elements which such programs have in common. The characteristics used in deciding upon the programs to be included in this report are summarized below.

One principal characteristic of social security programs is that they are established by governmental statute. This is true whether or not their actual administration is entirely in public hands.

A second characteristic of the social security measures included in this study is that they usually provide some kind of cash payments to individuals to replace at least part of the loss or deficiency in their income caused by

such long or short-term contingencies as old age, invalidity, and death; sickness or maternity; work injury; and unemployment. Programs that provide regular cash allowances to families for the maintenance of children are also regarded as social security programs. Finally, statutory programs that provide medical treatment to individuals (other than traditional public-health services), or that are concerned with financing such curative services, are usually considered to be a form of social security in countries where they exist.

* * *

*Social insurance.*—One major element of most social insurance programs is that they are financed entirely or largely from special contributions paid by employers or employees, or both, rather than entirely from ordinary government revenues. These contributions are usually placed in a fund kept separate from other government accounts, and all benefits are paid in turn from this fund. The rights of individuals to benefits under social insurance ordinarily are either derived from or linked in some way with their contributions or coverage under the program. Benefit amounts under most social insurance programs also vary among beneficiaries according to their prior earnings. Such amounts are rarely adjusted to either the current means or needs of individual recipients.

Most social insurance programs are compulsory. This means that expressly defined categories of workers and their employers are required by law to register, pay contributions and otherwise participate in the system. Qualifying conditions and benefit formulas are nearly always prescribed in the statutes, leaving little if any room for administrative discretion in awarding benefits. There are



statutory programs in a few countries, however, under which the participation of employers and perhaps that of workers is voluntary or at least quasi-voluntary. A substantial subsidy is often granted by the government to such voluntary programs to stimulate broad participation.

Most social security provisions in force around the world today are actually of the social insurance type. They are also compulsory in their application. Thus, a large part of the material presented here concerns compulsory social insurance measures.

* * *

The following tabulation shows the number of countries included in the 1940, 1949, 1958, and 1971 Social Security Administration studies as having some type of social security program:

| | 1940 | 1949 | 1958 | 1971 |
|---|---|---|---|---|
| Any type of program | 57 | 58 | 80 | 125 |
| Old age, invalidity, survivors | 33 | 44 | 58 | 101 |
| Sickness and maternity | 24 | 36 | 59 | 68 |
| Work injury | 57 | 57 | 77 | 122 |
| Unemployment | 21 | 22 | 26 | 34 |
| Family allowances | 7 | 27 | 38 | 63 |

* * *

*Coverage.*—Wide differences exist in the proportion of the population covered by the sickness and maternity programs of various countries. These differences are correlated to a considerable degree with the economic development of the countries. Coverage is usually fairly extensive in the industrialized countries, but tends to be quite limited in countries still in the early stages of economic development. During the past decade, public health schemes in a

number of developed countries have greatly increased the percentage of people covered. Notable examples are France and Italy.

Wage earners aare vulnerable to the risk of income loss from sickness or maternity. Self-employed persons have traditionally been considered to be subject to this risk to a much lesser extent, and it does not really exist at all for persons not gainfully employed. Only a few countries cover self-employed persons for cash sickness benefits, due in part to the difficulty of verifying their actual loss of income when they become ill. As a result the coverage of nearly all of the cash benefit programs dealt with in the second row of the country summaries is limited primarily to employees in general or to particular classes of employees. A number of the newer systems apply only to employees of larger firms in industry and commerce or, as in India, only to those in the larger factories. These programs exclude virtually the entire agricultural population of the countries concerned, which in some may comprise more than 80 or 90 percent of the whole population. Some higher paid employees are excluded from sickness insurance in a few countries of Europe, e.g., the Federal Republic of Germany and the Netherlands.

* * *

*Qualifying conditions.*—Nearly all sickness and maternity programs provide for the payment of cash sickness or "temporary disability" benefits to insured employees who are prevented from working because of an illness or non-occupational injury. To be eligible for such payments, a worker must have suffered a wage loss. Specifically, he must be incapacitated for work and not be receiving his regular wages or sick leave payments from his employer. And he must usually furnish some kind of medical certification of his inability to work.



Besides being incapacitated for work, most sickness and maternity benefit programs require claimants for cash benefits to meet some kind of minimum qualifying period of contribution or employment. As a result, cash benefits are restricted to persons who regularly derive their livelihood from employment and who consequently suffer a genuine loss of earnings when they are ill. Further, the qualifying conditions help to secure a reasonable balance between program expenditures and revenues.

Comparison of the summaries (fourth column, second row) shows that the length of the qualifying period for cash sickness benefits differs considerably from country to country. It ranges from 1 month to 6 months or more and must usually have been served fairly recently, such as during the last 6 or 12 months immediately preceding the claim. The qualifying period for cash maternity benefits is ordinarily somewhat longer than that for sickness benefits. It is often fixed at 10 months of contribution or employment during the last 1 or 2 years preceding the expected date of confinement.

The qualifying period for medical benefits under some social insurance systems is the same as that for cash benefits. In this case, a worker acquires and retains eligibility for both types of benefits during the same period. Other systems require a somewhat shorter qualifying period for medical than for cash benefits. Many have no qualifying period at all for medical benefits and thus, in effect, provide them to any worker currently in insured employment. No qualifying period is required in those countries where medical care is furnished as a public service.

Most programs providing medical services to dependents of workers as well as to the workers themselves do not distinguish in their qualifying conditions between the two types

of beneficiaries. A few of them, however, require longer periods of insured employment for dependents before medical services are provided to them.

*Cash benefits.*—Countries commonly fix the benefit formula for cash sickness benefits at 50-75 percent of the worker's average earnings during the preceding few months. Payment of benefits at a rate less than full wages furnishes an incentive to workers who are ill to return to work as soon as possible rather than to continue drawing benefits, and thus discourages malingering. Beneficiaries supporting a wife or children are frequently paid supplements to their basic benefit. Most programs either expressly fix a maximum benefit amount, or do so indirectly through a general ceiling on earnings for contribution and benefit purposes. Benefit rates are reduced in a number of countries when beneficiaries are hospitalized at the expense of the social insurance system, but the reduction is always smaller for beneficiaries with dependents than for single persons.

A 2-7 day waiting period for cash sickness benefits is imposed under most programs. This means that no benefit is payable if a disabling illness lasts only a few days and that the first few days are not compensable in case of long illnesses. Under some programs, benefits are retroactively paid for the waiting period when the disability continues beyond a specified time, commonly 2 or 3 weeeks. The imposition of a waiting period serves to reduce both administrative and benefit costs of sickness insurance programs by excluding many claims for short illnesses during which a workers's income-loss is relatively small.

Cash sickness benefits are usually paid on a weekly basis, although they may be computed on another basis. The aggregate number of weeks during which a worker may receive

benefits for a single spell of sickness, or in a given year, is ordinarily limited by a statutory maximum. The summaries suggest that the most common limit is 26 weeks. In some countries, however, benefits may be drawn for a considerably longer period, or even for an unlimited duration (e.g., Sweden and United Kingdom). A number of countries permit the administering agency to extend the usual maximum to perhaps 39 or 52 weeks in individual cases (such as when recovery from the illness seems probable within the period of extension, or for infectious diseases). After cash sickness benefits are exhausted, they are converted in most countries into invalidity pensions if it is then apparent that the recipient will continue to be incapacitated either permanently or for a long period.

Cash benefits are also payable in the great majority of countries for a specified period of time before and after childbirth to working women covered under insurance. Prerequisites of such maternity benefits nearly always are that the woman abstains from paid employment while receiving benefits; that her employer is not continuing her wages and she is sustaining an actual income loss; and usually that she is using the prenatal and postnatal medical services provided by the system. The percent of earnings payable as a cash maternity benefit differs considerably from country to country, ranging from 50 to 100 percent of wages. Benefit payments usually start approximately 6 weeks before the expected date of confinement, and end 6 or 8 weeks after confinement.

Several countries provide a special nursing allowance in addition to the basic cash maternity benefit. This allowance normally amounts to 20 or 25 percent of the regular maternity benefit and may be payable for up to 6 months or longer. A grant for the purchase of a layette, or a layette itself, is furnished under some programs. Finally, a substantial lump-



sum "maternity grant" is paid in some countries upon the birth of each child. Not only insured women but also the wives of insured men are often eligible for this lump-sum payment. Similar birth grants are paid in some countries under the family allowance program (fifth column, bottom row, of the summaries).

*Medical benefits.*—The great majority of social security programs providing sickness and maternity cash benefits also provide medical benefits or services. The rationale of providing these two kinds of benefits is that the cost of medical care imposes a severe financial burden on a sick worker in much the same way as does his loss of wages. Another consideration is that the cost of providing cash sickness benefits to a worker who is ill will be lower the earlier that curative care enables him to return to work.

The particular types of medical services provided under social security programs vary somewhat from country to country. They usually include at least general practioner care, some hospitalization, and essential medicines. The services of specialists, limited or broader dental care, a wider range of medicines, and perhaps certain appliances are often added. And finally, transportation of patients, and home-nursing services may be included.

* * *

Maternity care for working women covered by the social security system is provided in most countries under the program that provides medical services generally. Normally, prenatal, obstetric, and postnatal care are included. Obstetric care is sometimes limited to the services of a midwife, although those of a doctor are usually available in case of complications. Care in a maternity home or hospital as well as essential medicines is ordinarily furnished where necessary. The method

used in each country for providing medical services generally—whether the service-benefit, reimbursement, or direct-provision method—is usually followed also in the provision of maternity care.

*Medical care for dependents.*—Countries providing medical benefits for insured workers through social insurance typically furnish similar services to their dependents. The latter usually include the spouse and young children (sometimes other adult or young relatives living with the insured and dependent upon him). Services available to dependents in some countries, however, are more limited than those provided to insured workers or family heads. The maximum duration of hospitalization, for example, may be briefer for dependent, or a larger percent of the cost of certain services such as medicines may be payable by the patient if the latter is a dependent. Medical care in case of maternity is generally provided to the wife of an insured man.

* * *

*Administrative organization.*—Patterns of administrative organization for sickness and maternity programs are generally similar to those for old age, invalidity, and survivors. Most commonly, such programs are administered by some form of quasi-autonomous national social insurance institution. These institutions are established by law and subject to general supervision by a government minister. They are usually managed by boards composed of representatives of insured workers, employers, and the government, and operate with a considerable degree of independence. This type of organization is particularly common in Latin American and Asian countries.

Some institutions own and operate their own medical establishments which furnish at least part of the services available under their programs. Direct contacts with insured



persons and providers of services in some countries are handled by regional and local branches of the national agency.

In several other countries, responsibility for most of the detailed administration of sickness insurance is placed in the hands of nongovernmental sickness funds or societies of various types. This is the case, for example, in Austria, Belgium, Denmark, Federal Republic of Germany, Luxembourg, Netherlands, and Switzerland, and to some extent in Australia and Japan. These funds serve, in effect, as administrative agents for the government in handling direct contacts with insured persons and providers of health services. All workers covered by the social insurance program are required to join one of the funds.

Each fund must usually be approved by the government before it can operate, and must satisfy certain minimum requirements specified in the law before receiving approval. The funds also continue to be subject to some governmental supervision. Their jurisdiction may be limited to a single city or district, or to a particular occupation. In some countries, the funds number several hundred or even more than a thousand.

* * *

In most of the remaining countries, representing a minority of the total, government departments are responsible for the actual provision of sickness and maternity benefits, including in some cases medical services. This administrative responsibility is often linked with that for other types of social security benefits, the entire range of benefits being administered as a single program. Examples of countries with exclusively governmental administration of health insurance are the United Kingdom, Ireland, and New Zealand.

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PLAINTIFFS' EXHIBIT NO. 86
Physician Service Patterns and Illness Rates, Helen Hershfield Avnet (Group Health, Inc.).

# *Physician Service Patterns and Illness Rates*

Helen Hershfield Avnet

A Research Report on Medical Data Retrieved from Insurance Records

Group Health Insurance, Inc.

## PREFACE

This study was undertaken by Group Health Insurance (GHI) to demonstrate the wealth of medically relevant data which can be produced as a by-product of medical insurance administration.

* * *

Without repeating what is already in the body of the Report, the unprecedented variety of subjects treated specifically or by implication is illustrated in this section of questions based on the contents:

* * *

How would reporting of annual incidence rates of each diagnosis, surgical or diagnostic procedure and other correlated treatment data for age-sex subgroups, provide a more equitable base for comparing and evaluating care under different systems of medical care distribution?

* * *

This volume is the third original research report to be published by GHI-GHDI in five years. Like its predecessors ("Psychiatric Insurance" and "Insured Dental Care") it is distributed as a community service. We hope that by showing what can be done as a first step by one organization, we shall be helping to stimulate further action in this sphere, by those in strategically appropriate positions, toward our common ultimate goal of improved medical care distribution.

George W. Melcher, Jr. M.D.
*President, Group Health Insurance, Inc.*



## Chapter 16
## DISTRIBUTION AND INCIDENCE OF ATTENDED ILLNESS

Diagnoses entered on claim forms by treating physicians have been analyzed in conjunction with demographic and treatment variables. The first type of analysis, relating illness data to the population at risk, results in the derivation of morbidity rates, discussed below. The second approach, coordinating treatment with diagnosis on a case basis, is presented in the following chapter.

* * *

Furthermore, as a regular source of data not requiring special collection efforts, insurance records have advantages with respect to lower costs, which should be a plus factor of some weight in arranging for eventual annual or biannual morbidity indices. As for accuracy of terminology, reliance on physicians for reports of diagnosis, whatever the shortcomings, is clearly preferable to consumer impressions of ailments as interpreted by household interviewers. Perfection of source material cannot be a prerequisite for compilation of needed data. In this connection it should be recalled that entries by physicians on death certificates are deemed the likeliest assurance of accuracy and are accepted for compilation of mortality statistics, even though some degree of incorrect, inconsistent, or unstandardized cause-of-death labeling, of unknown extent, must be assumed. The same will always be true of morbidity reporting.

In addition to its records of physician-reported diagnoses, population characteristics and treatment patterns, GHI's advantages as a collector of morbidity data stem from its type of organization and coverage: the fact that

it operates within the still-predominating free-choice fee-per-service framework removes the need to consider the possible influence of this factor (except for special comparative studies); while its provision of comprehensive coverage permits an integrated presentation of combined ambulatory-hospital experience. Morbidity studies confined to hospitalized illness can be helpful in evaluating and comparing hospital utilization, but ambulatory patients' diagnoses comprise the bulk of conditions demanding physicians' services. (See Table 126 for diagnostic comparison of hospital illness and all illness.) Similarly, the inclusion of all reported incidence in one analysis (as opposed to the separation of "chronic" and "acute" conditions), together with subsequent analysis relating treatment to diagnosis, helps to develop an integrated picture of the "whys" of the medical care detailed in previous chapters.

TABLE 126. All Diagnoses vs. Hospital Admissions: Comparison of Diagnostic Distributions

| CATEGORY | PER CENT OF REPORTED DIAGNOSES | |
|---|---|---|
| | *All Cases* | *Hospital Admissions* |
| TOTAL | 100.0 | 100.0 |
| Infective and Parasitic Diseases | 5.8 | .8 |
| Neoplasms | 1.9 | 9.2 |
| Malignant Neoplasms | .4 | 2.8 |
| Allergic, Endocrine System, Metabolic and Nutritional Diseases | 5.0 | 2.7 |
| Diseases of Blood and Blood-Forming Organs | .7 | .5 |
| Mental, Psychoneurotic and Personality Disorders | .4 | .5 |
| Diseases of Nervous System | 1.2 | 1.9 |
| Diseases of the Eye | 2.6 | 2.0 |
| Diseases of the Ear | 3.8 | 1.1 |
| Diseases of the Circulatory System | 5.2 | 10.1 |
| Heart Diseases | 1.9 | 5.2 |
| Diseases of the Respiratory System | 29.4 | 13.1 |



| | | |
|---|---|---|
| Diseases of the Digestive System | 7.0 | 14.8 |
| Diseases of the Urinary System | 1.5 | 3.6 |
| Diseases of the Male Genital Organs | .4 | 1.5 |
| Diseases of the Female Genital Organs and Breast | 3.2 | 5.2 |
| Deliveries and Complications of Pregnancy, Childbirth and Puerperium | 1.0 | 17.1 |
| Diseases of Skin and Subcutaneous Tissues | 6.0 | 1.9 |
| Diseases of Bones and Organs of Movement | 4.3 | 3.1 |
| Injuries and Adverse Effects of External Causes | 8.3 | 7.3 |
| Symptoms, Senility and Ill-Defined Conditions | 3.5 | 2.4 |
| Preventive Care | 8.6 | 0 |
| Other (Congenital Malformations and Certain Diseases of Early Infancy) | .2 | 1.2 |

**Notes on Methods of Classification and Analysis**

In classifying physicians' diagnostic entries retrieved from claim forms, twenty-three categories have been used, including separate categories for eye conditions, ear conditions, one for "undetermined" and one for "supplementary"—the latter generally indicating preventive care rather than a diagnosis of illness. Except for these few modifications, the classification system follows that of the "International Classification of Diseases".

* * *

**Most and Least Frequent Entries**

Inspection of incidence rates of individually listed disorders (as opposed to disease categories) brings into quick focus the relative infrequency of some of the more dramatic, disabling or lethal disorders and the comparatively routine nature of many of those most frequently reported—the latter reflecting, of course, the

inclusion of diagnoses rendered in connection with office or home visits (Table 127).

Of the 38 diagnoses listed among the most frequent, 20 affected 2 or more per cent of the population, and 18 affected between 1.0 and 1.9 per cent. This list is dominated by acute conditions but includes exceptions such as arthritis, arteriosclerotic heart disease, diabetes, ul ulcer–each reported for 1 to 3 per cent of the population.

* * *

## TABLE 127. Selected Incidence Rates, Most and Least Frequent Diagnoses Listed

CASES REPORTED PER 1000 EXPOSURE YEARS
(ADJUSTED TO AGE-SEX COMPOSITION OF GENERAL POPULATION)

| | | | |
|---|---|---|---|
| *Most Frequent* * | | | |
| Pharyngitis | 113.8 | Cellulitis | 20.3 |
| Bronchitis | 87.7 | German Measles | 19.1 |
| Gastroenteritis-Colitis | 54.7 | Myositis | 17.8 |
| Tonsillitis | 52.9 | Laryngitis | 17.7 |
| Sprain-Strain | 47.9 | Hay Fever | 16.7 |
| Otitis Media | 42.8 | Cystitis | 16.3 |
| Intestinal Virus | 40.4 | "Strep Throat" | 15.2 |
| Arthritis | 30.3 | Cervicitis | 15.2 |
| Dermatitis | 29.8 | Fracture | 14.3 |
| Influenza | 29.8 | Asthma | 14.1 |
| Laceration | 29.7 | Menstrual Disorder | 14.0 |
| Benign Neoplasm | 29.5 | Anemia | 13.8 |
| Synovitis-Bursitis | 28.2 | Arteriosclerotic Heart Disease | 13.2 |
| Obesity | 25.2 | Diabetes | 12.9 |
| Contusion(s) | 24.3 | Hemorrhoids | 11.9 |
| Sinusitis | 22.5 | Pneumonia | 11.6 |
| Conjunctivitis | 22.4 | Vaginitis | 11.3 |
| Gastritis-Duodenitis | 21.9 | Ulcers | 11.1 |
| Normal Delivery | 20.6 | Head Injury | 10.1 |
| *Least Frequent* † | | | |
| Muscular Dystrophy | .1 | Nephritis-Nephrosis | .9 |
| Hodgkin's Disease | .1 | Scoliosis | 1.1 |
| Ectopic Pregnancy | .1 | General Arteriosclerosis | 2.3 |
| Leukemia | .2 | Abortion | 2.6 |
| Pulmonary Embolism | .2 | Cataract | 3.7 |
| Infectious Hepatitis | .3 | Glaucoma | 4.0 |
| Multiple Sclerosis | .3 | Acute Coronary Occlusion | 4.5 |
| Retinal Detachment | .3 | Malignant Neoplasm | 8.6 |
| Complicated Delivery | .4 | | |

* Ten or more cases per 1000 exposure years.

† Diseases occurring at a rate of less than 1 case per 10,000 exposure years were not tabulated separately.



TABLE 128. Distribution of Attended Illness by First Month of Service, by Diagnostic Category

*Part I: to June*

| DIAGNOSTIC CATEGORY | Total | FIRST MONTH OF SERVICE: January | February | March | April | May | June |
|---|---|---|---|---|---|---|---|
| | % | % | % | % | % | % | % |
| Infective and Parasitic Diseases | 100.0 | 10.5 | 10.7 | 14.0 | 11.5 | 9.2 | 8.0 |
| Neoplasms | 100.0 | 9.1 | 8.8 | 9.1 | 9.1 | 9.8 | 8.8 |
| Allergic, Endocrine System, Metabolic and Nutritional Diseases | 100.0 | 11.5 | 7.9 | 9.5 | 10.5 | 10.3 | 9.1 |
| Diseases of Blood and Blood-Forming Organs | 100.0 | 10.7 | 6.6 | 6.3 | 9.4 | 13.0 | 11.5 |
| Mental, Psychoneurotic and Personality Disorders | 100.0 | 13.9 | 7.0 | 7.2 | 9.4 | 4.9 | 9.7 |
| Diseases of Nervous System | 100.0 | 8.1 | 8.8 | 8.8 | 11.2 | 8.4 | 9.0 |
| Diseases of the Eye | 100.0 | 8.5 | 5.9 | 8.2 | 8.7 | 8.6 | 9.4 |
| Diseases of the Ear | 100.0 | 9.3 | 8.5 | 9.9 | 8.4 | 10.0 | 8.5 |
| Diseases of the Circulatory System | 100.0 | 8.8 | 8.9 | 8.9 | 9.2 | 8.9 | 8.4 |
| Diseases of the Respiratory System | 100.0 | 10.0 | 10.2 | 9.7 | 8.8 | 7.7 | 6.4 |
| Diseases of the Digestive System | 100.0 | 10.1 | 8.2 | 8.2 | 8.8 | 6.7 | 7.7 |
| Diseases of the Urinary System | 100.0 | 8.2 | 6.9 | 10.8 | 8.7 | 9.7 | 7.8 |
| Diseases of the Male Genital Organs | 100.0 | 11.6 | 4.9 | 9.2 | 10.1 | 8.5 | 7.2 |
| Diseases of the Female Genital Organs | 100.0 | 9.2 | 7.1 | 8.7 | 9.3 | 9.0 | 8.9 |
| Deliveries and Complications of Pregnancy, Childbirth and Puerperium | 100.0 | 9.1 | 7.7 | 7.5 | 8.6 | 8.5 | 8.0 |
| Diseases of Skin and Subcutaneous Tissues | 100.0 | 8.9 | 8.7 | 7.9 | 8.3 | 9.1 | 10.0 |
| Diseases of Bones and Organs of Movement | 100.0 | 7.7 | 8.5 | 8.5 | 9.5 | 9.9 | 8.7 |
| Congenital Malformations | 100.0 | 8.8 | 8.8 | 4.4 | 9.4 | 8.5 | 8.8 |
| Diseases of Early Infancy | 100.0 | 12.9 | 13.9 | 4.9 | 3.0 | 5.9 | 10.9 |
| Symptoms, Senility and Ill-Defined Conditions | 100.0 | 8.6 | 9.0 | 8.2 | 8.9 | 9.8 | 8.3 |
| Injuries and Adverse Effects of External Causes | 100.0 | 7.1 | 6.6 | 7.8 | 7.9 | 9.2 | 8.9 |
| Supplementary Classifications (General Medical Examination, Well Baby Care) | 100.0 | 7.0 | 7.6 | 6.8 | 8.8 | 8.0 | 9.4 |
| Undetermined Classifications | 100.0 | 10.4 | 8.8 | 10.4 | 8.5 | 8.6 | 8.1 |
| TOTAL | 100.0 | 9.3 | 8.6 | 9.1 | 9.1 | 8.8 | 8.0 |
| TOTAL EXCLUDING UNDETERMINED CLASSIFICATIONS | 100.0 | 9.3 | 8.6 | 9.0 | 9.1 | 8.8 | 8.0 |

*Part II: July to December*

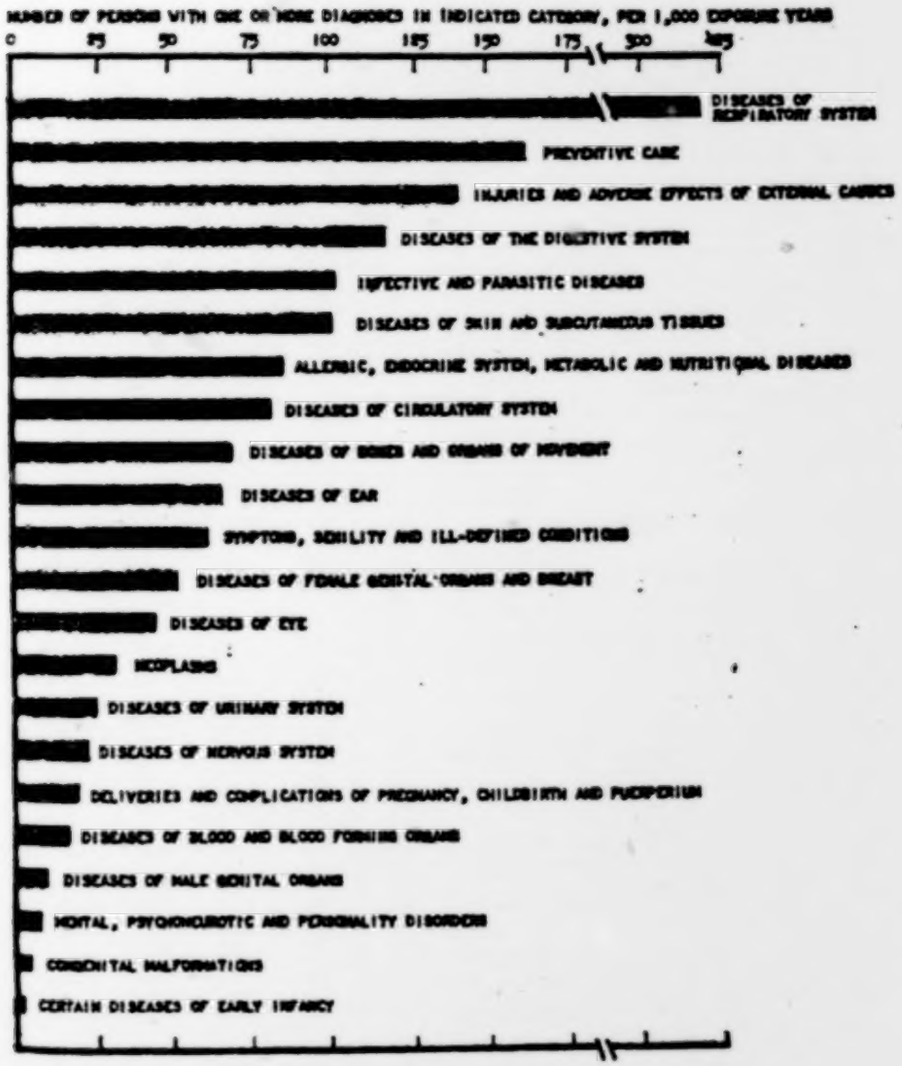
| DIAGNOSTIC CATEGORY | FIRST MONTH OF SERVICE: July | August | September | October | November | December |
|---|---|---|---|---|---|---|
| | % | % | % | % | % | % |
| Infective and Parasitic Diseases | 4.7 | 5.5 | 6.4 | 6.2 | 7.6 | 7.7 |
| Neoplasms | 7.2 | 7.3 | 8.6 | 8.2 | 7.2 | 9.0 |
| Allergic, Endocrine System, Metabolic and Nutritional Diseases | 6.3 | 6.8 | 7.2 | 7.9 | 6.8 | 6.0 |
| Diseases of Blood and Blood Forming Organs | 5.9 | 5.1 | 8.4 | 9.8 | 7.8 | 5.9 |
| Mental, Psychoneurotic and Personality Disorders | 7.2 | 7.3 | 11.1 | 7.3 | 7.8 | 7.2 |
| Diseases of Nervous System | 10.0 | 7.2 | 7.5 | 8.1 | 8.3 | 6.6 |
| Diseases of the Eye | 8.2 | 6.6 | 9.4 | 10.2 | 8.3 | 9.0 |
| Diseases of the Ear | 9.4 | 7.2 | 7.3 | 7.7 | 7.2 | 6.6 |
| Diseases of the Circulatory System | 7.7 | 7.8 | 7.6 | 9.2 | 8.0 | 6.6 |
| Diseases of the Respiratory System | 4.8 | 6.2 | 7.8 | 9.8 | 9.2 | 9.4 |
| Diseases of the Digestive System | 7.7 | 7.8 | 8.4 | 8.7 | 8.5 | 7.2 |
| Diseases of the Urinary System | 6.2 | 7.6 | 8.3 | 11.7 | 6.8 | 7.3 |
| Diseases of the Male Genital Organs | 8.4 | 11.6 | 8.2 | 8.5 | 6.8 | 7.0 |
| Diseases of the Female Genital Organs | 7.8 | 7.3 | 8.1 | 9.6 | 8.8 | 6.2 |
| Deliveries and Complications of Pregnancy, Childbirth and Puerperium | 8.6 | 7.7 | 7.6 | 9.8 | 9.6 | 9.3 |
| Diseases of Skin and Subcutaneous Tissues | 8.5 | 8.8 | 8.8 | 7.9 | 8.9 | 8.2 |
| Diseases of Bones and Organs of Movement | 8.6 | 7.7 | 8.1 | 10.0 | 7.6 | 7.2 |
| Congenital Malformations | 8.2 | 4.1 | 11.8 | 13.3 | 6.5 | 7.4 |
| Diseases of Early Infancy | 3.9 | 7.9 | 7.9 | 13.9 | 4.0 | 10.9 |
| Symptoms, Senility and Ill-Defined Conditions | 7.4 | 6.6 | 7.0 | 9.4 | 9.2 | 7.6 |
| Injuries and Adverse Effects of External Causes | 9.7 | 8.9 | 9.3 | 9.1 | 7.9 | 7.6 |
| Supplementary Classifications (General Medical Examination, Well Baby Care) | 8.9 | 9.4 | 9.4 | 10.0 | 11.2 | 8.5 |
| Undetermined Classifications | 6.3 | 6.7 | 7.0 | 9.2 | 8.1 | 7.9 |
| TOTAL | 6.8 | 7.3 | 8.0 | 9.1 | 8.4 | 7.5 |
| TOTAL EXCLUDING UNDETERMINED CLASSIFICATIONS | 6.9 | 7.4 | 8.1 | 9.1 | 8.4 | 7.4 |

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*Variations in Incidence Among Males and Females*

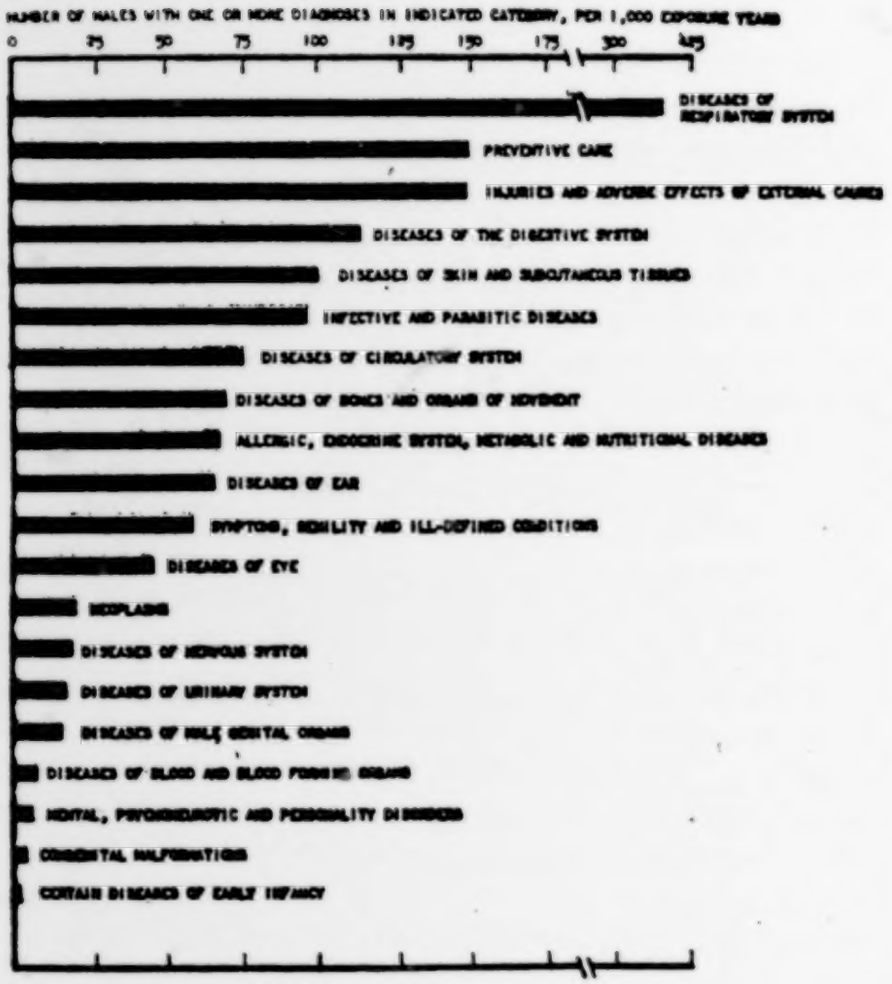
The comparative longevity of women raises speculation as to the possibly contributory role played by their greater inclination toward medical attention.

INCIDENCE OF ATTENDED ILLNESS,
BY DIAGNOSTIC CATEGORY
(Comprehensive Plan Sample)

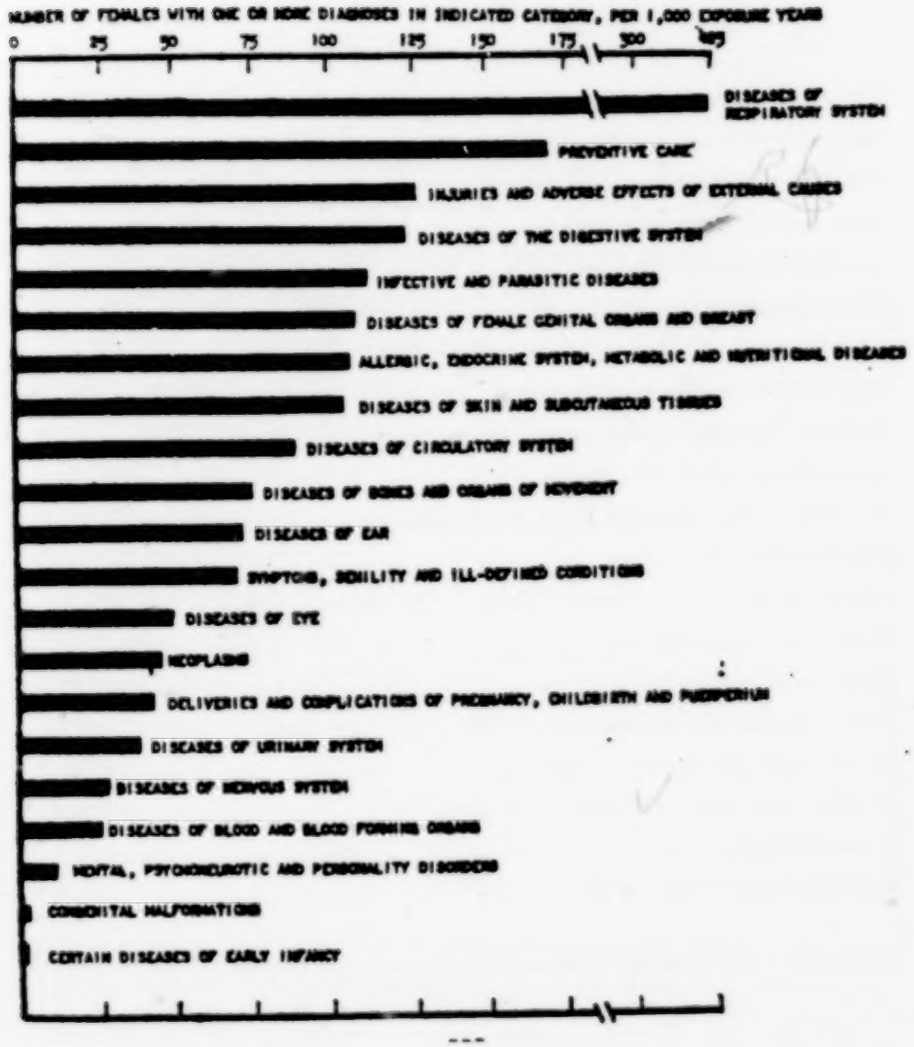





INCIDENCE OF ATTENDED ILLNESS, MALES,
BY DIAGNOSTIC CATEGORY
(Comprehensive Plan Sample)



INCIDENCE OF ATTENDED ILLNESS,
FEMALES, BY DIAGNOSTIC CATEGORY
(Comprehensive Plan Sample)






### Age-Sex Trends

Differences in total treated incidence rates between males and females were minor to age 14, with boys' rates slightly higher; substantial at ages 15 to 19, with boys' rates 16 per cent higher; major from ages 20 through 64, with women always much higher; and again minor after 65.

* * *

*Adults (Aged 20 or more).* One of the most striking findings is the sudden change in incidence rates experienced by each sex at age 20. The change was in opposite directions, boys' rates dropping off and girls' rates rising precipitously. This was found both as to the proportion seeking medical attention and the number of diagnoses reported.

In the case of males, the drop in total reported diagnoses, from 2,070 to 1,385 per thousand, between the late teens and early twenties, was associated with decreases in almost all categories but particularly in injuries, preventive care, and respiratory conditions.

Among females, a good part of the sudden spurt in incidence at age 20 resulted from pregnancies and from disorders of female organs, but there were also substantial increases in the incidence of most other categories—benign neoplasms, infective diseases, disorders of blood, bones, joints, digestive and urinary tract, mental and neurological conditions, circulatory disorders. The highest rate of skin disorders among females was recorded for those aged 20 to 24.

At 20 to 24, total female incidence rates were nearly double the male rates. The gap narrowed with each succeeding age increment, but remained substantial up to age 65.

At no age level did the combined incidence of pregnancy and treatment of female sex organs account for most of the difference in incidence rates between men and women. Up to age 55, women showed higher rates in most categories, the principal exceptions being injuries and skin disorders; but even here, female rates were higher from age 35 on.

Certain disease categories showed a clear upward trend among adults with increasing age, for both sexes—malignant neoplasms, diseases of the nervous system, eye disorders, disorders of bones and joints, circulatory disorders. The latter category showed dramatic changes at every age level after 25; at ages past 65, circulatory diseases topped respiratory diseases as the leading diagnosis and involved well over a quarter of the population, but particularly women. Malignant neoplasms increased dramatically at age 55, doubling the rate found for the previous age interval.

For other disease categories, the age trend was consistently upward among male adults, more erratic among females: benign neoplasms, blood diseases, disorders of the digestive system, urinary tract diseases, allergic-metabolic disorders.

In certain categories the trend was downward—infective diseases, skin disorders, injuries among males, disorders of female sex organs.

The incidence of ear conditions was comparatively steady after age 25.

Except for conditions most frequent in childhood—infective, respiratory, minor digestive and ear disorders—males past 65 showed generally highest rates, whereas among females, highest rates were frequently encountered at ages 35 to 44—e.g. benign neoplasms, urinary tract disorders, injuries, allergic-metabolic disorders.

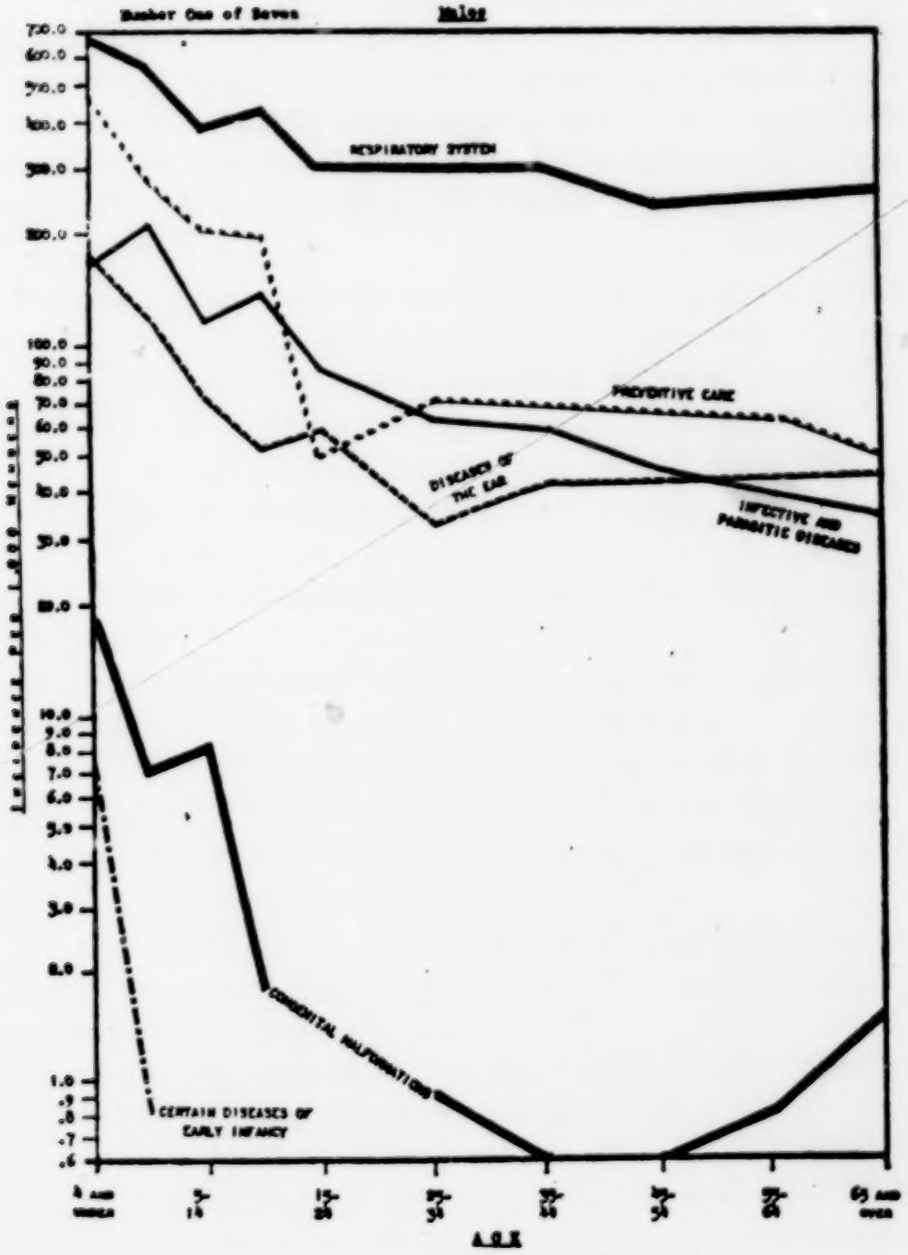
The relative importance of different disease categories to each adult age-sex subgroup changed gradually with increasing age, except for respiratory diseases.

Among males, skin disorders went from second place, at 20–24, to third, at 25–34, to fourth, at 35–44, after which circulatory disorders assumed third place, at ages 45–54, second at 55–64, and first at 65 and over. Digestive diseases went from fifth to fourth to third to second place by ages 45–54. Injuries went from second place, at 25–44, to fourth at ages 45–64 and fifth thereafter. Diseases of bones and joints, outranked by injuries to age 54, surpassed them in frequency after that point.



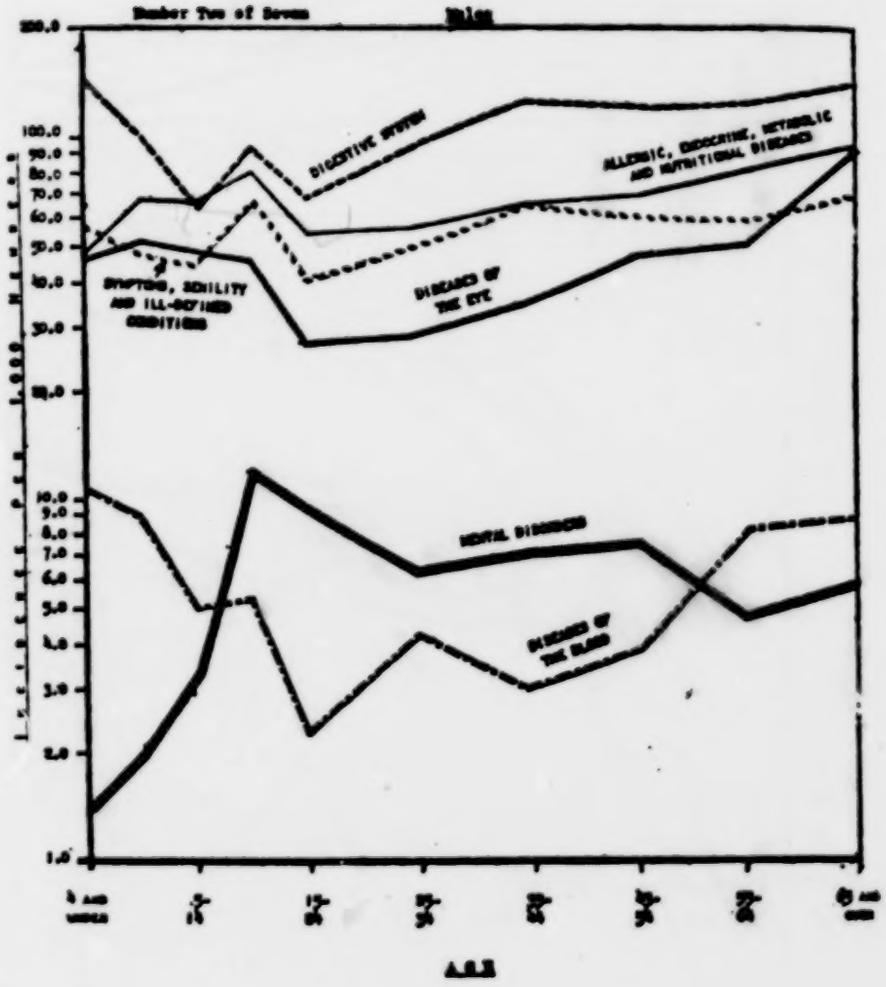
Female disorders were a leading type of illness among women at every age from 20 through 54. Skin conditions, a leader at ages 20 to 24, were displaced by allergic-metabolic and intestinal disorders, at ages 25 to 44. Allergic-metabolic conditions (including treatment of obesity) were most important at ages 35 to 44. Disorders of bones and joints were fifth in importance among women aged 45 to 54, moved to fourth at the next interval, 55 to 64, and were third at ages 65 on. At the same time, circulatory disorders moved from fourth, to second, to first place.

INCIDENCE OF ATTENDED ILLNESS OR PREVENTIVE CARE
BY DIAGNOSTIC CATEGORY, BY AGE AND SEX

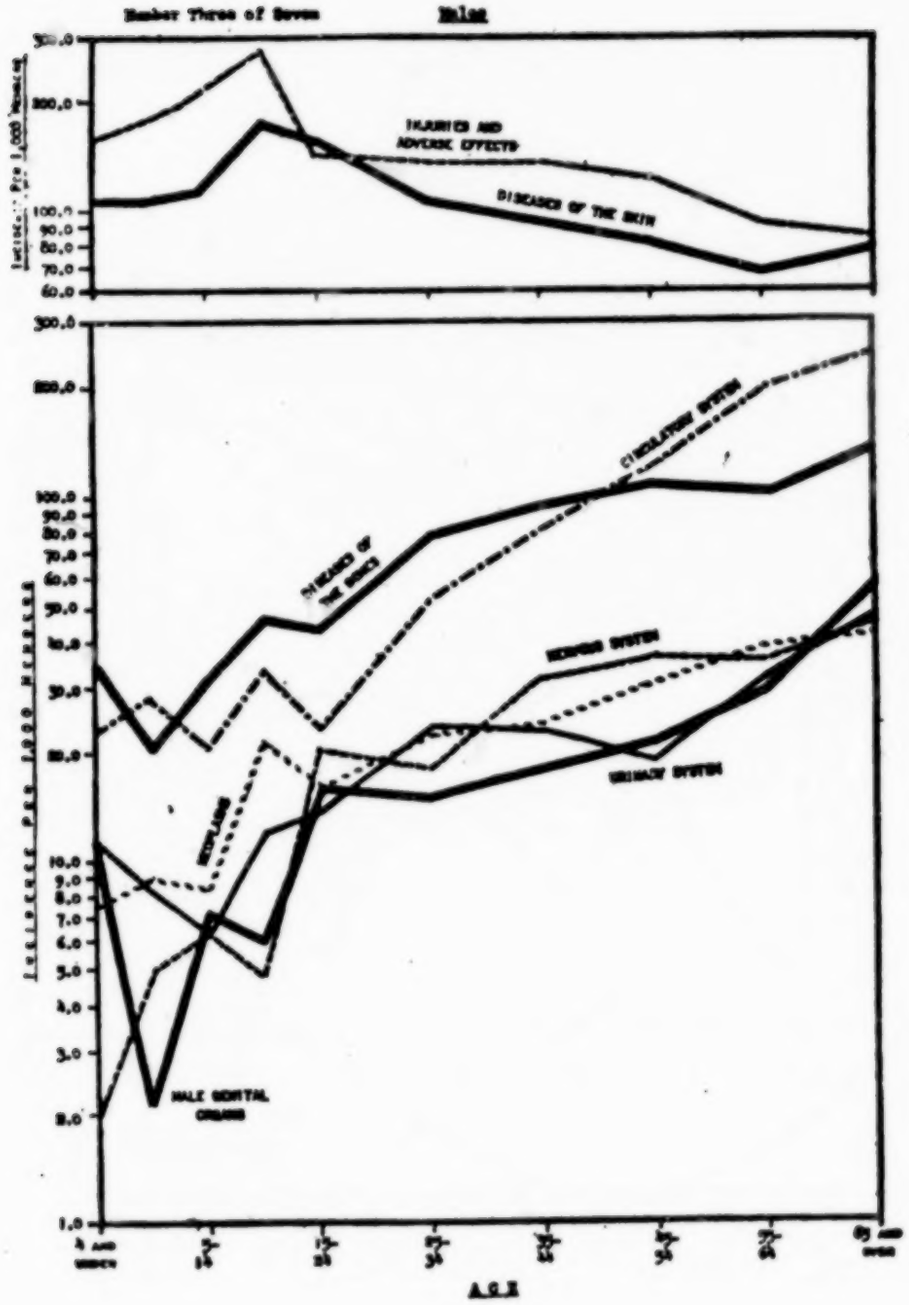





INCIDENCE OF ATTENDED ILLNESS OR PREVENTIVE CARE
BY DIAGNOSTIC CATEGORY, BY AGE AND SEX

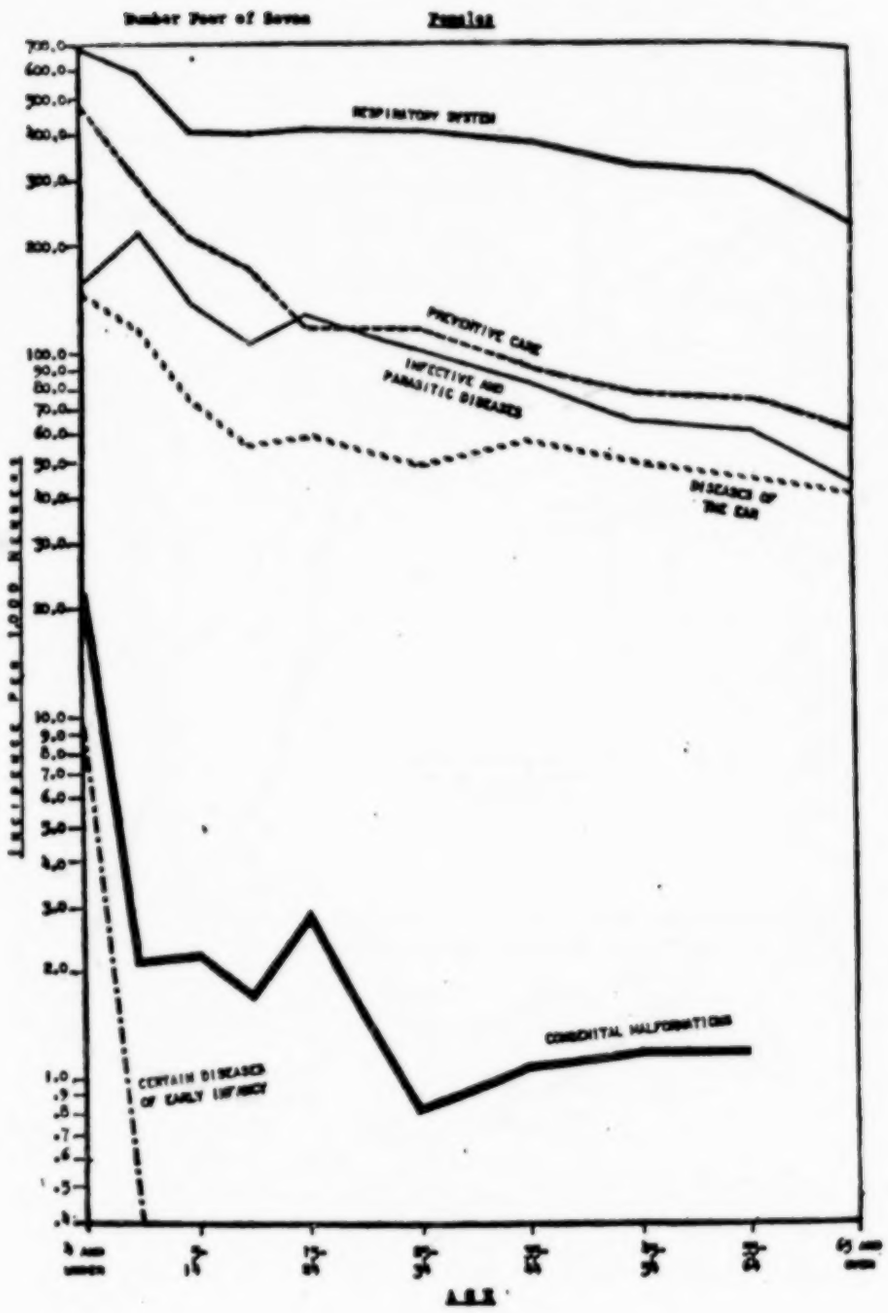


## INCIDENCE OF ATTENDED ILLNESS OR PREVENTIVE CARE BY DIAGNOSTIC CATEGORY, BY AGE AND SEX

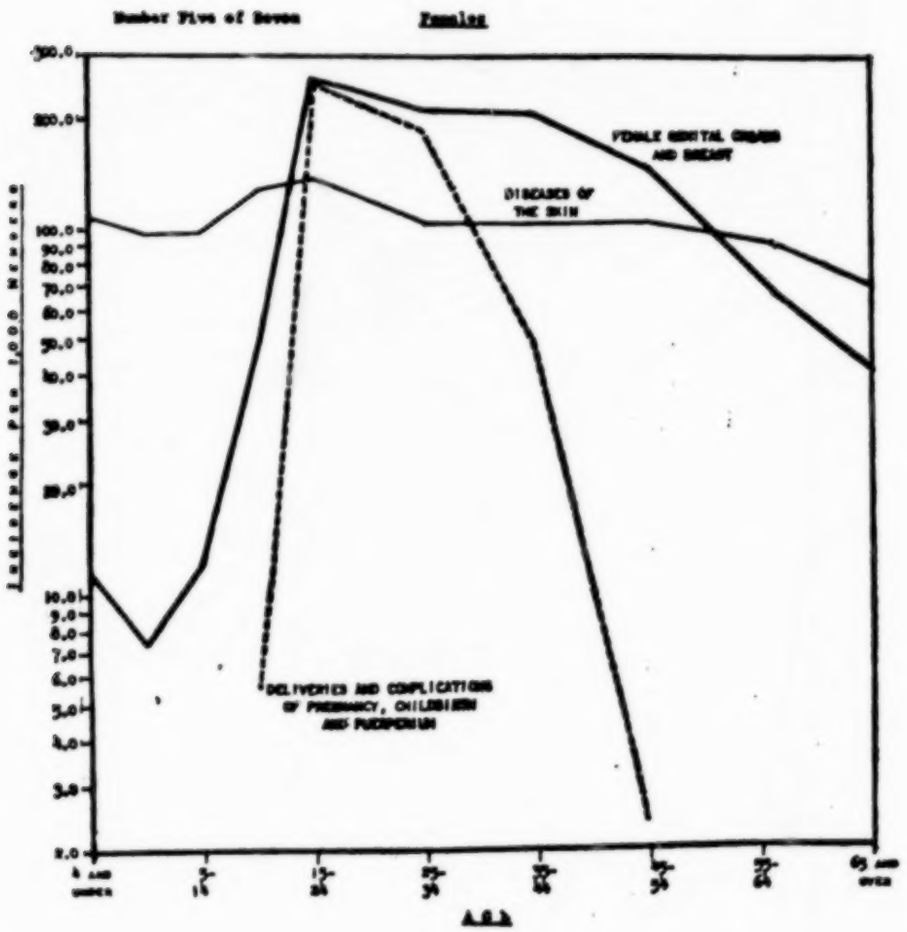





## INCIDENCE OF ATTENDED ILLNESS OR PREVENTIVE CARE BY DIAGNOSTIC CATEGORY, BY AGE AND SEX

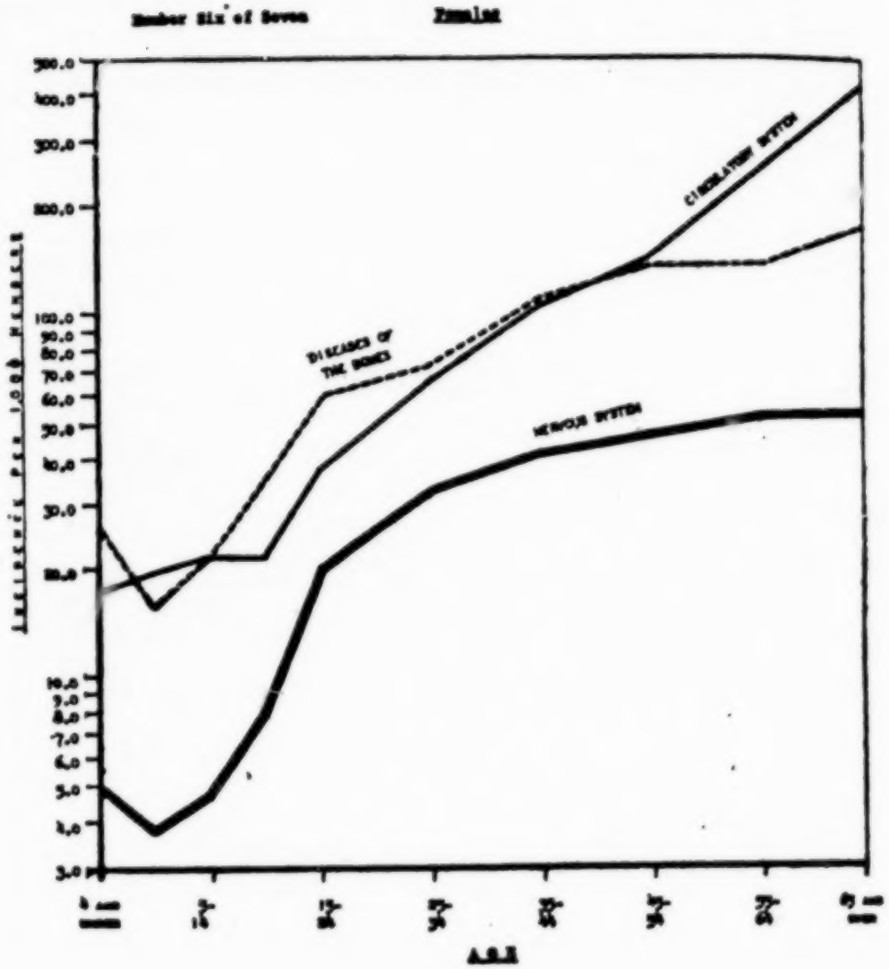


INCIDENCE OF ATTENDED ILLNESS OR PREVENTIVE CARE
BY DIAGNOSTIC CATEGORY, BY AGE AND SEX

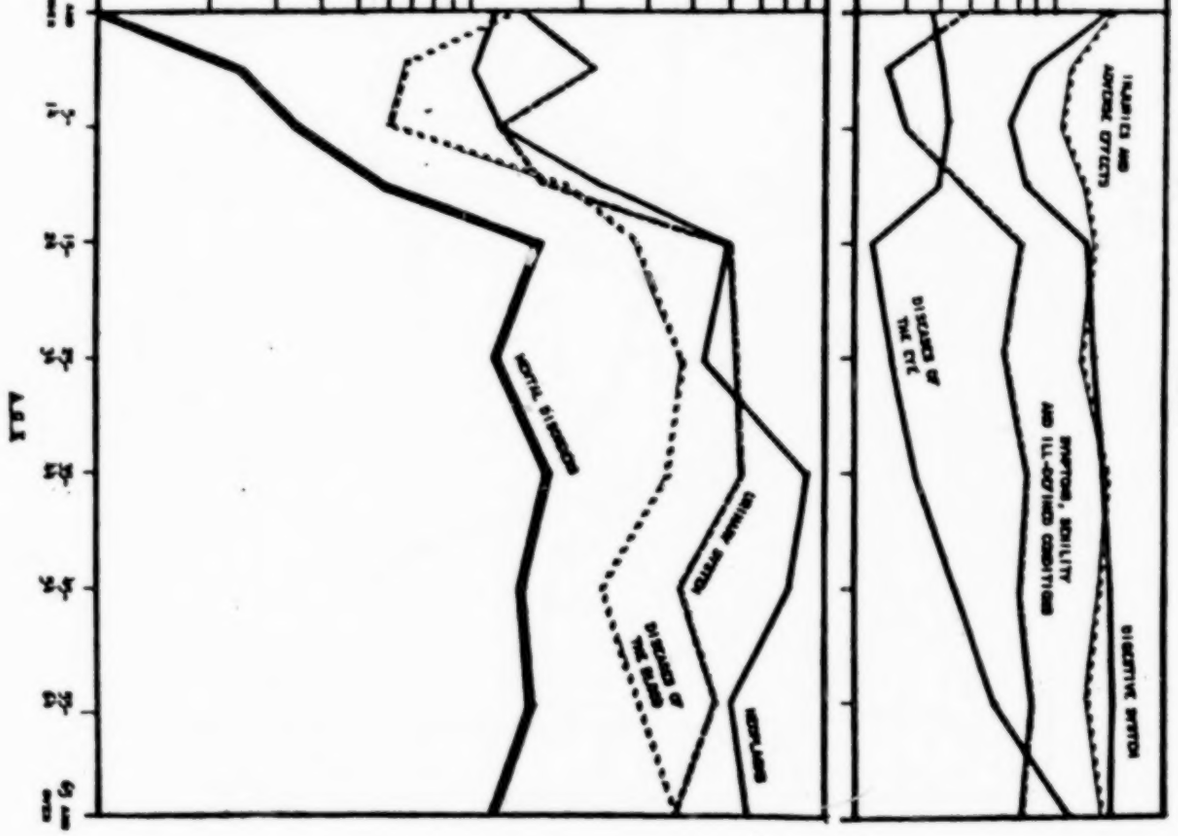





INCIDENCE OF ATTENDED ILLNESS OR PREVENTIVE CARE
BY DIAGNOSTIC CATEGORY, BY AGE AND SEX



INCIDENCE OF ATTENDED ILLNESS OR PREVENTIVE CARE
BY DIAGNOSTIC CATEGORY, BY AGE AND SEX




*Part II: Ages 20 and Over*

| DIAGNOSTIC CATEGORY | 20–24 | | 25–34 | | 35–44 | | 45–54 | | 55–64 | | 65 AND OVER | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | *M* | *F* | *M* | *F* | *M* | *F* | *M* | *F* | *M* | *F* | *M* | *F* |
| TOTAL | % 100.0 | % 100.0 | % 100.0 | % 100.0 | % 100.0 | % 100.0 | % 100.0 | % 100.0 | % 100.0 | % 100.0 | % 100.0 | % 100.0 |
| Infective and Parasitic Diseases | 6.8 | 5.6 | 4.9 | 4.7 | 4.2 | 3.7 | 3.5 | 3.1 | 2.7 | 2.9 | 2.0 | 2.2 |
| Neoplasms | 1.3 | 2.2 | 1.7 | 1.9 | 1.7 | 3.7 | 2.4 | 4.0 | 3.2 | 3.0 | 2.6 | 3.5 |
| Allergic, Endocrine System, Metabolic and Nutritional Diseases | 4.5 | 5.3 | 4.9 | 6.9 | 5.0 | 7.4 | 5.2 | 7.5 | 5.4 | 6.1 | 5.6 | 5.4 |
| Diseases of Blood and Blood Forming Organs | .1 | 1.2 | .3 | 1.6 | .2 | 1.4 | .3 | 1.1 | .5 | 1.3 | .5 | 1.5 |
| Mental, Psychoneurotic and Personality Disorders | .7 | .7 | .5 | .5 | .5 | .7 | .5 | .7 | .3 | .7 | .5 | .7 |
| Diseases of Nervous System | 1.6 | 1.0 | 1.3 | 1.5 | 2.2 | 1.8 | 2.5 | 2.3 | 2.3 | 2.5 | 2.6 | 2.3 |
| Diseases of the Eye | 2.3 | 1.4 | 2.4 | 1.7 | 2.6 | 1.9 | 3.5 | 2.9 | 3.5 | 3.6 | 5.4 | 6.0 |
| Diseases of the Ear | 4.8 | 2.8 | 2.8 | 2.4 | 3.2 | 2.8 | 3.2 | 2.6 | 2.9 | 2.4 | 2.6 | 1.8 |
| Diseases of the Circulatory System | 1.8 | 1.6 | 4.0 | 3.2 | 6.4 | 5.1 | 10.1 | 7.9 | 16.4 | 15.2 | 19.3 | 26.3 |
| Diseases of the Respiratory System | 30.6 | 22.5 | 30.2 | 24.0 | 27.6 | 23.1 | 22.4 | 20.8 | 21.7 | 19.3 | 19.0 | 13.1 |
| Diseases of the Digestive System | 5.9 | 6.0 | 8.1 | 6.7 | 9.8 | 7.4 | 10.2 | 8.4 | 9.8 | 9.2 | 9.1 | 7.6 |
| Diseases of the Urinary System | 1.1 | 2.3 | 1.7 | 2.5 | 1.6 | 2.6 | 1.4 | 1.9 | 2.1 | 2.3 | 2.6 | 1.7 |
| Diseases of the Male Genital Organs | 1.3 | — | 1.1 | — | 1.2 | — | 1.4 | — | 1.8 | — | 2.9 | — |
| Diseases of the Female Genital Organs and Breast | — | 12.2 | — | 10.7 | — | 10.5 | — | 8.2 | — | 3.6 | — | 1.8 |
| Deliveries and Complications of Pregnancy, Childbirth and Puerperium | — | 10.6 | — | 8.2 | — | 2.1 | — | .1 | — | 0 | — | 0 |
| Diseases of Skin and Subcutaneous Tissues | 14.0 | 6.8 | 9.3 | 5.1 | 7.1 | 5.1 | 6.4 | 5.6 | 4.8 | 4.9 | 4.8 | 3.2 |
| Diseases of Bones and Organs of Movement | 3.8 | 2.8 | 6.1 | 3.5 | 7.1 | 5.6 | 8.8 | 7.4 | 7.5 | 7.9 | 7.9 | 9.1 |
| Injuries and Adverse Effects of External Causes | 12.3 | 6.0 | 11.4 | 5.9 | 10.2 | 6.8 | 8.9 | 7.6 | 6.7 | 7.1 | 5.5 | 6.9 |
| Other † | 3.2 | 3.8 | 4.0 | 3.7 | 4.7 | 4.3 | 4.8 | 4.3 | 4.2 | 4.5 | 4.1 | 4.1 |
| Preventive Care | 3.9 | 5.2 | 5.3 | 5.3 | 4.7 | 4.0 | 4.5 | 3.6 | 4.2 | 3.5 | 2.8 | 2.8 |

* Adjusted to age-sex composition of general population of area.

† Other includes: Symptoms, Senility and Ill-Defined Conditions; Congenital Malformations; and Certain Diseases of Early Infancy.

TABLE 131. *(Cont'd)* Summary: Incidence of Attended Illness or Preventive Care, by Diagnostic Category, by Age and Sex (and Adjusted to Age-Sex Composition of General Population)

*Part II: Ages 20 and Over*

| DIAGNOSTIC CATEGORY | | GROSS AND NET INCIDENCE PER 1000 EXPOSURE YEARS | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 20–24 | | 25–44 | | 35–44 | | 45–54 | | 55–64 | | 65 AND OVER | |
| | | M | F | M | F | M | F | M | F | M | F | M | F |
| Total–Including Undetermined | Gross* | 1384.8 | 2613.8 | 1427.7 | 2475.0 | 1582.8 | 2504.3 | 1563.5 | 2300.2 | 1696.0 | 2292.2 | 2022.2 | 2415.7 |
| | Net† | 668.2 | 972.6 | 672.1 | 896.2 | 673.2 | 865.4 | 650.0 | 802.4 | 664.5 | 806.9 | 745.6 | 898.3 |
| Infective and Parasitic Diseases | Gross | 87.6 | 134.0 | 68.5 | 108.5 | 62.2 | 84.8 | 51.2 | 66.1 | 42.2 | 61.8 | 37.0 | 49.4 |
| | Net | 85.3 | 126.8 | 63.9 | 99.2 | 60.5 | 82.6 | 47.5 | 64.1 | 39.0 | 61.2 | 35.5 | 43.6 |
| Neoplasms | Gross | 16.1 | 53.3 | 22.9 | 43.0 | 24.5 | 85.7 | 34.8 | 84.5 | 51.0 | 64.1 | 48.8 | 78.5 |
| | Net | 16.1 | 50.4 | 22.0 | 42.6 | 23.1 | 78.1 | 30.0 | 72.1 | 37.5 | 49.7 | 41.4 | 55.2 |
| Malignant Neoplasms | Gross | 0 | 4.3 | .9 | 3.5 | 3.1 | 7.9 | 9.3 | 13.8 | 22.7 | 23.1 | 23.6 | 29.1 |
| | Net | 0 | 4.3 | .9 | 3.5 | 2.8 | 7.4 | 7.6 | 12.4 | 18.3 | 17.9 | 20.7 | 23.3 |
| Allergic, Endocrine System, Metabolic and Nutritional Diseases | Gross | 47.6 | 126.8 | 65.7 | 158.8 | 73.3 | 170.0 | 76.0 | 159.4 | 85.7 | 129.3 | 103.5 | 122.1 |
| | Net | 35.3 | 112.3 | 57.5 | 137.9 | 66.1 | 150.5 | 69.6 | 139.3 | 80.5 | 117.8 | 94.7 | 116.3 |
| Diseases of Blood and Blood Forming Organs | Gross | 2.3 | 28.8 | 4.3 | 37.2 | 3.1 | 33.4 | 3.9 | 22.4 | 8.4 | 28.3 | 8.9 | 34.9 |
| | Net | 2.3 | 28.8 | 4.3 | 37.2 | 3.1 | 33.4 | 3.9 | 22.4 | 8.4 | 28.3 | 8.9 | 34.6 |
| Mental Psychoneurotic and Personality Disorders | Gross | 9.2 | 15.8 | 6.9 | 12.0 | 7.3 | 17.0 | 7.6 | 14.9 | 4.8 | 14.4 | 5.9 | 14.5 |
| | Net | 9.2 | 15.8 | 6.5 | 12.0 | 7.3 | 16.4 | 7.6 | 13.8 | 4.8 | 14.4 | 5.9 | 11.6 |
| Diseases of Nervous System | Gross | 20.7 | 23.1 | 18.2 | 33.3 | 32.1 | 42.4 | 36.2 | 48.0 | 35.5 | 52.5 | 47.3 | 52.3 |
| | Net | 20.7 | 20.2 | 17.7 | 32.9 | 31.5 | 40.2 | 35.3 | 46.8 | 34.7 | 50.8 | 44.4 | 52.3 |
| Diseases of the Eye | Gross | 30.0 | 34.6 | 31.4 | 38.0 | 37.6 | 43.3 | 51.2 | 62.3 | 55.0 | 76.2 | 90.1 | 136.6 |
| | Net | 27.6 | 33.1 | 28.9 | 37.2 | 35.7 | 42.7 | 47.8 | 55.7 | 50.2 | 70.4 | 91.7 | 110.5 |

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| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Diseases of the Ear | Gross | 62.2 | 67.7 | 37.2 | 53.9 | 46.8 | 64.8 | 46.4 | 56.3 | 45.0 | 51.4 | 48.8 | 40.7 |
| | Net | 59.9 | 59.1 | 33.7 | 48.6 | 42.7 | 56.6 | 43.0 | 49.1 | 42.6 | 44.5 | 45.9 | 40.7 |
| Diseases of the Circulatory System | Gross | 23.1 | 38.9 | 54.0 | 72.8 | 94.0 | 118.2 | 143.9 | 168.9 | 258.6 | 323.9 | 356.5 | 595.9 |
| | Net | 23.1 | 38.9 | 51.4 | 67.4 | 80.0 | 105.5 | 117.0 | 140.8 | 192.4 | 245.4 | 248.5 | 418.6 |
| Diseases of the Respiratory System | Gross | 394.0 | 541.8 | 406.2 | 549.8 | 408.2 | 532.8 | 324.3 | 444.1 | 341.0 | 409.3 | 350.8 | 296.5 |
| | Net | 308.8 | 407.8 | 308.9 | 400.6 | 308.1 | 378.1 | 248.5 | 326.1 | 257.0 | 312.9 | 287.8 | 229.7 |
| Diseases of the Digestive System | Gross | 76.0 | 144.1 | 109.7 | 154.2 | 144.5 | 170.0 | 147.9 | 178.4 | 153.8 | 194.6 | 167.2 | 171.5 |
| | Net | 69.1 | 126.8 | 95.9 | 127.5 | 124.7 | 138.0 | 121.9 | 142.8 | 124.3 | 147.2 | 140.5 | 145.3 |
| Diseases of the Urinary System | Gross | 13.8 | 54.8 | 23.3 | 56.6 | 24.0 | 58.8 | 19.8 | 40.5 | 34.2 | 49.7 | 51.8 | 37.8 |
| | Net | 13.8 | 49.0 | 22.5 | 51.1 | 22.3 | 53.5 | 18.9 | 36.2 | 30.7 | 45.6 | 45.9 | 34.9 |
| Diseases of the Male Genital Organs | Gross | 16.1 | — | 14.7 | — | 17.8 | — | 20.9 | — | 29.1 | — | 54.7 | — |
| | Net | 16.1 | — | 14.7 | — | 17.8 | — | 20.9 | — | 29.1 | — | 54.7 | — |
| Diseases of the Female Genital Organs and Breast | Gross | — | 295.3 | — | 245.7 | — | 242.7 | — | 173.8 | — | 76.8 | — | 40.7 |
| | Net | — | 253.6 | — | 211.2 | — | 206.2 | — | 147.1 | — | 70.4 | — | 40.7 |
| Deliveries and Complications of Pregnancy, Childbirth and Puerperium | Gross | — | 256.5 | — | 186.7 | — | 47.5 | — | 2.3 | — | 0 | — | 0 |
| | Net | — | 250.7 | — | 182.9 | — | 47.5 | — | 2.3 | — | 0 | — | 0 |
| Diseases of Skin and Subcutaneous Tissues | Gross | 179.7 | 164.3 | 125.3 | 117.8 | 104.3 | 117.9 | 92.4 | 118.6 | 75.7 | 105.1 | 88.7 | 72.7 |
| | Net | 156.7 | 138.3 | 108.4 | 102.3 | 93.4 | 101.8 | 80.6 | 103.7 | 67.7 | 92.4 | 76.9 | 69.8 |
| Diseases of Bones and Organs of Movement | Gross | 48.4 | 67.7 | 82.1 | 80.6 | 104.6 | 128.4 | 127.8 | 156.9 | 117.5 | 168.0 | 145.0 | 206.4 |
| | Net | 43.8 | 59.1 | 77.8 | 71.7 | 92.3 | 110.0 | 108.8 | 133.9 | 101.2 | 136.3 | 133.1 | 171.5 |
| Injuries and Adverse Effects of External Causes | Gross | 159.0 | 144.1 | 154.2 | 134.4 | 150.9 | 156.4 | 129.5 | 160.9 | 104.8 | 150.1 | 102.1 | 157.0 |
| | Net | 140.6 | 129.7 | 135.6 | 119.7 | 135.2 | 139.1 | 121.6 | 134.2 | 92.0 | 125.3 | 85.8 | 133.7 |
| Symptoms, Senility and Ill-Defined Conditions | Gross | 41.5 | 89.3 | 53.1 | 84.1 | 69.4 | 96.4 | 67.6 | 91.6 | 64.9 | 94.7 | 74.0 | 93.0 |
| | Net | 41.5 | 83.6 | 50.5 | 74.4 | 65.0 | 86.8 | 60.5 | 81.9 | 59.0 | 89.5 | 69.5 | 84.3 |
| Preventive Care | Gross | 50.7 | 125.4 | 70.8 | 120.5 | 69.4 | 93.0 | 65.6 | 77.3 | 65.3 | 75.1 | 51.8 | 64.0 |
| | Net | 50.7 | 118.2 | 70.8 | 118.6 | 68.3 | 91.3 | 64.5 | 76.7 | 63.3 | 73.9 | 50.3 | 61.0 |
| Other (Congenital Malformations and Certain Diseases of Early Infancy) | Gross | 0 | 2.9 | .9 | .8 | .6 | 1.1 | .6 | 1.2 | .8 | 1.2 | 1.5 | 0 |
| | Net | 0 | 2.9 | .9 | .8 | .6 | 1.1 | .6 | 1.2 | .8 | 1.2 | 1.5 | 0 |

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* Gross rate is based on sum of patients reported for each component of a category; this represents duplicate count of persons treated for more than one condition in that category.

† Net rate is based on number of patients with any condition listed for a specified category.

‡ Adjusted to age-sex composition of general population of area.

TABLE 132. *(Cont'd)* Incidence of Attended Illness or Preventive Care, by Diagnosis, by Age and Sex (and Adjusted to Age-Sex Composition of General Population)

*Part II: Ages 20 and Over*

| DIAGNOSIS | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 20–24 | | 25–34 | | 35–44 | | 45–54 | | 55–64 | | 65 AND OVER | |
| | | *M* | *F* | *M* | *F* | *M* | *F* | *M* | *F* | *M* | *F* | *M* | *F* |
| TOTAL | Gross | 1384.8 | 2813.8 | 1427.7 | 2475.0 | 1582.8 | 2504.3 | 1563.5 | 2300.2 | 1696.0 | 2292.2 | 2022.2 | 2415.7 |
| | Net | 668.2 | 972.6 | 672.1 | 896.2 | 673.2 | 865.4 | 650.0 | 802.4 | 664.5 | 808.9 | 745.6 | 898.3 |
| I | | | | | | | | | | | | | |
| Infective and Parasitic Diseases | Gross | 87.6 | 134.0 | 66.5 | 106.5 | 82.2 | 84.8 | 51.2 | 66.1 | 42.2 | 61.6 | 37.0 | 49.4 |
| | Net | 85.3 | 126.8 | 63.9 | 99.2 | 80.5 | 82.6 | 47.5 | 64.1 | 39.0 | 61.2 | 35.5 | 43.6 |
| Streptococcal Sore Throat | | 13.8 | 18.7 | 13.4 | 22.9 | 11.1 | 16.1 | 9.9 | 12.1 | 7.5 | 5.8 | 3.0 | 2.9 |
| Measles | | 0 | 4.3 | 1.3 | 2.7 | 0 | .6 | 0 | 0 | 0 | 0 | 0 | 0 |
| Rubella (German Measles) | | 9.2 | 27.4 | 2.2 | 16.6 | 2.0 | 5.9 | .8 | 1.4 | 0 | .8 | 0 | 0 |
| Chicken Pox | | 0 | 0 | 0 | .4 | .3 | .3 | 0 | 0 | 0 | 0 | 0 | 0 |
| Mumps | | 0 | 0 | 0 | 1.2 | 1.4 | 1.1 | .9 | .3 | 1.2 | .8 | 0 | 0 |
| Infectious Hepatitis | | 0 | 0 | 0 | .4 | .3 | 0 | .8 | 0 | 0 | .8 | 0 | 0 |
| Glandular Fever (Infectious Mononucleosis) | | 4.6 | 4.3 | .4 | 2.7 | .8 | .9 | 0 | 0 | 0 | 1.2 | 0 | 0 |
| Intestinal Virus | | 34.8 | 60.5 | 35.0 | 46.9 | 37.9 | 49.2 | 29.4 | 41.4 | 24.7 | 41.5 | 19.2 | 23.3 |
| Dermatophytoses | | 16.2 | 5.8 | 7.3 | 4.6 | 5.3 | 5.9 | 5.1 | 5.5 | 3.6 | 4.0 | 1.5 | 8.7 |
| Other | | 9.2 | 13.0 | 6.9 | 8.1 | 3.3 | 4.8 | 4.5 | 5.4 | 5.2 | 7.5 | 13.3 | 14.5 |



TABLE 132. *(Cont'd)* Incidence of Attended Illness or Preventive Care, by Diagnosis, by Age and Sex (and Adjusted to Age-Sex Composition of General Population)

*Part II: Ages 20 and Over (Cont'd)*

| DIAGNOSIS | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 20–24 | | 25–34 | | 35–44 | | *M* | *F* | *M* | *F* | *M* | *F* |
| | | *M* | *F* | *M* | *F* | *M* | *F* | 45–54 | | 55–64 | | 65 AND OVER | |
| II | Gross | 16.1 | 53.3 | 22.9 | 43.0 | 24.5 | 85.7 | 34.8 | 84.5 | 51.0 | 64.1 | 48.8 | 78 |
| Neoplasms | Net | 16.1 | 50.4 | 22.0 | 42.6 | 23.1 | 78.1 | 30.0 | 72.1 | 37.5 | 49.7 | 41.4 | 58 |
| | Gross | 0 | 4.3 | .9 | 3.5 | 3.1 | 7.9 | 9.3 | 13.8 | 22.7 | 23.1 | 23.6 | 28 |
| Malignant Neoplasms | Net | 0 | 4.3 | .9 | 3.5 | 2.8 | 7.4 | 7.6 | 12.4 | 18.3 | 17.9 | 20.7 | 24 |
| Digestive System—Including Mouth | | 0 | 0 | 0 | 0 | .3 | .3 | 2.3 | .9 | 4.4 | 3.5 | 8.9 | 5 |
| Respiratory System | | 0 | 0 | .4 | 0 | 0 | .8 | 1.4 | .6 | 4.8 | 1.2 | 5.9 | 3 |
| Breast | | — | 1.5 | — | 1.5 | — | 2.6 | — | 5.2 | — | 5.8 | — | 1 |
| Female Genital Organs | | — | 1.4 | — | .4 | — | 2.3 | — | 1.4 | — | 3.5 | — | 0 |
| Male Genital Organs | | 0 | — | 0 | — | .3 | — | .6 | — | 2.4 | — | 2.9 | |
| Urinary System | | 0 | 0 | 0 | .8 | .3 | 0 | .6 | 0 | 2.4 | 0 | 0 | 0 |
| Skin | | 0 | 0 | .5 | 0 | .8 | 0 | 1.4 | 1.4 | 3.2 | 1.7 | 2.9 | 2 |
| Eye | | 0 | 0 | 0 | 0 | 0 | 0 | 0 | .3 | 0 | .8 | 0 | 0 |
| Nervous System—Including Brain | | 0 | 0 | 0 | 0 | 0 | .3 | .6 | .3 | 1.6 | 0 | 0 | 0 |
| Endocrine Glands | | 0 | 1.4 | 0 | 0 | 0 | .3 | .3 | .6 | 0 | .8 | 0 | 0 |
| Bone | | 0 | 0 | 0 | 0 | 0 | 0 | 0 | .8 | .4 | 0 | 0 | 0 |
| Connective Tissue | | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lymphosarcoma | | 0 | 0 | 0 | 0 | 0 | .8 | .3 | 0 | 0 | .8 | 0 | 0 |
| Hodgkin's Disease | | 0 | 0 | 0 | 0 | .3 | 0 | 0 | 0 | 0 | .8 | 0 | 0 |
| Other Lymphoma | | 0 | 0 | 0 | 0 | .3 | 0 | .2 | 0 | 0 | .5 | 0 | 0 |
| Multiple Myeloma | | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | .5 | 0 | 0 |
| Leukemia | | 0 | 0 | 0 | 0 | 0 | .3 | .2 | 1.4 | .8 | 0 | 0 | 0 |
| Not Elsewhere Classified | | 0 | 0 | 0 | .8 | .8 | .8 | 1.4 | 1.1 | 2.7 | 4.0 | 3.0 | 2 |

*Neoplasms (Cont'd)*

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Gross | 16.1 | 47.6 | 22.0 | 38.0 | 20.3 | 74.1 | 24.6 | 66.1 | 24.3 | 35.8 | 23.7 | 43.6 |
| Benign Neoplasms | Net | 16.1 | 47.6 | 21.6 | 37.8 | 20.1 | 70.4 | 23.5 | 60.6 | 23.9 | 32.3 | 23.7 | 37.8 |
| Mouth | | 0 | 1.4 | .4 | .8 | .3 | 2.0 | 1.2 | 1.2 | 1.2 | 1.7 | 0 | 5.8 |
| Rectum | | 0 | 0 | .4 | .4 | .3 | .8 | 1.4 | 1.2 | 2.4 | 2.9 | 5.9 | 0 |
| Breast | | — | 8.7 | — | 2.7 | — | 7.1 | — | 6.0 | — | 1.7 | — | 2.9 |
| Female Genital Organs | | — | 15.9 | — | 19.4 | — | 39.3 | — | 27.9 | — | 5.6 | — | 5.8 |
| Skin | | 11.5 | 13.0 | 17.3 | 12.0 | 12.5 | 17.0 | 12.7 | 16.9 | 9.6 | 13.9 | 7.4 | 17.5 |
| Other | | 4.6 | 6.6 | 3.9 | 2.7 | 7.2 | 7.9 | 9.3 | 12.9 | 11.1 | 9.8 | 10.4 | 11.6 |
| | Gross | 0 | 1.4 | 0 | 1.5 | 1.1 | 3.7 | .9 | 4.6 | 4.0 | 5.2 | 1.5 | 5.8 |
| Unspecified Neoplasms | Net | 0 | 1.4 | 0 | 1.5 | 1.1 | 3.7 | .9 | 4.6 | 4.0 | 5.2 | 1.5 | 5.8 |
| Rectum | | 0 | 0 | 0 | 0 | 0 | .3 | 0 | .6 | 0 | .8 | 0 | 0 |
| Breast | | — | 0 | — | 0 | — | 1.7 | — | .9 | — | 1.7 | — | 0 |
| Female Genital Organs | | — | 1.4 | — | 1.1 | — | .3 | — | .3 | — | 0 | — | 0 |
| Other | | 0 | 0 | 0 | .4 | 1.1 | 1.4 | .9 | 2.8 | 4.0 | 2.9 | 1.4 | 5.8 |
| III | | | | | | | | | | | | | |
| Allergic, Endocrine System, Metabolic and Nutritional Diseases | Gross | 57.6 | 126.8 | 65.7 | 158.8 | 73.3 | 170.0 | 76.0 | 159.4 | 65.7 | 129.3 | 103.5 | 122.1 |
| | Net | 55.3 | 112.3 | 57.5 | 137.9 | 66.1 | 150.5 | 69.6 | 139.3 | 60.5 | 117.8 | 94.7 | 116.3 |
| Hay Fever | | 16.1 | 18.7 | 16.9 | 23.6 | 15.9 | 18.1 | 9.9 | 19.8 | 8.0 | 14.4 | 13.3 | 5.8 |
| Asthma | | 6.9 | 8.7 | 10.8 | 12.4 | 8.4 | 13.6 | 8.8 | 16.9 | 13.5 | 13.9 | 14.8 | 14.6 |
| Other Allergic Diseases | | 18.5 | 17.3 | 12.1 | 15.9 | 9.8 | 15.6 | 7.6 | 15.5 | 6.0 | 8.7 | 11.8 | 5.8 |
| Diseases of Thyroid Gland | | 0 | 23.1 | 5.2 | 26.3 | 3.6 | 32.5 | 4.2 | 29.9 | 4.0 | 15.0 | 3.0 | 20.3 |
| Diabetes Mellitus | | 4.6 | 1.4 | 1.7 | 5.4 | 8.6 | 7.6 | 16.1 | 12.9 | 36.2 | 30.0 | 47.3 | 43.6 |
| Obesity (Not Otherwise Specified) | | 11.5 | 53.3 | 13.8 | 64.7 | 20.6 | 71.8 | 16.7 | 52.0 | 10.0 | 39.8 | 4.4 | 26.2 |
| Other | | 0 | 4.3 | 5.2 | 10.5 | 6.4 | 10.8 | 12.7 | 12.4 | 8.0 | 7.5 | 8.9 | 5.8 |
| IV | | | | | | | | | | | | | |
| Diseases of Blood and Blood Forming Organs | Gross | 2.3 | 28.8 | 4.3 | 37.2 | 3.1 | 33.4 | 3.9 | 22.4 | 8.4 | 28.3 | 8.9 | 34.9 |
| | Net | 2.3 | 28.8 | 4.3 | 37.2 | 3.1 | 33.4 | 3.9 | 22.4 | 8.4 | 28.3 | 8.9 | 34.9 |
| Anemias | | 2.3 | 28.8 | 3.4 | 36.0 | 2.0 | 31.1 | 3.1 | 21.5 | 6.8 | 24.3 | 3.0 | 32.0 |
| Other | | 0 | 0 | .9 | 1.2 | 1.1 | 2.3 | .8 | .9 | 1.6 | 4.0 | 5.9 | 2.9 |



TABLE 132. *(Cont'd)* Incidence of Attended Illness or Preventive Care, by Diagnosis, by Age and Sex (and Adjusted to Age-Sex Composition of General Population)

*Part II: Ages 20 and Over (Cont'd)*

| | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 20–24 | | 25–34 | | 35–44 | | 45–54 | | 55–64 | | 65 AND OVER | |
| DIAGNOSIS | | *M* | *F* | *M* | *F* | *M* | *F* | *M* | *F* | *M* | *F* | *M* | *F* |
| V | | | | | | | | | | | | | |
| Mental, Psychoneurotic and Personality Disorders | Gross | 9.2 | 15.8 | 6.9 | 12.0 | 7.3 | 17.0 | 7.6 | 14.9 | 4.8 | 14.4 | 8.9 | 14.5 |
| | Net | 9.2 | 15.8 | 6.5 | 12.0 | 7.3 | 16.4 | 7.6 | 13.8 | 4.8 | 14.4 | 5.9 | 11.6 |
| Chronic Brain Disorders | | 0 | 0 | 0 | 0 | .3 | 0 | .3 | .3 | .4 | 0 | 3.0 | 0 |
| Psychoses | | 0 | 2.9 | 2.2 | 1.1 | .8 | 2.3 | 0 | 1.7 | 0 | 1.7 | 3.0 | 2.9 |
| Psychophysiologic, Autonomic and Visceral Disorders | | 0 | 0 | 0 | .4 | .3 | .8 | .3 | .3 | 0 | .6 | 0 | 0 |
| Psychoneuroses | | 9.2 | 10.1 | 4.3 | 8.5 | 5.8 | 13.3 | 6.8 | 10.6 | 4.4 | 11.5 | 2.9 | 8.7 |
| Personality Disorders | | 0 | 2.8 | .4 | 1.2 | .3 | .2 | .2 | 2.0 | 0 | .6 | 0 | 2.9 |
| Mental Deficiency | | 0 | 0 | 0 | .8 | 0 | .3 | 0 | 0 | 0 | 0 | 0 | 0 |
| VI | Gross | 20.7 | 23.1 | 18.2 | 33.3 | 32.1 | 42.4 | 36.2 | 48.0 | 35.5 | 52.5 | 47.3 | 52.3 |
| Diseases of Nervous System | Net | 20.7 | 20.2 | 17.7 | 32.9 | 31.5 | 40.2 | 35.3 | 46.8 | 34.7 | 50.8 | 44.4 | 52.3 |
| Stroke | | 0 | 0 | 0 | 0 | .3 | 0 | 0 | 0 | 0 | 0 | 2.9 | 0 |
| Multiple Sclerosis | | 0 | 0 | 0 | .4 | .3 | 1.7 | 0 | .6 | .4 | 1.1 | 0 | 0 |
| Migraine | | 6.9 | 2.9 | 1.3 | 10.1 | 5.6 | 8.7 | 1.4 | 6.9 | 1.6 | 5.8 | 0 | 0 |
| Epilepsy | | 0 | 0 | .4 | .4 | .5 | .6 | .6 | .3 | 0 | 1.2 | 1.5 | 0 |
| Sciatica | | 2.3 | 4.3 | 3.5 | 4.2 | 5.0 | 5.4 | 8.2 | 9.8 | 7.6 | 9.8 | 5.9 | 8.7 |
| Other | | 11.5 | 15.9 | 13.0 | 18.2 | 20.4 | 26.0 | 26.0 | 30.4 | 25.9 | 34.6 | 37.0 | 43.6 |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| VII | Gross | 30.0 | 34.6 | 32.4 | 38.0 | 37.6 | 43.3 | 51.2 | 62.3 | 55.0 | 76.2 | 99.1 | 136.6 |
| Diseases of Eye | Net | 27.6 | 33.1 | 28.9 | 37.2 | 35.7 | 42.7 | 47.8 | 55.7 | 50.2 | 70.4 | 91.7 | 110.5 |
| Conjunctivitis and Ophthalmia | | 18.5 | 20.2 | 17.7 | 17.5 | 17.3 | 19.3 | 16.7 | 24.1 | 16.7 | 23.1 | 25.1 | 29.1 |
| Strabismus | | 2.3 | 5.8 | .9 | 2.3 | 1.1 | 1.4 | 1.7 | 2.0 | .4 | .6 | 0 | 2.9 |
| Cataract | | 0 | 0 | .4 | .4 | 0 | 1.4 | 2.5 | 2.3 | 5.6 | 8.1 | 22.2 | 23.2 |
| Glaucoma | | 0 | 0 | 0 | 0 | 1.1 | 2.0 | 4.0 | 3.2 | 6.8 | 6.9 | 13.3 | 32.0 |
| Detachment of Retina | | 0 | 0 | 0 | .4 | 0 | 0 | 0 | 0 | .4 | 1.1 | 0 | 2.9 |
| Other | | 9.2 | 8.6 | 13.4 | 17.4 | 18.1 | 19.2 | 24.3 | 30.7 | 25.1 | 36.4 | 38.5 | 46.5 |
| VIII | Gross | 62.2 | 67.7 | 37.2 | 53.9 | 46.8 | 64.8 | 46.4 | 56.3 | 45.0 | 51.4 | 48.8 | 40.7 |
| Diseases of Ear | Net | 59.9 | 59.1 | 33.7 | 48.8 | 42.7 | 56.6 | 43.0 | 49.1 | 42.6 | 44.5 | 45.9 | 40.7 |
| Otitis Externa | | 11.5 | 11.5 | 6.5 | 7.8 | 8.4 | 11.1 | 6.2 | 9.2 | 4.0 | 6.9 | 5.9 | 8.7 |
| Otitis Media | | 34.6 | 44.7 | 16.9 | 33.3 | 18.1 | 32.0 | 14.7 | 24.4 | 15.1 | 19.1 | 17.8 | 8.7 |
| Deafness | | 2.3 | 1.4 | 0 | .4 | .8 | .6 | 0 | .9 | 2.4 | 5.2 | 4.4 | 0 |
| Other | | 13.8 | 10.1 | 13.8 | 12.4 | 19.5 | 21.1 | 25.5 | 21.8 | 23.5 | 20.2 | 20.7 | 23.3 |
| IX | Gross | 23.1 | 38.9 | 54.0 | 72.8 | 94.0 | 118.2 | 145.9 | 168.9 | 258.6 | 323.9 | 356.5 | 595.9 |
| Diseases of Circulatory System | Net | 23.1 | 38.9 | 51.4 | 67.4 | 80.0 | 105.5 | 117.0 | 140.8 | 192.4 | 245.4 | 248.5 | 418.6 |
| Rheumatic Fever without Mention of Heart | | 0 | 0 | 0 | .4 | .3 | .3 | .8 | .3 | .4 | 0 | 0 | 0 |
| | Gross | 2.3 | 5.8 | 11.7 | 13.1 | 35.1 | 21.5 | 65.9 | 44.5 | 129.1 | 132.8 | 221.9 | 250.0 |
| Diseases of Heart | Net | 2.3 | 5.8 | 9.9 | 11.2 | 27.6 | 20.1 | 47.5 | 36.2 | 94.0 | 101.6 | 139.8 | 194.8 |
| Rheumatic Heart Disease | | 0 | 0 | .9 | 6.8 | 2.5 | 3.1 | 2.8 | 4.3 | 4.0 | 9.8 | 1.5 | 5.8 |
| Arteriosclerotic Heart Disease | | 0 | 0 | 1.3 | .4 | 4.2 | 2.0 | 10.5 | 6.9 | 34.7 | 25.4 | 81.4 | 69.8 |
| Acute Coronary Occlusion | | 0 | 0 | .9 | .8 | 3.9 | .3 | 11.3 | .9 | 13.9 | 8.1 | 16.3 | 20.3 |
| Coronary Insufficiency | | 0 | 0 | 3.5 | 1.5 | 7.8 | 8.4 | 13.6 | 7.2 | 24.7 | 20.2 | 34.0 | 46.5 |
| Angina Pectoris | | 0 | 1.5 | 1.7 | 1.1 | 7.0 | 4.2 | 12.7 | 7.7 | 16.7 | 15.6 | 25.1 | 28.2 |
| Hypertensive Heart Disease | | 0 | 0 | 0 | 1.2 | 1.9 | 2.3 | 4.0 | 6.6 | 9.6 | 28.9 | 34.0 | 49.4 |
| Other | | 2.3 | 4.3 | 3.4 | 1.5 | 7.8 | 6.2 | 11.0 | 10.9 | 25.5 | 24.2 | 29.6 | 32.0 |



TABLE 132. *(Cont'd)* Incidence of Attended Illness or Preventive Care, by Diagnosis, by Age and Sex (and Adjusted to Age-Sex Composition of General Population)

*Part II: Ages 20 and Over (Cont'd)*

| | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 20–24 | | 25–34 | | 35–44 | | 45–54 | | 55–64 | | 65 AND OVER | |
| DIAGNOSIS | | M | F | M | F | M | F | M | F | M | F | M | F |
| Diseases of Veins and Arteries | Gross | 20.8 | 33.1 | 42.3 | 59.3 | 58.6 | 96.4 | 79.4 | 124.1 | 129.1 | 191.1 | 134.6 | 345 |
| Other than Heart | Net | 20.8 | 33.1 | 42.3 | 56.6 | 55.5 | 89.4 | 76.1 | 124.1 | 123.5 | 179.0 | 127.2 | 309 |
| Hypertensive Diseases | | 4.6 | 1.4 | 13.4 | 18.6 | 22.9 | 35.3 | 41.0 | 75.8 | 82.4 | 131.1 | 87.3 | 255 |
| Hypotension | | 0 | 8.6 | 2.6 | 6.2 | 3.6 | 7.6 | 2.3 | 4.3 | 2.4 | 4.0 | 1.5 | 5 |
| Hemorrhoids | | 13.9 | 8.7 | 19.4 | 13.6 | 19.8 | 22.1 | 21.5 | 17.0 | 12.4 | 16.2 | 5.9 | 20 |
| General Arteriosclerosis | | 0 | 0 | 0 | 0 | 0 | .3 | .3 | 1.1 | 6.0 | 5.8 | 7.4 | 20 |
| Varicose Veins of Lower Extremities | | 0 | 2.9 | .9 | 6.2 | 2.5 | 6.8 | 2.2 | 6.3 | 2.8 | 6.3 | 4.4 | 6 |
| Pulmonary Embolism and Infarction | | 0 | 0 | 0 | .4 | 0 | .8 | 1.1 | 0 | .4 | 1.2 | 0 | 0 |
| Lymphadenitis | | 2.3 | 10.1 | 2.6 | 5.4 | 3.6 | 6.8 | 2.2 | 5.2 | 2.8 | 2.3 | 0 | 0 |
| Other | | 0 | 1.4 | 3.4 | 8.9 | 6.2 | 16.7 | 8.8 | 14.4 | 19.9 | 24.2 | 28.1 | 34 |
| X | Gross | 394.0 | 541.8 | 408.2 | 549.8 | 408.2 | 532.8 | 324.3 | 444.1 | 341.0 | 409.3 | 350.6 | 296 |
| Diseases of Respiratory System | Net | 308.8 | 407.8 | 308.9 | 400.6 | 308.1 | 378.1 | 248.5 | 326.1 | 257.0 | 312.9 | 267.8 | 229 |
| Acute Nasopharyngitis | | 20.7 | 31.7 | 23.8 | 32.9 | 24.8 | 31.7 | 19.2 | 27.3 | 20.7 | 27.1 | 14.8 | 5 |
| Pharyngitis | | 58.9 | 96.5 | 67.8 | 92.6 | 60.2 | 78.6 | 44.1 | 58.3 | 29.5 | 42.7 | 41.4 | 32 |
| Tonsillitis | | 39.2 | 36.0 | 31.5 | 32.9 | 18.1 | 22.6 | 11.3 | 8.6 | 5.6 | 7.5 | 7.4 | 2 |
| Hypertrophy of Tonsils | | 9.2 | 1.4 | .9 | 2.7 | 1.1 | 2.6 | .3 | 1.2 | 1.2 | 1.2 | 1.5 | 0 |
| Laryngitis and Tracheitis | | 2.3 | 17.3 | 12.5 | 18.2 | 14.2 | 21.5 | 9.9 | 19.0 | 7.6 | 18.5 | 11.8 | 14 |
| Sinusitis | | 18.4 | 33.2 | 25.1 | 40.7 | 29.6 | 34.2 | 22.1 | 35.0 | 19.5 | 24.8 | 11.8 | 8 |
| Influenza | | 20.8 | 37.5 | 31.5 | 40.3 | 34.0 | 41.6 | 29.7 | 32.8 | 27.1 | 32.9 | 20.7 | 23 |
| Pneumonia | | 6.9 | 7.2 | 8.6 | 10.9 | 7.8 | 13.3 | 7.4 | 14.9 | 17.9 | 18.5 | 10.4 | 17 |
| Bronchitis | | 69.1 | 87.9 | 61.8 | 89.9 | 71.4 | 96.7 | 66.4 | 95.9 | 80.5 | 86.0 | 99.1 | 52 |
| Other Diseases of Respiratory Tract | | 142.9 | 183.0 | 139.1 | 180.9 | 140.0 | 180.7 | 108.3 | 144.8 | 112.3 | 140.3 | 109.5 | 127. |
| Diseases of Lungs | | 4.6 | 10.1 | 5.6 | 7.8 | 7.0 | 9.3 | 7.6 | 8.3 | 19.1 | 9.8 | 22.2 | 11 |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| XI | | | | | | | | | | | | | |
| Diseases of the Digestive System | Gross | 76.0 | 144.1 | 109.7 | 154.2 | 144.5 | 170.0 | 147.9 | 178.4 | 153.8 | 194.6 | 167.2 | 171.5 |
| | Net | 69.1 | 126.8 | 95.9 | 127.5 | 124.7 | 138.0 | 121.9 | 142.8 | 124.3 | 147.2 | 140.5 | 145.3 |
| Stomatitis | | 2.3 | 0 | 1.7 | 3.5 | 1.7 | 3.1 | 2.0 | 3.2 | 0 | 1.7 | 0 | 0 |
| Other Diseases of the Buccal Cavity and Esophagus | | 6.9 | 7.2 | 3.9 | 4.3 | 5.3 | 5.4 | 3.7 | 6.0 | 2.4 | 8.7 | 1.5 | 2.9 |
| Ulcers | | 9.2 | 7.2 | 9.9 | 10.1 | 18.4 | 13.9 | 24.6 | 14.9 | 20.7 | 12.7 | 31.0 | 8.7 |
| Gastritis and Duodenitis | | 13.8 | 20.2 | 26.3 | 31.8 | 26.5 | 30.3 | 28.3 | 29.6 | 20.7 | 32.9 | 26.6 | 23.3 |
| Other Diseases of Stomach and Duodenum | | 4.6 | 2.9 | 3.4 | 5.0 | 5.9 | 5.6 | 6.2 | 6.3 | 6.8 | 13.3 | 10.4 | 2.9 |
| Appendicitis | | 0 | 2.9 | .9 | 2.7 | 1.1 | 1.4 | 2.0 | .9 | 1.2 | 1.7 | 0 | 0 |
| Hernia of Abdominal Cavity | | 0 | 0 | 3.5 | 2.3 | 6.1 | 4.8 | 9.9 | 8.9 | 14.8 | 12.7 | 20.7 | 17.4 |
| Gastroenteritis and Colitis (Except Ulcerative) | | 27.7 | 69.1 | 36.3 | 61.2 | 47.4 | 60.8 | 34.2 | 57.2 | 45.8 | 52.5 | 31.1 | 61.0 |
| Other Diseases of Intestines and Peritoneum | | 9.2 | 21.6 | 19.0 | 14.3 | 21.8 | 24.9 | 23.7 | 26.1 | 25.5 | 24.3 | 31.1 | 26.2 |
| Diseases of Liver, Gall Bladder and Pancreas | Gross | 2.3 | 13.0 | 4.8 | 19.0 | 10.3 | 19.8 | 13.3 | 25.3 | 15.9 | 34.1 | 14.8 | 29.1 |
| | Net | 2.3 | 13.0 | 4.8 | 19.0 | 9.8 | 19.5 | 12.2 | 24.4 | 15.5 | 32.9 | 13.3 | 29.1 |
| Diseases of Liver | | 0 | 1.5 | .5 | 1.9 | 3.3 | 2.3 | 5.4 | 1.7 | 4.4 | 1.7 | 4.4 | 0 |
| Diseases of Gall Bladder | | 2.3 | 11.5 | 3.0 | 16.7 | 5.9 | 16.4 | 5.9 | 22.1 | 11.1 | 29.5 | 8.9 | 26.2 |
| Diseases of Pancreas | | 0 | 0 | 1.3 | .4 | 1.1 | 1.1 | 2.0 | 1.5 | .4 | 2.9 | 1.5 | 2.9 |
| XII | | | | | | | | | | | | | |
| Diseases of Urinary System | Gross | 13.8 | 54.8 | 23.3 | 56.6 | 24.0 | 58.8 | 19.8 | 40.5 | 34.2 | 49.7 | 51.8 | 37.8 |
| | Net | 13.8 | 49.0 | 22.5 | 51.1 | 22.3 | 53.5 | 18.9 | 36.2 | 30.7 | 45.6 | 45.9 | 34.9 |
| Nephritis and Nephrosis | | 0 | 0 | .9 | 1.2 | .3 | 1.7 | .6 | .8 | .4 | 2.3 | 0 | 0 |
| Cystitis | | 2.3 | 40.4 | 8.2 | 35.6 | 9.2 | 33.6 | 6.2 | 25.9 | 15.9 | 33.5 | 16.3 | 26.2 |
| Other | | 11.5 | 14.4 | 14.2 | 19.8 | 14.5 | 23.5 | 13.0 | 13.8 | 17.9 | 13.9 | 35.5 | 11.6 |
| XIII | | | | | | | | | | | | | |
| Diseases of Male Genital Organs (Excluding Neoplasms) | Gross | 16.1 | — | 14.7 | — | 17.8 | — | 20.9 | — | 29.1 | — | 54.7 | — |
| | Net | 16.1 | — | 14.7 | — | 17.8 | — | 20.9 | — | 29.1 | — | 54.7 | — |

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TABLE 132. *(Cont'd)* Incidence of Attended Illness or Preventive Care, by Diagnosis, by Age and Sex (and Adjusted to Age-Sex Composition of General Population)

*Part II: Ages 20 and Over (Cont'd)*

| | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 20–24 | | 25–34 | | 35–44 | | 45–54 | | 55–64 | | 65 AND OVER | |
| DIAGNOSIS | | M | F | M | F | M | F | M | F | M | F | M | F |
| XIV | | | | | | | | | | | | | |
| Diseases of Female Genital Organs and Breast (Excluding Neoplasms) | Gross | — | 295.3 | — | 245.7 | — | 242.7 | — | 173.8 | — | 76.8 | — | 40.7 |
| | Net | — | 253.6 | — | 211.2 | — | 206.2 | — | 147.1 | — | 70.4 | — | 40.7 |
| Diseases of Breast | | — | 17.3 | — | 12.8 | — | 14.4 | — | 15.2 | — | 6.4 | — | 2.9 |
| Diseases of Ovaries, Fallopian Tubes and Parametrium | | — | 28.8 | — | 17.4 | — | 9.3 | — | 2.6 | — | .8 | — | 0 |
| Cervicitis | | — | 90.8 | — | 67.4 | — | 63.6 | — | 30.5 | — | 12.1 | — | 8.8 |
| Vaginitis and Vulvitis | | — | 53.3 | — | 42.6 | — | 42.7 | — | 19.5 | — | 17.3 | — | 14.5 |
| Menstrual Disorders | | — | 72.0 | — | 63.2 | — | 58.6 | — | 30.7 | — | 3.5 | — | 0 |
| Menopausal Symptoms | | — | 1.4 | — | 1.2 | — | 20.1 | — | 54.9 | — | 21.9 | — | 0 |
| Other | | — | 31.7 | — | 41.1 | — | 34.0 | — | 20.4 | — | 15.0 | — | 14.5 |
| XV | | | | | | | | | | | | | |
| Deliveries and Complications of Pregnancy, Childbirth and Puerperium | Gross | — | 256.5 | — | 186.7 | — | 47.5 | — | 2.3 | — | 0 | — | 0 |
| | Net | — | 250.7 | — | 182.9 | — | 47.5 | — | 2.3 | — | 0 | — | 0 |
| Normal Deliveries | | — | 230.6 | — | 160.0 | — | 37.6 | — | .9 | — | 0 | — | 0 |
| Complicated Deliveries | | — | 4.3 | — | 3.1 | — | .5 | — | 0 | — | 0 | — | 0 |
| Abortion | | — | 17.3 | — | 20.1 | — | 8.5 | — | 1.4 | — | 0 | — | 0 |
| Ectopic Pregnancy | | — | 0 | — | .8 | — | .3 | — | 0 | — | 0 | — | 0 |
| Other | | — | 4.3 | — | 2.7 | — | .6 | — | 0 | — | 0 | — | 0 |

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| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| XVI | | | | | | | | | | | | | |
| Diseases of Skin and | Gross | 179.7 | 164.3 | 125.3 | 117.8 | 104.3 | 117.9 | 92.4 | 118.6 | 75.7 | 105.1 | 88.7 | 72.7 |
| Subcutaneous Tissues | Net | 156.7 | 138.3 | 108.4 | 102.3 | 93.4 | 101.8 | 80.6 | 103.7 | 67.7 | 92.4 | 76.9 | 69.8 |
| Boil and Carbuncle | | 20.7 | 8.6 | 16.0 | 8.5 | 11.2 | 9.6 | 11.0 | 8.0 | 9.6 | 8.1 | 10.3 | 5.8 |
| Cellulitis | | 36.9 | 17.3 | 31.5 | 21.3 | 25.9 | 21.8 | 19.5 | 22.4 | 15.1 | 19.1 | 17.7 | 5.8 |
| Impetigo | | 6.9 | .4.3 | .9 | 1.9 | 2.0 | .8 | .3 | .6 | .4 | 1.2 | 0 | 0 |
| Infectious Wart | | 13.8 | 15.9 | 9.1 | 10.9 | 7.2 | 11.0 | 9.0 | 12.6 | 6.3 | 6.4 | 3.0 | 5.8 |
| Dermatitis | | 39.2 | 37.5 | 20.3 | 32.2 | 20.6 | 32.3 | 19.2 | 28.4 | 17.1 | 24.8 | 25.1 | 20.3 |
| Acne | | 18.4 | 20.2 | 2.1 | 5.8 | .6 | 1.7 | .6 | .9 | 0 | 0 | 0 | 0 |
| Sebaceous Cyst | | 11.5 | 11.5 | 12.1 | 7.4 | 10.6 | 6.8 | 9.0 | 9.5 | 6.4 | 4.6 | 8.9 | 5.8 |
| Other | | 32.3 | 49.0 | 33.3 | 29.8 | 26.2 | 33.9 | 23.8 | 36.2 | 20.7 | 41.0 | 23.7 | 29.2 |
| XVII | | | | | | | | | | | | | |
| Diseases of Bones and | Gross | 48.4 | 67.7 | 82.1 | 80.6 | 104.6 | 128.4 | 127.8 | 156.9 | 117.5 | 168.0 | 145.0 | 206.4 |
| Organs of Movement | Net | 43.8 | 59.1 | 77.8 | 71.7 | 92.3 | 110.0 | 108.8 | 133.9 | 101.2 | 136.3 | 133.1 | 171.5 |
| Arthritis and Rheumatism | | 6.9 | 10.1 | 16.4 | 17.8 | 25.9 | 38.2 | 37.3 | 55.4 | 44.2 | 71.0 | 66.6 | 93.0 |
| Osteomyelitis and Other Diseases of Bones and Joints | | 4.6 | 8.7 | 6.5 | 5.2 | 8.4 | 10.2 | 11.9 | 15.2 | 9.2 | 17.3 | 16.3 | 29.1 |
| Synovitis, Bursitis and Tenosynovitis | | 11.5 | 18.7 | 25.9 | 22.5 | 38.2 | 43.0 | 42.4 | 55.2 | 40.2 | 41.0 | 42.9 | 55.2 |
| Infective Myositis | | 25.4 | 21.6 | 28.5 | 29.1 | 26.0 | 26.0 | 29.1 | 23.6 | 17.9 | 21.9 | 11.8 | 20.3 |
| Muscular Dystrophy | | 0 | 0 | 0 | 0 | 0 | 0 | .3 | .3 | 0 | .6 | 0 | 0 |
| Scoliosis | | 0 | 1.4 | .9 | 1.5 | 1.4 | 2.0 | .6 | .3 | .8 | 1.2 | 0 | 2.9 |
| Other Deformities | | 0 | 4.3 | 1.3 | .4 | 1.1 | 2.2 | 1.7 | 2.3 | 1.6 | 5.8 | 1.5 | 0 |
| Other Diseases of Musculoskeletal System | | 0 | 2.9 | 2.6 | 3.5 | 3.6 | 6.8 | 4.5 | 4.6 | 3.6 | 9.2 | 5.9 | 5.8 |



TABLE 132. *(Cont'd)* Incidence of Attended Illness or Preventive Care, by Diagnosis, by Age and Sex (and Adjusted to Age-Sex Composition of General Population)

*Part II: Ages 20 and Over (Cont'd)*

| | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 20–24 | | 25–34 | | 35–44 | | 45–54 | | 55–64 | | 65 AND OVER | |
| DIAGNOSIS | | *M* | *F* | *M* | *F* | *M* | *F* | *M* | *F* | *M* | *F* | *M* | *F* |
| XVIII | | | | | | | | | | | | | |
| Injuries and Adverse Effects | Gross | 159.0 | 144.1 | 154.2 | 134.4 | 150.9 | 156.4 | 129.5 | 160.9 | 104.8 | 150.1 | 102.1 | 157.0 |
| of External Causes | Net | 140.6 | 129.7 | 135.6 | 119.7 | 135.2 | 139.1 | 121.6 | 134.2 | 92.0 | 125.3 | 85.8 | 133.7 |
| | Gross | 16.1 | 10.1 | 11.2 | 7.7 | 15.1 | 12.4 | 10.2 | 14.9 | 9.6 | 23.7 | 3.0 | 14.5 |
| Fractures | Net | 13.8 | 10.1 | 10.4 | 6.6 | 13.9 | 11.9 | 9.9 | 14.1 | 8.4 | 21.9 | 3.0 | 14.5 |
| Skull and Face | | 2.3 | 0 | 1.7 | .4 | 2.2 | .8 | .8 | 0 | 1.2 | 0 | 0 | 0 |
| Torso | Gross | 2.3 | 1.5 | .9 | 1.5 | 1.7 | 1.7 | 3.7 | 3.1 | 2.4 | 4.6 | 1.5 | 0 |
| Spine (Vertical Column) | | 2.3 | 0 | 0 | .7 | .6 | 1.4 | .3 | .5 | 0 | 2.9 | 0 | 0 |
| Ribs, Sternum and Larynx | | 0 | 1.5 | .9 | .8 | 1.1 | .3 | 3.4 | 2.6 | 2.4 | 1.7 | 1.5 | 0 |
| UPPER EXTREMITIES | Gross | 6.9 | 1.4 | 3.4 | 1.9 | 7.6 | 3.4 | 3.4 | 4.3 | 4.0 | 9.3 | 1.5 | 2.9 |
| Clavicle | | 2.3 | 1.4 | .8 | .4 | .3 | .3 | .3 | .3 | .4 | 0 | 0 | 0 |
| Scapula | | 0 | 0 | .4 | 0 | .3 | 0 | 0 | .3 | 0 | 0 | 0 | 0 |
| Humerus | | 0 | 0 | 0 | .4 | .6 | .3 | .3 | .3 | .4 | .6 | 1.5 | 0 |
| Radius and Ulna | | 2.3 | 0 | .4 | 0 | 1.1 | 0 | 1.1 | 1.1 | .8 | 2.9 | 0 | 0 |
| Wrist | | 2.3 | 0 | 0 | .4 | .3 | .6 | 0 | 1.1 | 1.2 | .6 | 0 | 2.9 |
| Hand-Finger | | 0 | 0 | 1.8 | .7 | 5.0 | 2.3 | 1.7 | 1.2 | 1.2 | 5.2 | 0 | 0 |
| LOWER EXTREMITIES | Gross | 4.6 | 7.2 | 5.2 | 3.9 | 3.6 | 6.2 | 2.3 | 7.5 | 2.0 | 9.2 | 0 | 11.6 |
| Pelvis | | 0 | 0 | 0 | .4 | 0 | 0 | 0 | 0 | 0 | .6 | 0 | 0 |
| Femur | | 0 | 0 | 0 | 0 | 0 | 0 | 0 | .3 | .4 | 1.7 | 0 | 8.7 |
| Patella | | 0 | 0 | 0 | 0 | 0 | 0 | .3 | 0 | 0 | 0 | 0 | 0 |
| Tibia and Fibula | | 0 | 0 | 1.7 | .8 | .8 | 1.4 | .3 | 1.8 | .8 | 1.2 | 0 | 0 |
| Ankle | | 0 | 1.4 | 1.3 | .8 | .6 | 1.7 | 0 | 1.4 | .4 | .6 | 0 | 0 |
| Foot and Toe | | 4.6 | 5.8 | 2.2 | 1.9 | 2.2 | 3.1 | 1.7 | 4.0 | .4 | 5.1 | 0 | 2.9 |
| Late Effects of Fractures | | 0 | 0 | 0 | 0 | 0 | .3 | 0 | 0 | 0 | .6 | 0 | 0 |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| *Injuries (Cont'd)* | | | | | | | | | | | | | |
| Dislocations | | 4.6 | 1.4 | 1.7 | 1.1 | .8 | 1.7 | 2.0 | 1.2 | .8 | 1.7 | 0 | 0 |
| Sprains and Strains | | 43.8 | 54.8 | 65.2 | 56.6 | 71.4 | 64.8 | 61.6 | 63.8 | 42.6 | 46.8 | 32.5 | 40.7 |
| Head Injuries (Other than Fractures) | | 6.9 | 2.9 | 5.2 | 3.9 | 4.7 | 2.0 | 5.7 | 2.9 | 4.4 | 5.2 | 4.4 | 11.6 |
| Internal Injuries | | 0 | 1.4 | 0 | 1.1 | 0 | 0 | 0 | 0 | .4 | 0 | 0 | 0 |
| Lacerations and Open Wounds | | 32.3 | 37.5 | 28.4 | 21.7 | 22.9 | 22.3 | 14.4 | 21.6 | 12.8 | 13.8 | 10.3 | 23.3 |
| Superficial Injuries | | 6.9 | 5.8 | 7.3 | 7.0 | 5.3 | 5.7 | 4.8 | 8.9 | 2.8 | 9.2 | 8.9 | 8.7 |
| Foreign Body | | 2.3 | 0 | 6.5 | 3.1 | 5.0 | 4.0 | 4.8 | 3.4 | 2.4 | 2.9 | 0 | 5.8 |
| Contusions | | 27.7 | 23.0 | 22.0 | 21.7 | 15.6 | 29.7 | 16.1 | 23.8 | 13.1 | 23.7 | 23.7 | 29.1 |
| Complications of Surgical or Medical Procedures | | 2.3 | 7.2 | 2.6 | 7.4 | 4.5 | 9.3 | 6.8 | 16.1 | 11.1 | 16.2 | 16.3 | 14.6 |
| Other | | 16.1 | 0 | 6.1 | 3.1 | 5.6 | 4.8 | 3.1 | 4.3 | 4.8 | 6.9 | 3.0 | 8.7 |
| XIX | Gross | 0 | 2.9 | .9 | .8 | .8 | 1.1 | .8 | 1.2 | .8 | 1.2 | 1.5 | 0 |
| Congenital Malformations | Net | 0 | 2.9 | .9 | .8 | .8 | 1.1 | .8 | 1.2 | .8 | 1.2 | 1.5 | 0 |
| XX | | | | | | | | | | | | | |
| Certain Diseases of Early Infancy | Gross | — | — | — | — | — | — | — | — | — | — | — | — |
| | Net | — | — | — | — | — | — | — | — | — | — | — | — |
| XXI | | | | | | | | | | | | | |
| Symptoms, Senility and Ill-Defined Conditions | Gross | 41.5 | 89.3 | 53.1 | 84.1 | 69.4 | 96.4 | 67.6 | 91.6 | 64.9 | 94.7 | 74.0 | 93.0 |
| | Net | 41.5 | 83.6 | 50.5 | 74.4 | 65.0 | 86.8 | 60.5 | 81.9 | 59.0 | 89.5 | 69.5 | 84.3 |
| Symptoms Referrable to Nervous System | | 2.3 | 5.8 | 6.0 | 8.2 | 9.8 | 12.5 | 8.5 | 10.9 | 11.5 | 8.6 | 8.9 | 11.6 |
| Symptoms Referrable to Cardiovascular System | | 2.3 | 10.1 | 2.2 | 5.8 | 5.8 | 12.5 | 6.5 | 14.7 | 6.4 | 11.0 | 11.8 | 8.7 |
| Symptoms Referrable to Respiratory System | | 6.9 | 10.1 | 12.5 | 10.1 | 13.1 | 10.7 | 15.6 | 12.6 | 15.1 | 13.3 | 16.3 | 14.5 |
| Symptoms Referrable to Upper and Lower Gastro-intestinal System | | 4.6 | 21.6 | 7.8 | 11.6 | 9.2 | 13.0 | 7.9 | 12.3 | 9.9 | 20.8 | 5.9 | 14.6 |
| Symptoms Referrable to Urinary System | | 0 | 1.4 | 1.3 | 5.8 | 3.1 | 4.2 | 6.0 | 2.0 | 2.8 | 6.3 | 8.9 | 0 |
| Pain in Back | | 2.3 | 11.5 | 3.9 | 6.2 | 5.0 | 8.2 | 6.2 | 8.0 | 8.6 | 5.8 | 5.9 | 14.6 |
| Other Referrable Symptoms (Not Elsewhere Classified) | | 4.6 | 5.8 | 4.7 | 8.5 | 6.7 | 6.5 | 5.9 | 7.5 | 6.0 | 8.1 | 7.4 | 14.5 |
| Headache | | 9.3 | 11.5 | 6.5 | 12.8 | 8.1 | 13.0 | 6.5 | 12.4 | 4.8 | 9.8 | 3.0 | 5.8 |
| Other Ill-Defined Diseases | | 9.2 | 11.5 | 8.2 | 15.1 | 8.8 | 15.8 | 4.5 | 11.2 | 4.8 | 11.0 | 5.9 | 8.7 |



TABLE 132. *(Concluded)* Incidence of Attended Illness or Preventive Care, by Diagnosis, by Age and Sex (and Adjusted to Age-Sex Composition of General Population)

*Part II: Ages 20 and Over (Concluded)*

| DIAGNOSIS | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 20–24 | | 25–34 | | 35–44 | | 45–54 | | 55–64 | | 65 AND OVER | |
| | | M | F | M | F | M | F | M | F | M | F | M | F |
| XXII | Gross | 50.7 | 125.4 | 70.8 | 120.5 | 69.4 | 93.0 | 65.6 | 77.3 | 65.3 | 75.1 | 51.8 | 64.0 |
| Supplementary Classifications | Net | 50.7 | 118.2 | 70.8 | 118.6 | 68.3 | 91.3 | 64.5 | 76.7 | 63.3 | 73.9 | 50.3 | 61.0 |
| General Medical Examinations (Including Immunizations) | | 48.4 | 90.8 | 48.4 | 87.2 | 44.6 | 68.7 | 35.3 | 48.6 | 25.5 | 43.9 | 23.7 | 32.0 |
| Well Baby and Child Care (Including Immunizations) | | — | — | — | — | — | — | — | — | — | — | — | — |
| Diagnostic Screening | | 2.3 | 13.0 | 22.4 | 12.4 | 24.8 | 18.9 | 30.3 | 28.7 | 39.8 | 31.2 | 28.1 | 32.0 |
| Other | | — | 21.6 | — | 20.9 | — | 5.4 | — | 0 | — | 0 | — | 0 |
| XXIII | Gross | 96.8 | 204.6 | 77.3 | 188.3 | 18.2 | 199.7 | 113.9 | 171.8 | 122.7 | 165.7 | 176.0 | 151.2 |
| Undetermined Classifications | Net | 96.8 | 204.6 | 77.3 | 188.3 | 18.2 | 199.7 | 113.9 | 171.8 | 122.7 | 165.7 | 176.0 | 151.2 |

* Less than .05.

† Gross rate is based on sum of patients reported for each component of a category; this represents duplicate count of persons treated for more than one condition in that category.

‡ Net rate is based on number of patients with *any* condition listed for a specified category.

§ Adjusted to age-sex composition of general population of area.

*Category 2. Higher Blue-Collar Class Rates*

In contrast to most diagnoses in the previous category, theories as to varying degrees of medical motivation do not generally emerge to explain instances where higher blue-collar class incidence rates occurred.

Members of blue-collar families were treated more frequently for infective diseases, tonsillitis, pneumonia, influenza, bronchitis, other respiratory conditions, gall bladder disorders, duodenal ulcers. It is probably reasonable to surmise that these conditions occurred more frequently, during the study year, among the blue-collar classes; but whether this is a regular occurrence and if so why must be left to further investigation. It is certainly difficult to reconcile the higher ulcer rates found for blue-collar members, particularly the 60 per cent higher rate of the males, with common assumptions as to greater ulcer susceptibility among those in positions of greatest responsibility.

Maternity care was used about 40 per cent more frequently in the blue-collar families. But it may be noteworthy that the reported abortion rate, in proportion to number of deliveries, was identical in the two groups discussed—one abortion to 7·53 deliveries.

*Category 3. Class Differences Varying for Males and Females*

The incidence of treated arthritis was a third higher among males of the blue-collar group than in the professional-executive-sales class.

Females of the latter class, however, experienced the highest rates—over 10 per cent higher than blue-collar class females.

A somewhat similar pattern was found for synovitis, and in fact for the total category of diseases of bones, joints and muscles.

The reverse pattern occurred for heart diseases. Here, the rate for males of the professional-executive-sales category was 25 per cent higher than among males of the blue-collar group, whereas treated incidence among females of the blue-collar



group was 50 per cent higher than among females of the professional-executive-sales group.

Still another pattern was found for a miscellaneous group of diagnoses in which males of different classes experienced similar rates, while females of the blue-collar group showed higher rates than those in the professional-executive-sales category. Examples include diabetes (blue-collar female rate nearly a third higher than professional-executive-sales females), hernia (blue-collar female rate over 80 per cent higher), liver

Class, by Diagnosis, by Sex and Class: Comparison of Professional-Executive-Sales and Blue-Collar Class Rates

| DIAGNOSIS | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS, INCLUDING DEPENDENTS | | | |
|---|---|---|---|---|---|
| | | MALE | | FEMALE | |
| | | *Professional, Executive and Sales* | *Blue Collar* | *Professional, Executive and Sales* | *Blue Collar* |
| TOTAL | Gross * | 1923.5 | 1787.2 | 2301.8 | 2239.1 |
| | Net † | 771.4 | 733.1 | 841.3 | 847.5 |
| I | Gross | 74.5 | 108.3 | 121.9 | 126.0 |
| Infective and Parasitic Diseases | Net | 68.8 | 98.2 | 112.5 | 115.0 |
| Streptococcal Sore Throat | | 9.8 | 15.5 | 17.8 | 19.5 |
| Measles | | 3.6 | 6.8 | 6.7 | 6.1 |
| Rubella (German Measles) | | 15.9 | 23.5 | 34.5 | 27.9 |
| Chicken Pox | | 2.6 | 5.5 | 2.2 | 5.2 |
| Mumps | | 1.6 | 3.4 | 3.9 | 3.8 |
| Infectious Hepatitis | | .5 | .2 | 0 | .2 |
| Glandular Fever (Infectious Mononucleosis) | | 1.5 | 1.2 | .6 | 1.8 |
| Intestinal Virus | | 30.8 | 39.2 | 36.2 | 49.4 |
| Dermatophytoses | | 3.1 | 7.0 | 8.3 | 5.0 |
| Other | | 5.1 | 6.0 | 11.7 | 7.1 |
| II | Gross | 36.0 | 23.0 | 54.0 | 46.1 |
| Neoplasms | Net | 29.8 | 18.5 | 46.2 | 40.7 |
| | Gross | 11.3 | 5.4 | 7.8 | 6.2 |
| Malignant Neoplasms | Net | 9.2 | 4.1 | 6.7 | 5.3 |
| Digestive System—Including Mouth | | 2.6 | .7 | 0 | .4 |
| Respiratory System | | 1.5 | 1.0 | 1.1 | .2 |
| Breast | | — | — | 1.7 | 1.9 |
| Female Genital Organs | | — | — | 1.1 | .8 |
| Male Genital Organs | | 0 | .7 | — | — |
| Urinary System | | 0 | .8 | 0 | 0 |
| Skin | | 2.6 | .8 | 1.7 | .3 |
| Eye | | 0 | 0 | .5 | .1 |
| Nervous System—Including Brain | | 1.0 | .3 | .5 | .1 |
| Endocrine Glands | | 0 | .1 | 0 | .3 |
| Bone | | 0 | .1 | .8 | .2 |
| Connective Tissue | | 0 | 0 | 0 | 0 |
| Lymphosarcoma | | 0 | 0 | 0 | .1 |
| Hodgkin's Disease | | 0 | .1 | 0 | .1 |
| Other Lymphoma | | .5 | .2 | 0 | 0 |
| Multiple Myeloma | | 0 | .1 | 0 | .1 |
| Leukemia | | .5 | .1 | 0 | .4 |
| Not Elsewhere Classified | | 2.6 | .8 | .8 | 1.0 |
| | Gross | 23.7 | 15.4 | 44.5 | 37.7 |
| Benign Neoplasms | Net | 22.1 | 15.1 | 41.2 | 35.3 |
| Mouth | | 1.6 | .4 | 1.1 | 1.4 |
| Rectum | | 1.5 | .9 | .5 | .5 |
| Breast | | — | — | 1.7 | 3.7 |
| Female Genital Organs | | — | — | 15.6 | 15.3 |
| Skin | | 13.4 | 8.7 | 18.4 | 10.3 |
| Other | | 7.2 | 5.4 | 7.2 | 6.5 |



TABLE 133. *(Cont'd)*

| DIAGNOSIS | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS, INCLUDING DEPENDENTS | | | |
|---|---|---|---|---|---|
| | | MALE | | FEMALE | |
| | | *Professional, Executive and Sales* | *Blue Collar* | *Professional, Executive and Sales* | *Blue Collar* |
| *Neoplasms (Cont'd)* | | | | | |
| | Gross | 1.0 | 1.2 | 1.7 | 2.2 |
| Unspecified Neoplasms | Net | 1.0 | 1.2 | 1.7 | 2.2 |
| Rectum | | 0 | 0 | 0 | .2 |
| Breast | | — | — | 0 | .8 |
| Female Genital Organs | | — | — | 0 | .3 |
| Other | | 1.0 | 1.2 | 1.7 | 1.1 |
| III | | | | | |
| Allergic, Endocrine System, Metabolic and Nutritional Diseases | Gross | 90.4 | 70.8 | 126.4 | 116.7 |
| | Net | 81.7 | 63.9 | 110.8 | 104.5 |
| Hay Fever | | 23.1 | 15.7 | 25.0 | 16.9 |
| Asthma | | 13.9 | 14.0 | 13.4 | 13.2 |
| Other Allergic Diseases | | 18.0 | 11.2 | 14.5 | 15.5 |
| Diseases of Thyroid Gland | | 2.0 | 3.0 | 25.6 | 16.2 |
| Diabetes Mellitus | | 11.3 | 10.9 | 5.8 | 9.1 |
| Obesity (Not Otherwise Specified) | | 13.9 | 10.3 | 30.1 | 40.0 |
| Other | | 8.2 | 5.7 | 12.2 | 6.0 |
| IV | | | | | |
| Diseases of Blood and Blood Forming Organs | Gross | 4.8 | 6.2 | 12.8 | 22.4 |
| | Net | 4.8 | 6.2 | 12.8 | 22.4 |
| Anemias | | 4.1 | 4.8 | 12.2 | 20.9 |
| Other | | .5 | 1.8 | .8 | 1.8 |
| V | | | | | |
| Mental, Psychoneurotic and Personality Disorders | Gross | 6.2 | 5.4 | 11.1 | 9.9 |
| | Net | 6.2 | 5.1 | 10.8 | 9.5 |
| Chronic Brain Disorders | | 0 | .8 | .8 | .1 |
| Psychoses | | .5 | .7 | 1.1 | 1.5 |
| Psychophysiologic, Autonomic and Visceral Disorders | | 0 | .1 | 0 | .2 |
| Psychoneuroses | | 5.2 | 3.4 | 6.7 | 7.1 |
| Personality Disorders | | 0 | .4 | 2.2 | .9 |
| Mental Deficiency | | .5 | .2 | .5 | .1 |
| VI | Gross | 26.2 | 20.8 | 28.4 | 27.2 |
| Diseases of Nervous System | Net | 25.2 | 20.3 | 28.7 | 26.2 |
| Stroke | | 0 | .1 | 0 | 0 |
| Multiple Sclerosis | | .5 | .1 | 0 | .4 |
| Migraine | | 3.1 | 2.0 | 5.0 | 4.8 |
| Epilepsy | | .5 | .7 | 0 | .7 |
| Sciatica | | 4.1 | 3.9 | 1.7 | 4.7 |
| Other | | 18.0 | 14.0 | 21.7 | 16.8 |
| VII | Gross | 67.8 | 44.8 | 69.1 | 50.5 |
| Diseases of Eye | Net | 63.7 | 41.6 | 65.1 | 47.2 |
| Conjunctivitis and Ophthalmia | | 28.8 | 21.8 | 29.0 | 21.6 |
| Strabismus | | 6.7 | 3.7 | 8.9 | 5.2 |
| Cataract | | 1.5 | 1.9 | 0 | 2.2 |
| Glaucoma | | 3.8 | 1.8 | 4.5 | 1.4 |
| Detachment of Retina | | 0 | .1 | 0 | .2 |
| Other | | 27.2 | 15.7 | 26.7 | 19.9 |

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TABLE 133. (Cont'd) Incidence of Attended Illness or Preventive Care, by Diagnosis, by Sex and Class: Comparison of Professional-Executive-Sales and Blue-Collar Class Rates

| DIAGNOSIS | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS, INCLUDING DEPENDENTS | | | |
|---|---|---|---|---|---|
| | | MALE | | FEMALE | |
| | | *Professional, Executive and Sales* | *Blue Collar* | *Professional, Executive and Sales* | *Blue Collar* |
| VIII | Gross | 63.7 | 67.8 | 74.6 | 73.0 |
| Diseases of Ear | Net | 59.6 | 63.6 | 68.5 | 67.0 |
| Otitis Externa | | 7.7 | 8.1 | 7.2 | 9.4 |
| Otitis Media | | 37.5 | 42.4 | 50.1 | 48.1 |
| Deafness | | 1.0 | .9 | .6 | 1.1 |
| Other | | 17.5 | 16.4 | 16.7 | 14.4 |
| IX | Gross | 104.8 | 94.5 | 90.2 | 106.6 |
| Diseases of Circulatory System | Net | 86.3 | 75.6 | 77.4 | 87.5 |
| Rheumatic Fever without Mention of Heart | | .5 | .5 | .6 | .9 |
| | Gross | 50.9 | 40.4 | 21.7 | 38.3 |
| Diseases of Heart | Net | 38.5 | 29.4 | 18.4 | 25.8 |
| Rheumatic Heart Disease | | 2.1 | 1.9 | 1.1 | 4.4 |
| Arteriosclerotic Heart Disease | | 12.3 | 8.7 | 4.4 | 4.7 |
| Acute Coronary Occlusion | | 4.1 | 4.8 | 1.7 | 1.3 |
| Coronary Insufficiency | | 11.8 | 8.2 | 2.2 | 5.0 |
| Angina Pectoris | | 5.1 | 6.6 | 2.8 | 4.5 |
| Hypertensive Heart Disease | | 2.1 | 2.9 | 2.8 | 5.1 |
| Other | | 13.4 | 7.3 | 6.7 | 7.3 |
| Diseases of Veins and Arteries | Gross | 53.4 | 53.6 | 67.9 | 73.4 |
| (Other than Heart) | Net | 51.4 | 51.9 | 62.9 | 68.5 |
| Hypertensive Diseases | | 24.1 | 25.3 | 28.4 | 38.2 |
| Hypotension | | 0 | 1.3 | 5.0 | 3.4 |
| Hemorrhoids | | 14.9 | 10.3 | 10.0 | 10.1 |
| General Arteriosclerosis | | 0 | 1.1 | 1.7 | 1.0 |
| Varicose Veins of Lower Extremities | | 2.1 | 1.4 | 5.6 | 3.9 |
| Pulmonary Embolism and Infarction | | 1.0 | .2 | 0 | .3 |
| Lymphadenitis | | 3.6 | 7.6 | 6.1 | 6.9 |
| Other | | 7.7 | 6.4 | 11.1 | 9.6 |
| X | Gross | 483.8 | 528.6 | 546.8 | 615.3 |
| Diseases of Respiratory System | Net | 351.8 | 370.4 | 378.6 | 430.6 |
| Acute Nasopharyngitis | | 24.6 | 31.9 | 29.5 | 36.8 |
| Pharyngitis | | 86.3 | 82.6 | 107.4 | 104.0 |
| Tonsillitis | | 47.8 | 61.9 | 58.5 | 65.4 |
| Hypertrophy of Tonsils | | 12.3 | 10.5 | 12.2 | 11.7 |
| Laryngitis and Tracheitis | | 22.1 | 16.6 | 27.3 | 19.5 |
| Sinusitis | | 23.6 | 19.1 | 31.2 | 23.9 |
| Influenza | | 25.2 | 29.7 | 25.1 | 33.6 |
| Pneumonia | | 7.7 | 11.3 | 8.3 | 12.6 |
| Bronchitis | | 68.3 | 88.6 | 71.3 | 97.7 |
| Other Diseases of Respiratory Tract | | 161.3 | 168.0 | 189.3 | 202.6 |
| Diseases of Lungs | | 4.6 | 8.4 | 6.7 | 5.5 |



TABLE 133. *(Cont'd)*

| DIAGNOSIS | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS, INCLUDING DEPENDENTS | | | |
|---|---|---|---|---|---|
| | | MALE | | FEMALE | |
| | | *Professional, Executive and Sales* | *Blue Collar* | *Professional, Executive and Sales* | *Blue Collar* |
| XI | Gross | 127.4 | 125.5 | 121.9 | 151.7 |
| Diseases of the Digestive System | Net | 113.0 | 108.9 | 105.8 | 128.8 |
| Stomatitis | | 3.6 | 2.4 | 2.2 | 4.1 |
| Other Diseases of Buccal Cavity and Esophagus | | 4.1 | 4.0 | 5.0 | 5.8 |
| Ulcers | | 8.2 | 13.1 | 6.7 | 7.9 |
| Gastritis and Duodenitis | | 17.0 | 20.2 | 18.9 | 23.6 |
| Other Diseases of Stomach and Duodenum | | 6.2 | 4.2 | 7.8 | 4.7 |
| Appendicitis | | 3.6 | 2.1 | 1.1 | 3.2 |
| Hernia of Abdominal Cavity | | 8.7 | 7.8 | 2.8 | 5.1 |
| Gastroenteritis and Colitis (Except Ulcerative) | | 48.8 | 47.5 | 51.2 | 65.4 |
| Other Diseases of Intestines and Peritoneum | | 20.0 | 16.0 | 14.5 | 17.0 |
| Diseases of Liver, Gall Bladder and | Gross | 7.2 | 8.2 | 11.7 | 14.9 |
| Pancreas | Net | 7.2 | 7.8 | 11.7 | 14.5 |
| Diseases of Liver | | 2.6 | 2.6 | 1.1 | 1.5 |
| Diseases of Gall Bladder | | 3.6 | 4.8 | 10.0 | 12.3 |
| Diseases of Pancreas | | 1.0 | .8 | .8 | 1.1 |
| XII | Gross | 18.5 | 19.6 | 36.8 | 36.3 |
| Diseases of the Urinary System | Net | 18.0 | 18.0 | 34.0 | 32.8 |
| Nephritis and Nephrosis | | 0 | .7 | .8 | 1.4 |
| Cystitis | | 6.2 | 7.5 | 24.5 | 21.1 |
| Other | | 12.3 | 11.4 | 11.7 | 13.8 |
| XIII | | | | | |
| Diseases of the Male Genital Organs | Gross | 22.6 | 15.2 | — | — |
| (Excluding Neoplasms) | Net | 22.6 | 15.2 | — | — |
| XIV | | | | | |
| Diseases of the Female Genital | | | | | |
| Organs and Breast (Excluding | Gross | — | — | 132.0 | 124.9 |
| Neoplasms) | Net | — | — | 117.5 | 108.5 |
| Diseases of Breast | | — | — | 10.0 | 8.6 |
| Diseases of Ovaries, Fallopian Tubes and Parametrium | | — | — | 3.9 | 6.2 |
| Cervicitis | | — | — | 32.3 | 29.5 |
| Vaginitis and Vulvitis | | — | — | 19.5 | 20.1 |
| Menstrual Disorders | | — | — | 34.0 | 27.2 |
| Menopausal Symptoms | | — | — | 17.3 | 15.5 |
| Other | | — | — | 15.0 | 17.8 |
| XV | | | | | |
| Deliveries and Complications of | | | | | |
| Pregnancy, Childbirth and | Gross | — | — | 29.0 | 41.3 |
| Puerperium | Net | — | — | 29.0 | 40.5 |
| Normal Deliveries | | — | — | 24.5 | 35.3 |
| Complicated Deliveries | | — | — | 0 | .5 |
| Abortion | | — | — | 3.4 | 4.9 |
| Ectopic Pregnancy | | — | — | 0 | .2 |
| | | — | — | 1.1 | .4 |

## Care, by Diagnosis, by Sex and Class: Comparison of Professional-Executive-Sales and Blue-Collar Class Rates

| DIAGNOSIS | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS, INCLUDING DEPENDENTS | | | |
|---|---|---|---|---|---|
| | | MALE | | FEMALE | |
| | | *Professional, Executive and Sales* | *Blue Collar* | *Professional, Executive and Sales* | *Blue Collar* |
| XVI | | | | | |
| Diseases of Skin and Subcutaneous Tissues | Gross | 135.1 | 107.2 | 138.6 | 111.4 |
| | Net | 117.6 | 98.1 | 125.8 | 98.2 |
| Boil and Carbuncle | | 10.3 | 11.0 | 11.7 | 7.8 |
| Cellulitis | | 24.7 | 21.4 | 20.0 | 19.5 |
| Impetigo | | 5.6 | 5.7 | 5.8 | 4.7 |
| Infectious Wart | | 12.8 | 8.9 | 17.8 | 9.3 |
| Dermatitis | | 32.4 | 24.7 | 31.2 | 33.6 |
| Acne | | 10.8 | 4.1 | 11.7 | 4.8 |
| Sebaceous Cyst | | 8.7 | 6.1 | 7.8 | 4.8 |
| Other | | 29.8 | 25.3 | 32.8 | 28.1 |
| XVII | | | | | |
| Diseases of Bones and Organs of Movement | Gross | 77.0 | 82.4 | 105.8 | 86.3 |
| | Net | 69.9 | 72.9 | 91.9 | 74.8 |
| Arthritis and Rheumatism | | 16.9 | 22.4 | 31.2 | 27.9 |
| Osteomyelitis and Other Diseases of Bones and Joints | | 9.8 | 8.4 | 7.8 | 8.1 |
| Synovitis, Bursitis and Tenosynovitis | | 23.1 | 26.2 | 31.7 | 25.4 |
| Infective Myositis | | 13.9 | 18.2 | 16.7 | 17.3 |
| Muscular Dystrophy | | 0 | .2 | 0 | .1 |
| Scoliosis | | 1.0 | .6 | 3.4 | 1.0 |
| Other Deformities | | 8.7 | 3.8 | 7.8 | 3.6 |
| Other Diseases of Musculoskeletal System | | 3.8 | 2.6 | 7.2 | 2.9 |
| XVIII | | | | | |
| Injuries and Adverse Effects of External Causes | Gross | 203.4 | 159.5 | 162.0 | 134.5 |
| | Net | 174.1 | 139.8 | 145.1 | 117.4 |
| | Gross | 20.5 | 14.4 | 15.6 | 11.8 |
| Fractures | Net | 18.0 | 13.3 | 15.0 | 10.8 |
| Skull and Face | | 2.5 | 1.9 | 1.1 | .4 |
| Torso | Gross | .5 | 1.5 | 1.7 | 1.5 |
| Spine | | 0 | .3 | 1.1 | .5 |
| Ribs, Sternum and Larynx | | .5 | 1.3 | .8 | 1.0 |
| UPPER EXTREMITIES | Gross | 11.3 | 7.5 | 8.4 | 4.6 |
| Clavicle | | 0 | .7 | 1.7 | .5 |
| Scapula | | 0 | .1 | 0 | 0 |
| Humerus | | 1.0 | .7 | .8 | .2 |
| Radius and Ulna | | 4.1 | 2.2 | 2.8 | 1.3 |
| Wrist | | 1.8 | .7 | 2.2 | .8 |
| Hand–Finger | | 4.6 | 3.1 | 1.1 | 2.0 |
| LOWER EXTREMITIES | Gross | 6.2 | 3.5 | 3.9 | 5.2 |
| Pelvis | | 0 | .1 | .8 | .1 |
| Femur | | .5 | .1 | .8 | .3 |
| Patella | | .5 | .3 | 0 | 0 |
| Tibia and Fibula | | 1.0 | 1.1 | 1.1 | 1.4 |
| Ankle | | 1.8 | .3 | .5 | .9 |
| Foot–Toe | | 2.8 | 1.8 | 1.1 | 2.8 |
| Late Effects of Fractures | | 0 | 0 | .5 | .1 |



TABLE 133. *(Concluded)*

| DIAGNOSIS | | NUMBER OF MEMBERS WITH INDICATED DIAGNOSIS PER 1,000 EXPOSURE YEARS, INCLUDING DEPENDENTS | | | |
|---|---|---|---|---|---|
| | | MALE | | FEMALE | |
| | | *Professional, Executive and Sales* | *Blue Collar* | *Professional, Executive and Sales* | *Blue Collar* |
| *Injuries (Cont'd)* | | | | | |
| Dislocations | | 2.6 | 2.1 | 2.2 | 1.6 |
| Sprains and Strains | | 69.3 | 47.4 | 56.8 | 40.2 |
| Head Injuries (Other than Fractures) | | 9.2 | 13.5 | 7.8 | 7.4 |
| Internal Injuries | | 0 | .3 | 0 | .2 |
| Lacerations and Open Wounds | | 37.0 | 34.4 | 29.5 | 25.7 |
| Superficial Injuries | | 12.8 | 9.9 | 12.2 | 9.3 |
| Foreign Body | | 5.7 | 3.8 | 6.1 | 3.8 |
| Contusions | | 32.9 | 22.8 | 20.1 | 22.6 |
| Complications of Surgical and Medical Procedures | | 6.7 | 5.0 | 7.8 | 7.4 |
| Other | | 6.7 | 6.0 | 3.9 | 4.5 |
| XIX | Gross | 6.1 | 4.1 | 3.3 | 3.3 |
| Congenital Malformations | Net | 6.1 | 4.1 | 3.3 | 3.3 |
| XX | Gross | 0 | 1.0 | 1.1 | 1.0 |
| Certain Diseases of Early Infancy | Net | 0 | 1.0 | 1.1 | 1.0 |
| XXI | | | | | |
| Symptoms, Senility and Ill-Defined Conditions | Gross | 64.7 | 57.7 | 72.4 | 76.0 |
| | Net | 61.6 | 53.7 | 67.9 | 69.5 |
| Symptoms Referrable to Nervous System | | 2.6 | 7.5 | 8.9 | 8.2 |
| Symptoms Referrable to Cardiovascular System | | 6.7 | 4.2 | 5.6 | 8.6 |
| Symptoms Referrable to Respiratory System | | 14.4 | 13.7 | 8.9 | 10.3 |
| Symptoms Referrable to Upper and Lower Gastrointestinal System | | 10.3 | 8.2 | 11.7 | 12.3 |
| Symptoms Referrable to Urinary System | | 3.6 | 3.1 | 1.7 | 3.4 |
| Pain in Back | | 4.1 | 4.0 | 7.2 | 5.6 |
| Other Referrable Symptoms (Not Elsewhere Classified) | | 8.2 | 7.5 | 12.8 | 8.6 |
| Headache | | 9.3 | 5.2 | 5.6 | 9.8 |
| Other Ill-Defined Diseases | | 5.6 | 4.3 | 10.0 | 9.2 |
| XXII | Gross | 170.5 | 148.0 | 186.5 | 165.7 |
| Supplementary Classifications | Net | 169.5 | 143.9 | 183.2 | 161.6 |
| General Medical Examinations (Including Immunizations) | | 99.1 | 61.4 | 118.0 | 76.6 |
| Well Baby and Child Care (Including Immunizations) | | 59.1 | 57.6 | 54.6 | 61.7 |
| Other | | 12.3 | 29.0 | 13.9 | 27.4 |
| XXIII | | | | | |
| Undetermined Classifications | Gross | 140.2 | 97.8 | 177.1 | 133.0 |

* Gross rate is based on sum of patients reported for each component of a category; this represents duplicate count of persons treated for more than one condition in that category.

* Net rate is based on number of patients with any condition listed for a specified category.

conditions (blue-collar female rate about a fourth higher), anemias (blue-collar female rate about 70 per cent higher), sciatica (blue-collar female rate nearly triple), gastroenteritis and colitis (blue-collar female rate nearly 30 per cent higher).

No hypotheses as to the reasons for these findings are offered or even attempted. The usual cautionary reservation as to conclusions based on one year's multivariate analysis may be particularly applicable here.

* * *

The average obstetrical case involved 4.4 days of hospitalization, as against 8.4 days for non-maternity cases and 7.7 days for all cases (Table 139).

TABLE 139. Hospital Utilization Indices, by Type of Admission

| TYPE OF CASE | NUMBER PER 1000 EXPOSURE YEARS * | | | Average Number of Days Per Admission |
|---|---|---|---|---|
| | *Members Admitted* | *Admissions* | *Hospital Days* | |
| All Cases | 102.6 | 116.0 | 896.5 | 7.7 |
| Non-Maternity | 84.1 | 97.0 | 812.7 | 8.4 |
| Surgical | 48.9 | 55.1 | 378.7 | 6.9 |
| Medical | 35.2 | 41.9 | 434.0 | 10.4 |
| Maternity | 18.5 | 19.0 | 83.8 | 4.4 |

* Comprehensive and limited Plan samples.

The average stay of 7.7 days for GHI patients compares with averages of 8.1 nationally and 9.2, northeastern United States, reported by the National Center for Health Statistics.[1] The discrepancy in data coming from the two different types of sources may be related to age distribution differences as well as to the fact that insurance figures, by their nature, exclude most of the care rendered in government hospitals, where stays



tend to be much longer than in voluntary or proprietary hospitals. Blue Cross experience, not regularly published, happens to be available for 1964. When Blue Cross data rather than national health survey data are used as the basis of comparison, it is found that the GHI experience conformed rather closely: the GHI average stay for members under age 65 was 7.3 days, as against the Blue Cross figure of 7.6 in the Northeast, and 13.2 days for members aged 65 and over as against the Blue Cross figure of 13.4 in the Northeast, for the same period.[2]

[1] *Op. cit.*

[2] Passman, Mary Jane. *Hospitalization by Blue Cross Members in 1964, "Inquiry,"* Blue Cross Association, May 1966.

TABLE 147. Hospital Utilization, by Diagnosis: Frequency of Admissions and Days Per 1,000 Exposure Years [1]

| DIAGNOSIS | Total Admissions Per 1,000 Exposure Years † | Total Days Per 1,000 Exposure Years † | TYPE OF ADMISSION: SURGICAL Admissions Per 1,000 Exposure Years | SURGICAL Days Per 1,000 Exposure Years | MEDICAL Admissions Per 1,000 Exposure Years | MEDICAL Days Per 1,000 Exposure Years |
|---|---|---|---|---|---|---|
| Combined Total | 114.4 | 851.2 | 54.8 | 357.8 | 40.2 | 401.3 |
| *Infective and Parasitic Diseases* | .9 | 8.8 | — | — | .9 | 8.8 |
| Streptococcal Sore Throat | .1 | .5 | — | — | .1 | .5 |
| Measles | 0 | 0 | — | — | 0 | 0 |
| Rubella (German Measles) | 0 • | .1 | — | — | 0 • | .1 |
| Chicken Pox | 0 | 0 | — | — | 0 | 0 |
| Mumps | 0 | 0 | — | — | 0 | 0 |
| Infectious Hepatitis | .1 | 2.1 | — | — | .1 | 2.1 |
| Glandular Fever (Infectious Mononucleosis) | .1 | 1.6 | — | — | .1 | 1.6 |
| Intestinal Virus | .4 | 2.4 | — | — | .4 | 2.4 |
| Dermatophytoses | 0 | 0 | — | — | 0 | 0 |
| Other | .2 | 2.1 | — | — | .2 | 2.1 |
| *Neoplasms* | 10.6 | 93.0 | 8.9 | 73.3 | 1.7 | 19.7 |
| Malignant Neoplasms | 3.3 | 44.0 | 2.5 | 31.8 | .8 | 12.2 |
| Digestive System (Including Mouth) | .8 | 10.0 | .5 | 9.1 | .1 | .9 |
| Respiratory System | .8 | 7.3 | .4 | 5.4 | .2 | 1.8 |
| Breast | .5 | 7.0 | .4 | 6.4 | .1 | .8 |
| Female Genital Organs | .4 | 3.8 | .4 | 3.1 | 0 • | .7 |
| Male Genital Organs | .3 | 5.3 | .2 | 3.0 | .1 | 2.3 |
| Urinary System | .2 | 2.1 | .2 | 2.1 | 0 | 0 |
| Skin | .2 | .7 | .2 | .7 | 0 | 0 |
| Eye | 0 • | .2 | 0 • | .2 | 0 | 0 |
| Nervous System (Including Brain) | .1 | 1.1 | .1 | .4 | 0 • | .7 |
| Endocrine Glands | 0 | 0 | 0 | 0 | 0 | 0 |
| Bone | 0 • | .5 | 0 | 0 | 0 • | .5 |
| Connective Tissue | 0 | 0 | 0 | 0 | 0 | 0 |
| Lymphosarcoma | 0 • | .1 | 0 • | .1 | 0 | 0 |
| Hodgkin's Disease | 0 • | .2 | 0 • | .2 | 0 | 0 |
| Other Lymphoma | .1 | 2.1 | 0 • | .3 | .1 | 1.8 |
| Multiple Myeloma | .1 | 1.2 | 0 | 0 | .1 | 1.2 |
| Leukemia | .1 | 1.5 | 0 | 0 | .1 | 1.5 |
| N.E.C.† | .1 | 1.1 | .1 | .8 | 0 • | .3 |
| Benign Neoplasms | 7.0 | 47.2 | 6.2 | 40.2 | .8 | 6.4 |
| Mouth | .2 | .6 | .2 | .5 | 0 • | .1 |
| Rectum | .3 | 3.0 | .2 | 2.6 | .1 | .4 |
| Breast | .7 | 3.4 | .6 | 3.0 | .1 | .4 |
| Female Genital Organs | 2.9 | 27.2 | 2.7 | 25.5 | .2 | 1.7 |
| Skin | 1.5 | 6.2 | 1.3 | 4.5 | .2 | 1.7 |
| Other | 1.4 | 6.6 | 1.2 | 4.7 | .2 | 2.1 |



TABLE 147. *(Cont'd)*

| DIAGNOSIS | Total Admissions Per 1,000 Exposure Years † | Total Days Per 1,000 Exposure Years † | TYPE OF ADMISSION: SURGICAL Admissions Per 1,000 Exposure Years | SURGICAL Days Per 1,000 Exposure Years | MEDICAL Admissions Per 1,000 Exposure Years | MEDICAL Days Per 1,000 Exposure Years |
|---|---|---|---|---|---|---|
| *Neoplasms (Cont'd)* | | | | | | |
| Unspecified Neoplasms | .3 | 1.8 | .2 | .7 | .1 | 1.1 |
| Rectum | 0 • | .2 | 0 • | .2 | 0 | 0 |
| Breast | 0 • | .1 | 0 • | .1 | 0 | 0 |
| Female Genital Organs | .1 | .1 | .1 | .1 | 0 | 0 |
| Other | .2 | 1.4 | .1 | .3 | .1 | 1.1 |
| *Allergic, Endocrine System, Metabolic and Nutritional Diseases* | 3.0 | 30.9 | .5 | 3.5 | 2.5 | 27.4 |
| Hay Fever | 0 | 0 | 0 | 0 | 0 | 0 |
| Asthma | .6 | 5.9 | 0 | 0 | .6 | 5.9 |
| Other Allergic Diseases | .1 | .5 | 0 • | .2 | .1 | .3 |
| Diseases of Thyroid Gland | .7 | 5.4 | .4 | 2.8 | .3 | 2.6 |
| Diabetes Mellitus | 1.3 | 15.4 | 0 | 0 | 1.3 | 15.4 |
| Obesity (N.O.S.) † | .1 | 1.6 | 0 | 0 | .1 | 1.6 |
| Other | .2 | 2.1 | .1 | .5 | .1 | 1.6 |
| *Diseases of Blood and Blood-Forming Organs* | .6 | 5.5 | .1 | .2 | .5 | 5.3 |
| Anemias | .4 | 3.6 | 0 • | 0 • | .4 | 3.6 |
| Other | .2 | 1.9 | .1 | .2 | .1 | 1.7 |
| *Mental, Psychoneurotic and Personality Disorders †* | .5 | 8.6 | — | — | — | — |
| *Diseases of the Nervous System* | 2.1 | 18.4 | .6 | 3.1 | 1.5 | 15.3 |
| Stroke | .1 | .7 | 0 • | .1 | .1 | .6 |
| Multiple Sclerosis | .1 | 1.3 | 0 | 0 | .1 | 1.3 |
| Migraine | 0 • | .2 | 0 | 0 | 0 • | .2 |
| Epilepsy | 0 • | .1 | 0 | 0 | 0 • | .1 |
| Sciatica | .2 | 2.6 | 0 | 0 | .2 | 2.6 |
| Other | 1.7 | 13.5 | .6 | 3.0 | 1.1 | 10.5 |
| *Diseases of the Eye* | 2.2 | 12.4 | 2.0 | 10.9 | .2 | 1.5 |
| Conjunctivitis and Ophthalmia | 0 • | .2 | 0 | 0 | 0 • | .2 |
| Strabismus | .6 | 1.7 | .6 | 1.7 | 0 | 0 |
| Cataract | .9 | 6.3 | .8 | 6.2 | .1 | .1 |
| Glaucoma | .2 | .8 | .2 | .7 | 0 • | .1 |
| Detachment of Retina | .1 | 2.6 | .1 | 2.0 | 0 • | .6 |
| Other | .4 | .8 | .3 | .3 | .1 | .5 |

TABLE 147. *(Cont'd)* Hospital Utilization, by Diagnosis: Frequency of Admissions and Days Per 1,000 Exposure Years[1]

| DIAGNOSIS | Total Admissions Per 1,000 Exposure Years † | Total Days Per 1,000 Exposure Years † | TYPE OF ADMISSION: SURGICAL Admissions Per 1,000 Exposure Years | SURGICAL Days Per 1,000 Exposure Years | MEDICAL Admissions Per 1,000 Exposure Years | MEDICAL Days Per 1,000 Exposure Years |
|---|---|---|---|---|---|---|
| *Diseases of the Ear* | 1.2 | 6.7 | .7 | 3.8 | .5 | 2.9 |
| Otitis Externa | 0 * | .2 | 0 | 0 | 0 * | .2 |
| Otitis Media | .4 | 1.7 | .3 | .5 | .3 | 1.2 |
| Deafness | 0 | 0 | 0 | 0 | 0 | 0 |
| Other | .8 | 4.8 | .5 | 3.7 | .3 | 2.1 |
| *Diseases of the Circulatory System* | 11.1 | 133.6 | 3.6 | 30.9 | 7.5 | 102.7 |
| Rheumatic Fever without Mention of Heart | .1 | 2.0 | 0 | 0 | .1 | 2.0 |
| *Diseases of the Heart* | 5.8 | 84.7 | .4 | 8.7 | 5.4 | 76.0 |
| Rheumatic Heart Disease | .7 | 9.4 | .2 | 3.7 | .5 | 5.7 |
| Arteriosclerotic Heart Disease, So Described | 1.0 | 16.7 | 0 * | .1 | 1.0 | 16.6 |
| Acute Coronary Occlusion | 1.2 | 23.9 | 0 * | .3 | 1.2 | 23.6 |
| Coronary Insufficiency | 1.1 | 10.6 | 0 * | .1 | 1.1 | 10.5 |
| Angina Pectoris | .3 | 3.6 | 0 | 0 | .3 | 3.6 |
| Hypertensive Heart Disease | .3 | 2.3 | 0 | 0 | .3 | 2.3 |
| Other | 1.2 | 18.2 | .2 | 4.5 | 1.0 | 13.7 |
| Diseases of Veins and Arteries (Other than the Heart) | 5.2 | 46.9 | 3.2 | 22.2 | 2.0 | 24.7 |
| Hypertensive Diseases | .7 | 9.1 | .1 | .4 | .6 | 8.7 |
| Hypotension | 0 | 0 | 0 | 0 | 0 | 0 |
| Hemorrhoids | 1.8 | 11.7 | 1.8 | 11.3 | 0 * | .4 |
| General Arteriosclerosis | .1 | 1.1 | .1 | 1.1 | 0 | 0 |
| Varicose Veins of Lower Extremities | .7 | 4.1 | .7 | 4.0 | 0 * | .1 |
| Pulmonary Embolism and Infarction | .1 | 1.8 | 0 * | .2 | .1 | 1.6 |
| Lymphadenitis | .4 | 1.7 | .1 | .4 | .3 | 1.3 |
| Other | 1.4 | 17.4 | .4 | 4.8 | 1.0 | 12.6 |
| *Diseases of the Respiratory System* | 14.5 | 58.2 | 9.9 | 17.5 | 4.6 | 41.7 |
| Acute Nasopharyngitis | .1 | .5 | 0 | 0 | .1 | .5 |
| Pharyngitis | .2 | 2.1 | 0 | 0 | .2 | 2.1 |
| Tonsillitis | .7 | 2.7 | .5 | 1.3 | .2 | 1.4 |
| Hypertrophy of Tonsils | 8.0 | 8.2 | 8.0 | 8.2 | 0 | 0 |
| Laryngitis and Tracheitis | .2 | 1.0 | 0 * | .2 | .2 | .8 |
| Sinusitis | .2 | 1.5 | .1 | .9 | .1 | .6 |
| Influenza | .1 | .2 | 0 | 0 | .1 | .2 |
| Pneumonia | 2.1 | 22.2 | .1 | 0 * | 2.0 | 22.2 |
| Bronchitis | .7 | 5.3 | .1 | .3 | .6 | 5.0 |
| Other Diseases of Upper Respiratory Tract | 1.3 | 5.2 | .9 | 3.3 | .4 | 1.9 |
| Diseases of Lungs | .9 | 9.3 | .2 | 2.3 | .7 | 7.0 |



TABLE 147. *(Cont'd)*

| DIAGNOSIS | Total Admissions Per 1,000 Exposure Years † | Total Days Per 1,000 Exposure Years † | TYPE OF ADMISSION: SURGICAL Admissions Per 1,000 Exposure Years | SURGICAL Days Per 1,000 Exposure Years | MEDICAL Admissions Per 1,000 Exposure Years | MEDICAL Days Per 1,000 Exposure Years |
|---|---|---|---|---|---|---|
| *Diseases of the Digestive System* | 16.3 | 151.1 | 9.3 | 91.2 | 7.0 | 59.9 |
| Stomatitis | 0 * | .1 | 0 | 0 | 0 * | .1 |
| Other Diseases of Buccal Cavity and Esophagus | .2 | .7 | .1 | .2 | .1 | .5 |
| Ulcers | 2.3 | 26.6 | .6 | 10.1 | 1.7 | 16.5 |
| Gastritis and Duodenitis | .8 | 4.7 | .1 | .4 | .7 | 4.3 |
| Other Diseases of Stomach and Duodenum | .1 | .5 | 0 * | .1 | .1 | .4 |
| Appendicitis | 2.0 | 15.0 | 1.8 | 14.2 | .2 | .8 |
| Hernia of Abdominal Cavity | 3.5 | 28.7 | 3.2 | 26.5 | .3 | 2.2 |
| Gastroenteritis and Colitis (Except Ulcerative) | 1.1 | 7.3 | 0 | 0 | 1.1 | 7.3 |
| Other Diseases of Intestines and Peritoneum | 2.8 | 23.2 | 1.4 | 10.4 | 1.4 | 12.8 |
| Diseases of the Liver, Gall Bladder and Pancreas | 3.5 | 44.3 | 2.1 | 29.3 | 1.4 | 15.0 |
| Disease of the Liver | .6 | 7.1 | 0 * | .1 | .6 | 7.0 |
| Disease of the Gall Bladder | 2.6 | 34.9 | 2.0 | 28.9 | .6 | 6.0 |
| Disease of the Pancreas | .3 | 2.3 | .1 | .3 | .2 | 2.0 |
| *Diseases of the Urinary System* | 4.0 | 31.6 | 1.9 | 13.9 | 2.1 | 17.7 |
| Nephritis and Nephrosis | .1 | 2.3 | 0 | 0 | .1 | 2.3 |
| Cystitis | 1.1 | 6.1 | .5 | 2.1 | .6 | 4.0 |
| Other | 2.8 | 23.2 | 1.4 | 11.8 | 1.4 | 11.4 |
| *Diseases of the Male Genital Organs* | 1.7 | 13.2 | 1.6 | 12.2 | .1 | 1.0 |
| *Diseases of the Female Genital Organs and Breast* | 5.8 | 36.4 | 5.1 | 31.6 | .7 | 4.8 |
| Diseases of the Breast | .8 | 3.3 | .8 | 2.8 | 0 * | .5 |
| Diseases of the Ovaries, Fallopian Tubes and Parametrium | .4 | 3.1 | .2 | 1.9 | .2 | 1.2 |
| Cervicitis | 1.0 | 7.1 | .9 | 6.6 | .1 | .5 |
| Vaginitis and Vulvitis | .1 | .8 | 0 * | .3 | .1 | .5 |
| Menstrual Disorders | 1.4 | 5.3 | 1.3 | 4.8 | .1 | .5 |
| Menopausal Symptoms | 0 | 0 | 0 | 0 | 0 | 0 |
| Other | 2.1 | 16.8 | 1.9 | 15.4 | .2 | 1.4 |
| *Deliveries and Complications of Pregnancy, Childbirth and Puerperium* † | 19.1 | 83.7 | — | — | — | — |

TABLE 147. *(Cont'd)* Hospital Utilization, by Diagnosis: Frequency of Admissions and Days Per 1,000 Exposure Years [1]

| DIAGNOSIS | Total Admissions Per 1,000 Exposure Years † | Total Days Per 1,000 Exposure Years † | TYPE OF ADMISSION: SURGICAL Admissions Per 1,000 Exposure Years | SURGICAL Days Per 1,000 Exposure Years | MEDICAL Admissions Per 1,000 Exposure Years | MEDICAL Days Per 1,000 Exposure Years |
|---|---|---|---|---|---|---|
| *Diseases of Skin and Subcutaneous Tissues* | 2.1 | 11.6 | 1.0 | 4.3 | 1.1 | 7.3 |
| Boil and Carbuncle | .1 | .8 | 0* | .1 | .1 | .7 |
| Cellulitis | .8 | 4.8 | .2 | 1.8 | .4 | 3.0 |
| Impetigo | 0 | 0 | 0 | 0 | 0 | 0 |
| Infectious Wart | .1 | .7 | .1 | .2 | 0* | .5 |
| Dermatitis | .1 | .9 | 0 | 0 | .1 | .8 |
| Acne | 0 | 0 | 0 | 0 | 0 | 0 |
| Sebaceous Cyst | .3 | .4 | .3 | .4 | 0* | 0* |
| Other | .9 | 4.0 | .4 | 1.8 | .5 | 2.8 |
| *Diseases of Bones and Organs of Movement* | 3.5 | 35.1 | 2.2 | 17.9 | 1.3 | 17.2 |
| Arthritis and Rheumatism | .4 | 5.8 | .1 | .8 | .3 | 5.0 |
| Osteomyelitis and Other Diseases of Bones and Joints | 1.5 | 20.8 | .8 | 10.8 | .7 | 10.0 |
| Synovitis, Bursitis and Tenosynovitis | 1.0 | 4.3 | .8 | 3.0 | .2 | 1.3 |
| Infective Myositis | 0* | .4 | 0 | 0 | 0* | .4 |
| Muscular Dystrophy | 0* | .3 | 0* | .1 | 0* | .2 |
| Scoliosis | .1 | .4 | .1 | .4 | 0 | 0 |
| Other Deformities | .3 | 2.0 | .3 | 2.0 | 0 | 0 |
| Other Diseases of Musculoskeletal System | .2 | 1.1 | .1 | 1.0 | .1 | .1 |
| *Injuries and Adverse Effects of External Causes* | 8.1 | 54.1 | 4.1 | 22.0 | 4.0 | 32.1 |
| Fractures | 3.0 | 24.2 | 2.4 | 14.5 | .6 | 9.7 |
| Skull and Face | .5 | 3.8 | .3 | .7 | .2 | 2.9 |
| Torso | .3 | 3.3 | .1 | 1.0 | .1 | 2.3 |
| Spine (Vertebral Column) | .2 | 3.3 | .1 | 1.0 | .1 | 2.3 |
| Ribs, Sternum and Larynx | 0* | 0* | 0* | 0* | 0 | 0 |
| Upper Extremities | 1.3 | 6.1 | 1.2 | 5.3 | .1 | .8 |
| Clavicle | .1 | .9 | .1 | .4 | 0* | .5 |
| Scapula | 0* | .1 | 0* | .1 | 0 | 0 |
| Humerus | .2 | 2.3 | .2 | 2.3 | 0 | 0 |
| Radius and Ulna | .7 | 2.0 | .7 | 1.9 | 0* | .1 |
| Wrist | .1 | .4 | .1 | .4 | 0 | 0 |
| Hand-Finger | .2 | .4 | .1 | .2 | .1 | .2 |
| Lower Extremities | 1.0 | 11.2 | .8 | 7.5 | .2 | 3.7 |
| Pelvis | 0* | .3 | 0 | 0 | 0* | .3 |
| Femur | .2 | 4.8 | .2 | 2.4 | 0* | 2.3 |
| Patella | 0 | 0 | 0 | 0 | 0 | 0 |
| Tibia and Fibula | .4 | 1.9 | .4 | 1.8 | 0* | .2 |
| Ankle | .2 | 2.2 | .1 | 1.5 | .1 | .7 |
| Foot-Toe | .2 | 2.2 | .1 | 2.0 | .1 | .2 |
| Late Effects of Fractures | 0 | 0 | 0 | 0 | 0 | 0 |



TABLE 147. *(Concluded)*

| DIAGNOSIS | Total Admissions Per 1,000 Exposure Years † | Total Days Per 1,000 Exposure Years † | TYPE OF ADMISSION: SURGICAL Admissions Per 1,000 Exposure Years | SURGICAL Days Per 1,000 Exposure Years | MEDICAL Admissions Per 1,000 Exposure Years | MEDICAL Days Per 1,000 Exposure Years |
|---|---|---|---|---|---|---|
| *Injuries (Cont'd)* | | | | | | |
| Dislocations | .3 | 1.6 | .2 | 1.1 | .1 | .5 |
| Sprains and Strains | 1.3 | 9.8 | .1 | .7 | 1.2 | 9.1 |
| Head Injuries (Other than Fractures) | 1.0 | 5.3 | .1 | .9 | .9 | 4.4 |
| Internal Injuries | .1 | .5 | .1 | .5 | 0 | 0 |
| Lacerations and Open Wounds | 1.0 | 3.5 | .8 | 2.7 | .2 | .8 |
| Superficial Injuries | .1 | .5 | 0* | .2 | .1 | .3 |
| Foreign Body | .1 | .3 | .1 | .1 | 0* | .2 |
| Contusions | .7 | 5.8 | .1 | .7 | .6 | 4.9 |
| Complications of Surgical or Medical Procedures | .1 | .5 | .1 | .2 | 0* | .3 |
| Other | .4 | 2.3 | .1 | .4 | .3 | 1.9 |
| *Congenital Malformations* | .8 | 6.3 | .7 | 5.0 | .1 | 1.3 |
| *Certain Diseases of Early Infancy* | .5 | 5.4 | .1 | .5 | .4 | 4.9 |
| *Symptoms, Senility and Ill-Defined Conditions* | 2.6 | 18.7 | .5 | 3.8 | 2.1 | 14.9 |
| Symptoms Referrable to Nervous System | .3 | 1.9 | 0* | .2 | .3 | 1.7 |
| Symptoms Referrable to Cardiovascular System | .2 | .7 | 0 | 0 | .2 | .7 |
| Symptoms Referrable to Respiratory System | .5 | 2.9 | .1 | .5 | .4 | 2.4 |
| Symptoms Referrable to Upper and Lower Gastrointestinal System | .5 | 5.7 | 0* | .4 | .5 | 5.3 |
| Symptoms Referrable to Urinary System | .4 | 2.7 | .1 | 1.0 | .3 | 1.7 |
| Pain in Back | .1 | .4 | 0 | 0 | .1 | .4 |
| Other Referrable Symptoms, N.E.C.‡ | .5 | 3.8 | .2 | 1.1 | .3 | 2.5 |
| Headache | 0 | 0 | 0 | 0 | 0 | 0 |
| Other Ill-Defined Diseases | .1 | .8 | .1 | .6 | 0* | .2 |
| *Undetermined Classifications* | 3.3 | 28.5 | 1.8 | 12.4 | 1.4 | 14.5 |

[1] Comprehensive Plan sample.

* Less than .05.

† Including in addition to surgical and medical admissions, 19.1 obstetrical admissions and 83.7 obstetrical days, and .3 psychiatric admissions and 8.6 psychiatric days, per 1,000 exposure years. Of the obstetrical admissions, 16.5 were for normal deliveries, 2.3 for abortions or miscarriages, .3 for complicated deliveries or ectopic pregnancies.

‡ Not elsewhere classified or otherwise specified.

## HOSPITALIZATION: DISTRIBUTION OF ADMISSIONS AND AGGREGATE DAYS, BY LENGTH OF STAY, BY TYPE OF ADMISSION

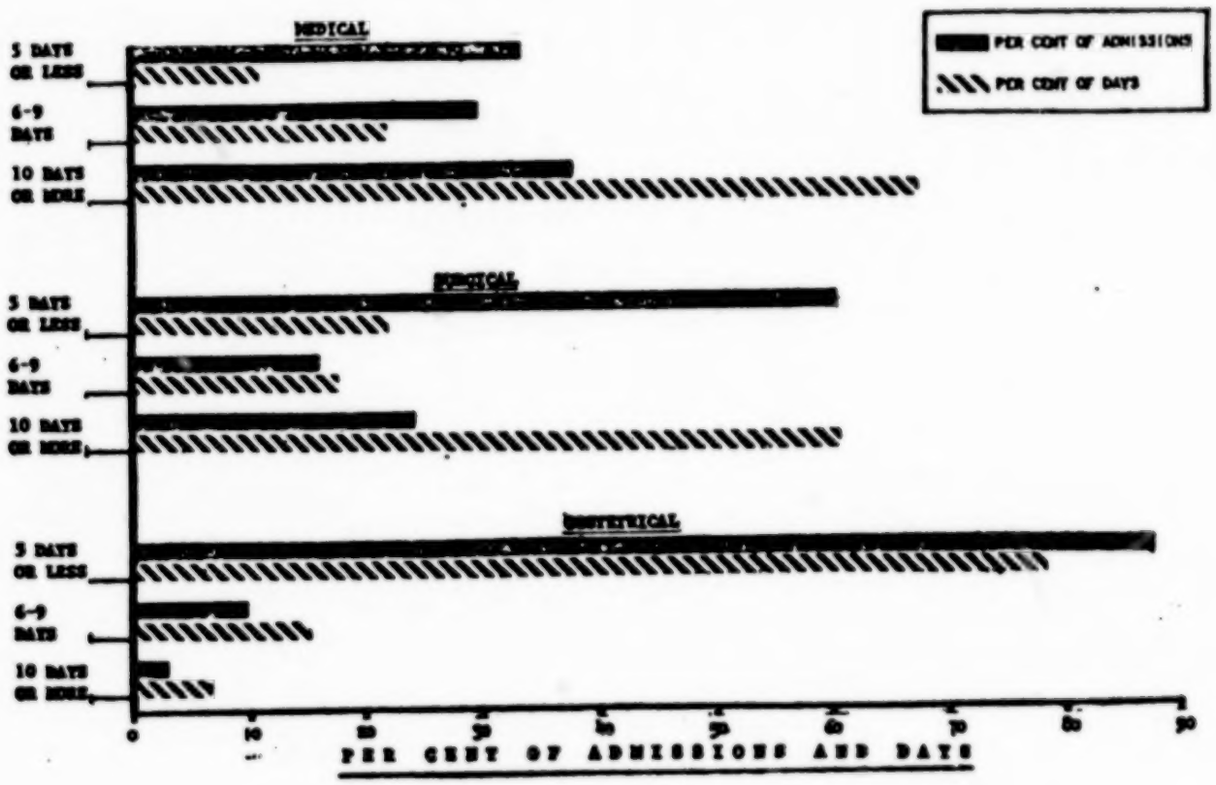


TABLE 161. Distribution of Hospital Admissions and Days by Diagnostic Category, by Type of Admission

| DIAGNOSTIC CATEGORY | ALL | | TYPE OF ADMISSION * | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | MEDICAL | | SURGICAL | | OBSTETRICAL | | | |
| | Admissions | Days | Admissions | Days | Admissions | Days | Admissions | Days | | |
| | % | % | % | % | % | % | % | % | | |
| Infective and Parasitic Diseases | .5 | 1.1 | .2 | .1 | 0 | 0 | | | | |
| Neoplasms | 9.5 | 11.0 | 2.3 | 2.3 | 16.2 | 20.3 | | | | |
| Allergic, Endocrine System, Metabolic and Nutritional Diseases | 2.5 | 3.9 | 4.4 | 5.2 | | | | | | |
| Diseases of Blood and Blood-Forming Organs | .5 | .7 | .5 | .7 | .1 | .1 | | | | |
| Diseases of Nervous System | 1.9 | 2.3 | 1.3 | 1.4 | .9 | .9 | | | | |
| Diseases of the Eye | 2.0 | 1.5 | 4.0 | 4.0 | 1.1 | 3.2 | | | | |
| Diseases of the Ear | 1.1 | .5 | .5 | .4 | 3.8 | 1.0 | | | | |
| Diseases of the Circulatory System | 10.1 | 16.5 | 1.2 | .9 | 1.4 | 9.2 | | | | |
| Diseases of the Respiratory System | 13.1 | 7.3 | 10.2 | 26.5 | 7.1 | 5.2 | | | | |
| Diseases of the Digestive System | 14.8 | 18.6 | 11.8 | 10.7 | 18.8 | 26.5 | | | | |
| Diseases of the Urinary System | 3.7 | 3.9 | 18.1 | 15.5 | 17.7 | 4.0 | | | | |
| Diseases of the Male Genital Organs | 1.5 | 1.6 | 5.4 | 4.6 | 3.7 | 3.5 | | | | |
| Diseases of the Female Genital Organs and Breast | 5.2 | 4.5 | .3 | .3 | 2.9 | | 100.0 | 100.0 | | |
| Deliveries and Complications of Pregnancy, Childbirth and Puerperium | 17.2 | 10.2 | 1.6 | 1.3 | 9.8 | 9.3 | | | | |
| Diseases of Skin and Subcutaneous Tissue | 1.9 | 1.4 | 0 | 0 | 0 | 0 | 100.0 | 100.0 | | |
| Diseases of Bones and Organs of Movement | 3.2 | 4.3 | 2.8 | 1.9 | 2.0 | 1.3 | | | | |
| Congenital Malformations | .8 | .8 | 3.4 | 4.4 | 4.2 | 5.3 | | | | |
| Certain Diseases of Early Infancy | .5 | .7 | .3 | .3 | 1.3 | 1.5 | | | | |
| Symptoms, Senility and Ill-Defined Conditions | 2.4 | 2.3 | 1.1 | 1.3 | .1 | .1 | | | | |
| Injuries and Adverse Effects of External Causes | 7.3 | 6.0 | 5.5 | 3.8 | .9 | 1.1 | | | | |
| TOTAL | 100.0 | 100.0 | 10.3 | 8.2 | 7.8 | 6.4 | | | | |
| | | | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | | |

* Comprehensive Plan sample, excluding psychiatric admissions.



TABLE 162. Average Length of Stay, Surgical and Medical Admissions, by Major Diagnostic Categories

| DIAGNOSTIC CATEGORY | NUMBER OF DAYS PER STAY | | |
|---|---|---|---|
| | Hospital Admissions * | Surgical Admissions | Medical Admissions |
| Infective and Parasitic Diseases | 9.9 | — | 9.9 |
| Neoplasms | 8.8 | 8.2 | 11.8 |
| Allergic, Endocrine System, Metabolic and Nutritional Diseases | 10.4 | 7.5 | 11.0 |
| Diseases of Blood and Blood-Forming Organs | 9.4 | 2.0 | 10.8 |
| Diseases of the Nervous System | 8.8 | 5.4 | 10.0 |
| Diseases of the Eye | 5.8 | 5.4 | 6.9 |
| Diseases of the Ear | 5.8 | 4.5 | 7.5 |
| Diseases of the Circulatory System | 12.0 | 8.5 | 13.8 |
| Diseases of the Respiratory System | 4.1 | 1.7 | 9.0 |
| Diseases of the Digestive System | 9.3 | 9.8 | 8.5 |
| Diseases of the Urinary System | 7.8 | 7.1 | 8.5 |
| Diseases of the Male Genital Organs | 8.0 | 7.8 | 8.8 |
| Diseases of the Female Genital Organs and Breast | 6.3 | 6.3 | 7.8 |
| Deliveries and Complications of Pregnancy, Childbirth and Puerperium | 4.4 | — | — |
| Diseases of Skin and Subcutaneous Tissues | 5.4 | 3.9 | 6.8 |
| Diseases of Bones and Organs of Movement | 10.1 | 8.3 | 13.1 |
| Congenital Malformations | 7.7 | 6.9 | 11.8 |
| Certain Diseases of Early Infancy | 10.4 | 6.5 | 11.0 |
| Symptoms, Senility and Ill-Defined Conditions | 7.1 | 7.7 | 7.0 |
| Injuries and Adverse Effects of External Causes | 6.7 | 5.3 | 8.0 |
| TOTAL, Excluding Maternity | 8.0 | 6.5 | 10.0 |
| TOTAL, Including Maternity | 7.4 | — | — |

* Comprehensive Plan sample, excluding psychiatric admissions.

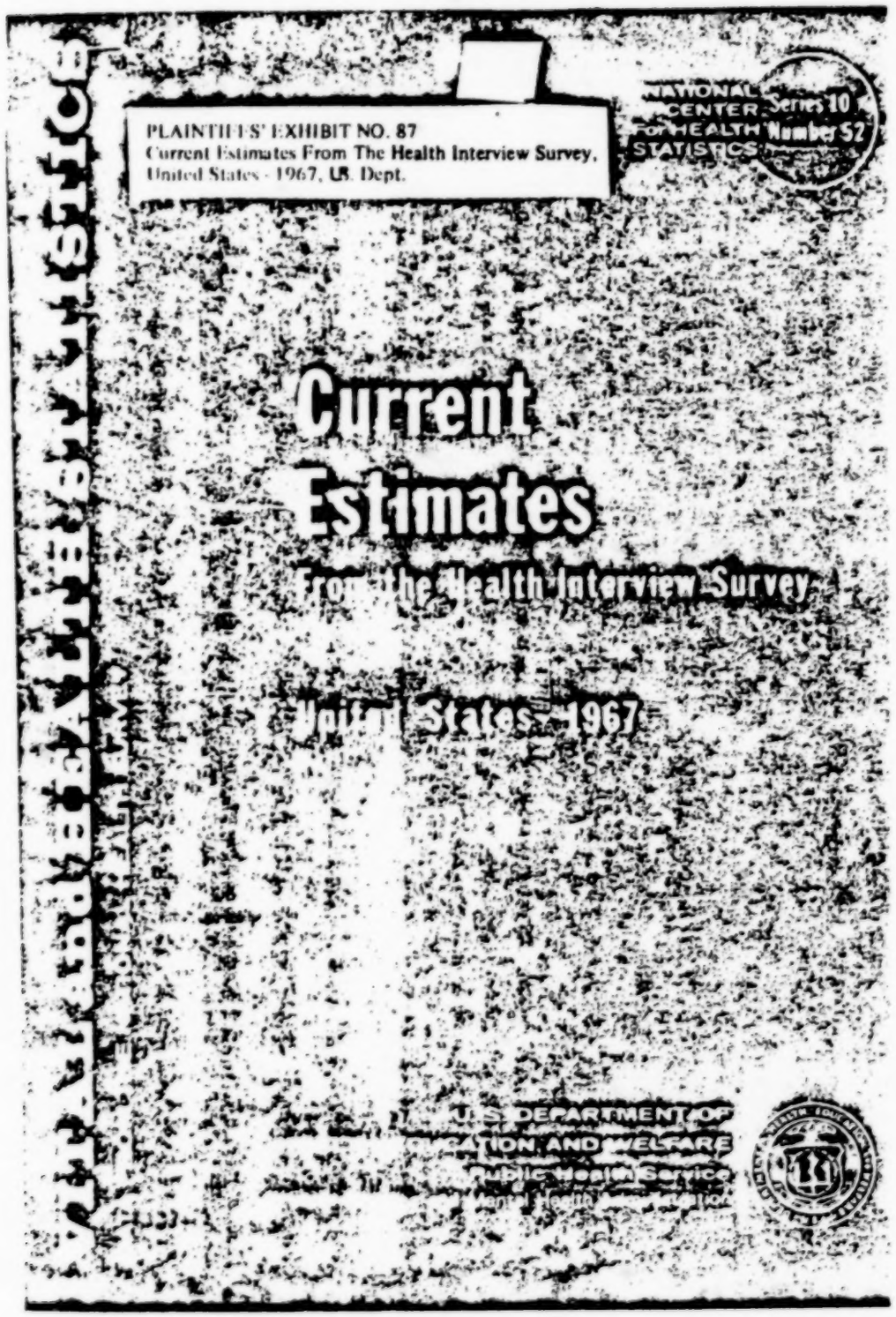





TABLE 1. INCIDENCE OF ACUTE CONDITIONS, PERCENT DISTRIBUTION, AND NUMBER OF ACUTE CONDITIONS PER 100 PERSONS PER YEAR, BY SEX AND CONDITION GROUP: UNITED STATES, 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| CONDITION GROUP | BOTH SEXES | MALE | FEMALE | BOTH SEXES | MALE | FEMALE | BOTH SEXES | MALE | FEMALE |
|---|---|---|---|---|---|---|---|---|---|
| | INCIDENCE OF ACUTE CONDITIONS IN THOUSANDS | | | PERCENT DISTRIBUTION | | | NUMBER OF ACUTE CONDITIONS PER 100 PERSONS PER YEAR | | |
| ALL ACUTE CONDITIONS | 367,453 | 170,606 | 196,847 | 100.0 | 100.0 | 100.0 | 190.0 | 183.0 | 196.9 |
| INFECTIVE AND PARASITIC DISEASES | 44,174 | 21,153 | 23,020 | 12.0 | 12.4 | 11.7 | 22.8 | 22.7 | 23.0 |
| COMMON CHILDHOOD DISEASES | 8,884 | 4,609 | 4,275 | 2.4 | 2.7 | 2.2 | 4.6 | 4.9 | 4.3 |
| THE VIRUS, N.O.S. | 26,662 | 11,978 | 14,684 | 7.3 | 7.0 | 7.4 | 13.8 | 12.9 | 14.6 |
| OTHER INFECTIVE AND PARASITIC DISEASES | 8,648 | 4,567 | 4,081 | 2.4 | 2.7 | 2.1 | 4.5 | 4.9 | 4.1 |
| RESPIRATORY CONDITIONS | 204,581 | 93,951 | 110,630 | 55.7 | 55.1 | 56.2 | 105.8 | 100.8 | 110.4 |
| UPPER RESPIRATORY CONDITIONS | 132,318 | 61,037 | 71,280 | 36.0 | 35.8 | 36.2 | 68.4 | 65.5 | 71.1 |
| COMMON COLD | 103,513 | 47,519 | 55,998 | 28.2 | 27.9 | 28.4 | 53.5 | 51.0 | 55.9 |
| OTHER ACUTE UPPER RESPIRATORY CONDITIONS | 28,805 | 13,522 | 15,283 | 7.8 | 7.9 | 7.8 | 14.9 | 14.5 | 15.3 |
| INFLUENZA | 64,760 | 29,092 | 35,668 | 17.6 | 17.1 | 18.1 | 33.5 | 31.2 | 35.6 |
| INFLUENZA WITH DIGESTIVE MANIFESTATIONS | 8,975 | 4,093 | 4,882 | 2.4 | 2.4 | 2.5 | 4.6 | 4.4 | 4.9 |
| OTHER INFLUENZA | 55,785 | 24,999 | 30,786 | 15.2 | 14.7 | 15.6 | 28.8 | 26.8 | 30.7 |
| OTHER RESPIRATORY CONDITIONS | 7,504 | 3,822 | 3,682 | 2.0 | 2.2 | 1.9 | 3.9 | 4.1 | 3.7 |
| PNEUMONIA | 2,110 | 1,205 | 905 | 0.6 | 0.7 | 0.5 | 1.1 | 1.3 | 0.9 |
| BRONCHITIS | 3,719 | 1,822 | 1,897 | 1.0 | 1.1 | 1.0 | 1.9 | 2.0 | 1.9 |
| OTHER ACUTE RESPIRATORY CONDITIONS | 1,675 | 795 | * | 0.5 | 0.5 | * | 0.9 | 0.9 | * |
| DIGESTIVE SYSTEM CONDITIONS | 16,538 | 7,836 | 8,702 | 4.5 | 4.6 | 4.4 | 8.6 | 8.4 | 8.7 |
| DENTAL CONDITIONS | 5,671 | 2,360 | 3,311 | 1.5 | 1.4 | 1.7 | 2.9 | 2.5 | 3.3 |
| FUNCTIONAL AND SYMPTOMATIC UPPER GASTROINTESTINAL DISORDERS, N.E.C. | 3,533 | 1,495 | 2,038 | 1.0 | 0.9 | 1.0 | 1.8 | 1.6 | 2.0 |
| OTHER DIGESTIVE SYSTEM CONDITIONS | 7,334 | 3,980 | 3,354 | 2.0 | 2.3 | 1.7 | 3.8 | 4.3 | 3.3 |
| INJURIES | 55,503 | 31,709 | 23,794 | 15.1 | 18.6 | 12.1 | 28.7 | 34.0 | 23.7 |
| FRACTURES, DISLOCATIONS, SPRAINS, AND STRAINS | 18,124 | 9,270 | 8,855 | 4.9 | 5.4 | 4.5 | 9.4 | 9.9 | 8.8 |
| FRACTURES AND DISLOCATIONS | 5,554 | 3,233 | 2,322 | 1.5 | 1.9 | 1.2 | 2.9 | 3.5 | 2.3 |
| SPRAINS AND STRAINS | 10,570 | 6,037 | 4,533 | 2.9 | 3.5 | 2.3 | 5.5 | 6.5 | 4.5 |
| OPEN WOUNDS AND LACERATIONS | 15,721 | 9,455 | 6,266 | 4.3 | 5.5 | 3.2 | 8.1 | 10.1 | 6.3 |
| CONTUSIONS AND SUPERFICIAL INJURIES | 10,006 | 4,992 | 5,013 | 2.7 | 2.9 | 2.5 | 5.2 | 5.4 | 5.0 |
| OTHER CURRENT INJURIES | 13,652 | 7,992 | 5,660 | 3.7 | 4.7 | 2.9 | 7.1 | 8.6 | 5.6 |
| ALL OTHER ACUTE CONDITIONS | 48,657 | 15,957 | 30,701 | 12.7 | 9.4 | 15.6 | 24.1 | 17.1 | 30.6 |
| DISEASES OF THE EAR | 9,115 | 4,554 | 4,561 | 2.5 | 2.7 | 2.3 | 4.7 | 4.9 | 4.6 |
| HEADACHES | 3,428 | 860 | 2,568 | 0.9 | 0.5 | 1.3 | 1.8 | 0.9 | 2.6 |
| GENITOURINARY DISORDERS | 6,129 | 723 | 5,407 | 1.7 | 0.4 | 2.7 | 3.2 | 0.8 | 5.4 |
| DELIVERIES AND DISORDERS OF PREGNANCY AND THE PUERPERIUM | 4,252 | ... | 4,252 | 1.2 | ... | 2.2 | 2.2 | ... | 4.2 |
| DISEASES OF THE SKIN | 5,047 | 2,054 | 2,993 | 1.4 | 1.2 | 1.5 | 2.6 | 2.2 | 3.0 |
| DISEASES OF THE MUSCULOSKELETAL SYSTEM | 4,202 | 1,528 | 2,674 | 1.1 | 0.9 | 1.4 | 2.2 | 1.6 | 2.7 |
| ALL OTHER ACUTE CONDITIONS | 14,483 | 6,237 | 8,245 | 3.9 | 3.7 | 4.2 | 7.5 | 6.7 | 8.2 |

NOTE: Excluded from these statistics are all conditions involving neither restricted activity nor medical attention.

N.o.s.—not otherwise specified; n.e.c.—not elsewhere classified.

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TABLE 2. INCIDENCE OF ACUTE CONDITIONS AND NUMBER OF ACUTE CONDITIONS PER 100 PERSONS PER YEAR, BY AGE, SEX, AND CONDITION GROUP: UNITED STATES, 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| SEX AND CONDITION GROUP | ALL AGES | UNDER 6 | 6-16 | 17-44 | 45 & OVER | ALL AGES | UNDER 6 | 6-16 | 17-44 | 45 & OVER |
|---|---|---|---|---|---|---|---|---|---|---|
| | INCIDENCE OF ACUTE CONDITIONS IN THOUSANDS | | | | | NUMBER OF ACUTE CONDITIONS PER 100 PERSONS PER YEAR | | | | |
| **BOTH SEXES** | | | | | | | | | | |
| ALL ACUTE CONDITIONS | 267,453 | 78,287 | 99,166 | 121,466 | 68,494 | 190.0 | 334.7 | 227.0 | 176.8 | 118.9 |
| INFECTIVE AND PARASITIC DISEASES | 44,174 | 11,449 | 15,679 | 12,041 | 5,005 | 22.8 | 48.9 | 35.9 | 17.5 | 8.7 |
| RESPIRATORY CONDITIONS | 204,581 | 48,546 | 58,314 | 64,252 | 37,469 | 105.8 | 199.0 | 128.9 | 93.5 | 65.1 |
| UPPER RESPIRATORY CONDITIONS | 132,314 | 35,433 | 37,211 | 37,652 | 22,021 | 68.4 | 151.5 | 85.2 | 54.8 | 38.2 |
| INFLUENZA | 64,760 | 8,485 | 17,562 | 24,656 | 14,077 | 33.5 | 36.2 | 40.2 | 35.9 | 24.4 |
| OTHER RESPIRATORY CONDITIONS | 7,504 | 2,648 | 1,541 | 1,943 | 1,372 | 3.9 | 11.3 | 3.5 | 2.8 | 2.4 |
| DIGESTIVE SYSTEM CONDITIONS | 16,538 | 3,267 | 3,475 | 5,573 | 3,719 | 8.6 | 14.0 | 9.1 | 8.1 | 6.5 |
| INJURIES | 55,503 | 6,922 | 13,168 | 20,989 | 12,424 | 28.7 | 38.1 | 30.1 | 30.5 | 21.6 |
| ALL OTHER ACUTE CONDITIONS | 46,657 | 8,103 | 10,646 | 18,631 | 9,877 | 24.1 | 34.6 | 23.0 | 27.1 | 17.1 |
| **MALE** | | | | | | | | | | |
| ALL ACUTE CONDITIONS | 170,606 | 40,977 | 51,083 | 48,600 | 29,966 | 183.0 | 342.5 | 230.6 | 150.1 | 112.1 |
| INFECTIVE AND PARASITIC DISEASES | 21,153 | 6,087 | 8,394 | 4,733 | 1,940 | 22.7 | 50.9 | 37.9 | 14.6 | 7.3 |
| RESPIRATORY CONDITIONS | 93,951 | 23,893 | 27,830 | 25,646 | 16,582 | 100.8 | 199.7 | 125.7 | 79.2 | 62.0 |
| UPPER RESPIRATORY CONDITIONS | 61,037 | 18,112 | 17,972 | 15,447 | 9,507 | 65.5 | 151.4 | 81.2 | 47.7 | 35.6 |
| INFLUENZA | 26,092 | 4,161 | 9,020 | 9,437 | 6,474 | 31.2 | 34.8 | 40.7 | 29.2 | 24.2 |
| OTHER RESPIRATORY CONDITIONS | 3,822 | 1,620 | 836 | 762 | * | 4.1 | 13.5 | 3.8 | 2.4 | * |
| DIGESTIVE SYSTEM CONDITIONS | 7,836 | 1,774 | 1,917 | 2,267 | 1,878 | 8.4 | 14.8 | 8.7 | 7.0 | 7.0 |
| INJURIES | 31,709 | 5,229 | 8,457 | 12,094 | 5,929 | 34.0 | 43.7 | 38.2 | 37.4 | 22.2 |
| ALL OTHER ACUTE CONDITIONS | 15,957 | 3,994 | 4,486 | 3,860 | 3,636 | 17.1 | 33.4 | 20.7 | 11.9 | 13.6 |
| **FEMALE** | | | | | | | | | | |
| ALL ACUTE CONDITIONS | 196,847 | 37,309 | 48,123 | 72,886 | 38,529 | 196.5 | 326.5 | 223.4 | 200.5 | 124.8 |
| INFECTIVE AND PARASITIC DISEASES | 23,020 | 5,362 | 7,285 | 7,308 | 3,065 | 23.0 | 46.9 | 33.8 | 20.1 | 9.9 |
| RESPIRATORY CONDITIONS | 110,630 | 22,653 | 28,484 | 38,606 | 20,887 | 110.4 | 198.2 | 132.2 | 106.2 | 67.7 |
| UPPER RESPIRATORY CONDITIONS | 71,280 | 17,321 | 19,239 | 22,206 | 12,514 | 71.1 | 151.6 | 89.3 | 61.1 | 40.5 |
| INFLUENZA | 38,668 | 4,324 | 8,542 | 15,220 | 7,662 | 35.6 | 37.7 | 39.6 | 41.9 | 24.8 |
| OTHER RESPIRATORY CONDITIONS | 3,682 | 1,028 | 702 | 1,181 | 771 | 3.7 | 9.0 | 3.3 | 3.2 | 2.5 |
| DIGESTIVE SYSTEM CONDITIONS | 8,702 | 1,493 | 2,062 | 3,306 | 1,841 | 8.7 | 13.1 | 9.6 | 9.1 | 6.0 |
| INJURIES | 23,794 | 3,693 | 4,712 | 8,895 | 6,494 | 23.7 | 32.3 | 21.9 | 24.5 | 21.0 |
| ALL OTHER ACUTE CONDITIONS | 30,701 | 4,109 | 5,581 | 14,771 | 6,241 | 30.6 | 36.0 | 25.9 | 40.6 | 20.2 |

NOTE: Excluded from these statistics are all conditions involving neither restricted activity nor medical attention.



TABLE 3. DAYS OF RESTRICTED ACTIVITY ASSOCIATED WITH ACUTE CONDITIONS AND DAYS OF RESTRICTED ACTIVITY PER 100 PERSONS PER YEAR, BY SEX AND CONDITION GROUP: UNITED STATES, 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| CONDITION GROUP | BOTH SEXES | MALE | FEMALE | BOTH SEXES | MALE | FEMALE |
|---|---|---|---|---|---|---|
| | DAYS OF RESTRICTED ACTIVITY IN THOUSANDS | | | DAYS OF RESTRICTED ACTIVITY PER 100 PERSONS PER YEAR | | |
| ALL ACUTE CONDITIONS | 1,455,388 | 638,154 | 816,934 | 752.4 | 684.6 | 815.4 |
| INFECTIVE AND PARASITIC DISEASES | 177,177 | 85,914 | 91,263 | 91.6 | 92.2 | 91.1 |
| COMMON CHILDHOOD DISEASES | 54,269 | 26,579 | 25,690 | 28.1 | 30.7 | 25.6 |
| THE VIRUS, N.E.C.S. | 79,628 | 34,894 | 44,734 | 41.2 | 37.4 | 44.6 |
| OTHER INFECTIVE AND PARASITIC DISEASES | 43,280 | 22,441 | 20,839 | 22.4 | 24.1 | 20.8 |
| RESPIRATORY CONDITIONS | 655,665 | 288,295 | 367,370 | 338.8 | 307.1 | 366.7 |
| UPPER RESPIRATORY CONDITIONS | 352,180 | 158,736 | 193,444 | 182.1 | 170.3 | 193.1 |
| COMMON COLD | 266,187 | 120,722 | 145,464 | 137.6 | 129.5 | 145.2 |
| OTHER ACUTE UPPER RESPIRATORY CONDITIONS | 85,993 | 38,014 | 47,980 | 44.5 | 40.8 | 47.9 |
| INFLUENZA | 241,622 | 99,758 | 141,919 | 124.9 | 107.0 | 141.6 |
| INFLUENZA WITH DIGESTIVE MANIFESTATIONS | 25,466 | 11,342 | 14,123 | 13.2 | 12.2 | 14.1 |
| OTHER INFLUENZA | 216,157 | 88,386 | 127,791 | 111.8 | 94.8 | 127.5 |
| OTHER RESPIRATORY CONDITIONS | 59,862 | 27,851 | 32,011 | 31.0 | 29.9 | 31.9 |
| PNEUMONIA | 29,441 | 12,894 | 16,547 | 15.2 | 13.8 | 16.5 |
| BRONCHITIS | 25,820 | 12,736 | 13,083 | 13.4 | 13.7 | 13.1 |
| OTHER ACUTE RESPIRATORY CONDITIONS | 4,602 | 2,221 | 2,381 | 2.4 | 2.4 | 2.4 |
| DIGESTIVE SYSTEM CONDITIONS | 67,964 | 31,251 | 36,712 | 35.1 | 33.5 | 36.6 |
| DENTAL CONDITIONS | 17,922 | 6,402 | 11,521 | 9.3 | 6.9 | 11.5 |
| FUNCTIONAL AND SYMPTOMATIC UPPER GASTROINTESTINAL DISORDERS, N.E.C. | 7,277 | 3,291 | 3,986 | 3.8 | 3.5 | 4.0 |
| OTHER DIGESTIVE SYSTEM CONDITIONS | 42,764 | 21,558 | 21,206 | 22.1 | 23.1 | 21.2 |
| INJURIES | 332,688 | 169,824 | 162,864 | 171.7 | 182.2 | 162.0 |
| FRACTURES, DISLOCATIONS, SPRAINS, AND STRAINS | 183,387 | 92,308 | 91,079 | 94.8 | 99.0 | 90.9 |
| FRACTURES AND DISLOCATIONS | 107,990 | 53,454 | 54,536 | 55.8 | 57.3 | 54.4 |
| SPRAINS AND STRAINS | 75,397 | 38,854 | 36,543 | 39.0 | 41.7 | 36.5 |
| OPEN WOUNDS AND LACERATIONS | 48,157 | 28,088 | 20,070 | 24.9 | 30.1 | 20.0 |
| CONTUSIONS AND SUPERFICIAL INJURIES | 49,569 | 19,100 | 26,468 | 23.6 | 20.5 | 26.4 |
| OTHER CURRENT INJURIES | 54,974 | 30,327 | 24,647 | 28.4 | 32.5 | 24.6 |
| ALL OTHER ACUTE CONDITIONS | 224,195 | 84,870 | 139,325 | 115.9 | 89.4 | 139.0 |
| DISEASES OF THE EAR | 31,134 | 15,665 | 15,438 | 16.1 | 16.8 | 15.4 |
| HEADACHES | 4,342 | 1,788 | 2,554 | 2.2 | 1.9 | 2.5 |
| GENITOURINARY DISORDERS | 34,431 | 5,298 | 29,132 | 17.8 | 5.7 | 29.1 |
| ABORTIONS AND DISORDERS OF PREGNANCY AND THE PUERPERIUM | 41,830 | --- | 41,830 | 21.6 | --- | 41.8 |
| DISEASES OF THE SKIN | 14,864 | 5,071 | 9,593 | 7.6 | 5.4 | 9.6 |
| DISEASES OF THE MUSCULOSKELETAL SYSTEM | 27,318 | 8,891 | 18,427 | 14.1 | 9.5 | 18.4 |
| ALL OTHER ACUTE CONDITIONS | 70,507 | 28,157 | 42,350 | 36.5 | 30.2 | 42.3 |

NOTE: N.o.s.—not otherwise specified; n.e.c.—not elsewhere classified.

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TABLE 4. DAYS OF BED DISABILITY ASSOCIATED WITH ACUTE CONDITIONS AND DAYS OF BED DISABILITY PER 100 PERSONS PER YEAR, BY SEX AND CONDITION GROUP: UNITED STATES 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| CONDITION GROUP | BOTH SEXES | MALE | FEMALE | BOTH SEXES | MALE | FEMALE |
|---|---|---|---|---|---|---|
| | DAYS OF BED DISABILITY IN THOUSANDS | | | DAYS OF BED DISABILITY PER 100 PERSONS PER YEAR | | |
| ALL ACUTE CONDITIONS | 611,158 | 264,635 | 346,523 | 316.0 | 283.9 | 345.9 |
| INFECTIVE AND PARASITIC DISEASES | 84,496 | 39,792 | 44,704 | 43.7 | 42.7 | 44.6 |
| COMMON CHILDHOOD DISEASES | 20,157 | 9,127 | 11,030 | 10.4 | 9.8 | 11.0 |
| THE VIRUS, N.E.C.S. | 41,872 | 18,163 | 23,708 | 21.7 | 19.5 | 23.7 |
| OTHER INFECTIVE AND PARASITIC DISEASES | 22,466 | 12,501 | 9,967 | 11.6 | 13.4 | 9.9 |
| RESPIRATORY CONDITIONS | 315,636 | 138,761 | 176,875 | 163.2 | 148.9 | 176.5 |
| UPPER RESPIRATORY CONDITIONS | 149,469 | 67,945 | 81,524 | 77.3 | 72.9 | 81.4 |
| COMMON COLD | 109,576 | 50,114 | 59,460 | 56.7 | 53.8 | 59.3 |
| OTHER ACUTE UPPER RESPIRATORY CONDITIONS | 39,896 | 17,831 | 22,065 | 20.6 | 19.1 | 22.0 |
| INFLUENZA | 132,857 | 55,203 | 77,654 | 68.7 | 59.2 | 77.5 |
| INFLUENZA WITH DIGESTIVE MANIFESTATIONS | 14,059 | 6,788 | 7,271 | 7.3 | 7.3 | 7.3 |
| OTHER INFLUENZA | 118,798 | 48,416 | 70,383 | 61.4 | 51.9 | 70.2 |
| OTHER RESPIRATORY CONDITIONS | 33,310 | 15,612 | 17,697 | 17.2 | 16.7 | 17.7 |
| PNEUMONIA | 16,936 | 8,138 | 8,799 | 8.8 | 8.7 | 8.8 |
| BRONCHITIS | 15,077 | 7,044 | 8,032 | 7.8 | 7.6 | 8.0 |
| OTHER ACUTE RESPIRATORY CONDITIONS | * | * | * | * | * | * |
| DIGESTIVE SYSTEM CONDITIONS | 33,287 | 16,021 | 17,266 | 17.2 | 17.2 | 17.2 |
| DENTAL CONDITIONS | 7,363 | 3,263 | 4,101 | 3.9 | 3.5 | 4.1 |
| FUNCTIONAL AND SYMPTOMATIC UPPER GASTROINTESTINAL DISORDERS, N.E.C. | 3,960 | 2,021 | 1,939 | 2.0 | 2.2 | 1.9 |
| OTHER DIGESTIVE SYSTEM CONDITIONS | 21,964 | 10,737 | 11,226 | 11.4 | 11.5 | 11.2 |
| INJURIES | 88,651 | 44,432 | 44,220 | 45.8 | 47.7 | 44.1 |
| FRACTURES, DISLOCATIONS, SPRAINS, AND STRAINS | 44,882 | 22,573 | 22,309 | 23.2 | 24.2 | 22.3 |
| FRACTURES AND DISLOCATIONS | 28,472 | 14,909 | 13,563 | 14.7 | 16.0 | 13.5 |
| SPRAINS AND STRAINS | 16,410 | 7,664 | 8,746 | 8.5 | 8.2 | 8.7 |
| OPEN WOUNDS AND LACERATIONS | 9,459 | 4,884 | 4,575 | 4.9 | 5.2 | 4.6 |
| CONTUSIONS AND SUPERFICIAL INJURIES | 13,456 | 5,302 | 8,154 | 7.0 | 5.7 | 8.1 |
| OTHER CURRENT INJURIES | 20,855 | 11,672 | 9,183 | 10.8 | 12.5 | 9.2 |
| ALL OTHER ACUTE CONDITIONS | 89,387 | 25,630 | 63,457 | 46.1 | 27.5 | 63.3 |
| DISEASES OF THE EAR | 10,665 | 5,228 | 5,457 | 5.5 | 5.6 | 5.4 |
| HEADACHES | 2,344 | * | 1,662 | 1.2 | * | 1.7 |
| GENITOURINARY DISORDERS | 17,198 | 3,324 | 13,874 | 8.9 | 3.6 | 13.8 |
| DELIVERIES AND DISORDERS OF PREGNANCY AND THE PUERPERIUM | 18,183 | --- | 18,183 | 9.4 | --- | 18.1 |
| DISEASES OF THE SKIN | 4,582 | * | 3,495 | 2.4 | * | 3.5 |
| DISEASES OF THE MUSCULOSKELETAL SYSTEM | 9,490 | 3,093 | 6,396 | 4.9 | 3.3 | 6.4 |
| ALL OTHER ACUTE CONDITIONS | 26,606 | 12,217 | 14,389 | 13.8 | 13.1 | 14.4 |

NOTE. N.o.s.—not otherwise specified; n.e.c.—not elsewhere classified.



TABLE 5. DAYS OF RESTRICTED ACTIVITY ASSOCIATED WITH ACUTE CONDITIONS AND DAYS OF RESTRICTED ACTIVITY PER 100 PERSONS PER YEAR, BY AGE, SEX, AND CONDITION GROUP: UNITED STATES, 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| SEX AND CONDITION GROUP | ALL AGES | UNDER 6 | 6-16 | 17-44 | 45 & OVER | ALL AGES | UNDER 6 | 6-16 | 17-44 | 45 & OVER |
|---|---|---|---|---|---|---|---|---|---|---|
| BOTH SEXES | DAYS OF RESTRICTED ACTIVITY IN THOUSANDS | | | | | DAYS OF RESTRICTED ACTIVITY PER 100 PERSONS PER YEAR | | | | |
| ALL ACUTE CONDITIONS | 1,455,088 | 204,915 | 319,372 | 499,405 | 431,396 | 752.4 | 874.3 | 731.1 | 726.7 | 749.9 |
| INFECTIVE AND PARASITIC DISEASES | 177,177 | 39,959 | 69,550 | 41,798 | 26,291 | 91.6 | 169.1 | 159.2 | 60.8 | 45.6 |
| RESPIRATORY CONDITIONS | 653,665 | 123,619 | 164,871 | 188,005 | 177,176 | 338.0 | 528.4 | 377.4 | 273.6 | 307.6 |
| UPPER RESPIRATORY CONDITIONS | 352,180 | 82,940 | 98,165 | 93,170 | 77,905 | 182.1 | 354.6 | 224.7 | 135.6 | 135.3 |
| INFLUENZA | 241,622 | 27,593 | 50,111 | 80,845 | 77,074 | 124.9 | 118.0 | 128.4 | 117.6 | 133.8 |
| OTHER RESPIRATORY CONDITIONS | 59,862 | 13,081 | 10,595 | 13,990 | 22,196 | 31.0 | 55.9 | 24.3 | 20.4 | 38.5 |
| DIGESTIVE SYSTEM CONDITIONS | 67,964 | 8,518 | 9,466 | 25,330 | 24,650 | 35.1 | 36.4 | 21.7 | 36.9 | 42.8 |
| INJURIES | 332,088 | 14,859 | 45,828 | 144,455 | 126,945 | 171.7 | 63.5 | 104.9 | 210.2 | 220.4 |
| ALL OTHER ACUTE CONDITIONS | 224,155 | 17,966 | 29,677 | 99,816 | 76,735 | 115.9 | 76.8 | 67.9 | 145.2 | 133.2 |
| MALE | | | | | | | | | | |
| ALL ACUTE CONDITIONS | 638,154 | 109,567 | 161,744 | 195,481 | 171,362 | 684.6 | 919.8 | 730.5 | 603.8 | 641.0 |
| INFECTIVE AND PARASITIC DISEASES | 85,914 | 21,293 | 36,442 | 17,372 | 10,846 | 92.2 | 177.5 | 164.6 | 53.7 | 40.4 |
| RESPIRATORY CONDITIONS | 286,295 | 66,222 | 79,785 | 69,886 | 70,403 | 307.1 | 553.5 | 360.3 | 215.9 | 263.4 |
| UPPER RESPIRATORY CONDITIONS | 158,736 | 44,184 | 48,317 | 36,267 | 29,988 | 170.3 | 369.1 | 218.2 | 112.0 | 112.2 |
| INFLUENZA | 99,756 | 13,617 | 27,124 | 28,453 | 30,514 | 107.0 | 113.8 | 122.5 | 87.9 | 114.1 |
| OTHER RESPIRATORY CONDITIONS | 27,851 | 8,441 | 4,343 | 5,167 | 9,900 | 29.9 | 70.6 | 19.6 | 16.0 | 37.0 |
| DIGESTIVE SYSTEM CONDITIONS | 31,251 | 5,499 | 4,070 | 8,895 | 12,787 | 33.5 | 46.0 | 18.4 | 27.5 | 47.8 |
| INJURIES | 169,824 | 6,569 | 28,785 | 87,989 | 46,481 | 182.2 | 54.9 | 130.0 | 271.8 | 173.9 |
| ALL OTHER ACUTE CONDITIONS | 84,870 | 10,045 | 12,662 | 11,338 | 30,825 | 89.6 | 84.8 | 57.2 | 35.0 | 115.3 |
| FEMALE | | | | | | | | | | |
| ALL ACUTE CONDITIONS | 816,934 | 94,948 | 157,628 | 303,924 | 260,434 | 815.4 | 830.8 | 731.6 | 836.0 | 843.8 |
| INFECTIVE AND PARASITIC DISEASES | 91,263 | 18,326 | 33,088 | 24,425 | 15,434 | 91.1 | 160.4 | 153.6 | 67.2 | 50.0 |
| RESPIRATORY CONDITIONS | 367,370 | 57,392 | 85,086 | 118,119 | 106,773 | 366.7 | 502.2 | 394.9 | 324.9 | 345.9 |
| UPPER RESPIRATORY CONDITIONS | 193,444 | 38,776 | 49,847 | 56,903 | 47,917 | 193.1 | 339.3 | 231.4 | 156.5 | 155.2 |
| INFLUENZA | 141,915 | 13,976 | 22,987 | 52,392 | 46,560 | 141.6 | 122.3 | 134.5 | 144.1 | 150.8 |
| OTHER RESPIRATORY CONDITIONS | 32,011 | 4,640 | 6,252 | 8,824 | 12,296 | 31.9 | 40.6 | 29.0 | 24.3 | 39.8 |
| DIGESTIVE SYSTEM CONDITIONS | 36,712 | 3,019 | 5,396 | 16,439 | 11,863 | 36.6 | 26.4 | 25.0 | 45.2 | 38.4 |
| INJURIES | 162,264 | 8,291 | 17,043 | 56,466 | 80,464 | 162.0 | 72.5 | 79.1 | 155.3 | 260.7 |
| ALL OTHER ACUTE CONDITIONS | 159,325 | 7,922 | 17,013 | 88,478 | 45,910 | 159.0 | 69.3 | 79.0 | 243.4 | 148.7 |

TABLE 8. DAYS OF BED DISABILITY ASSOCIATED WITH ACUTE CONDITIONS AND DAYS OF BED DISABILITY PER 100 PERSON PER YEAR, BY AGE, SEX, AND CONDITION GROUP: UNITED STATES, 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| SEX AND CONDITION GROUP | ALL AGES | UNDER 6 | 6-16 | 17-44 | 45 & OVER | ALL AGES | UNDER 6 | 6-16 | 17-44 | 45 & OVER |
|---|---|---|---|---|---|---|---|---|---|---|
| | DAYS OF BED DISABILITY IN THOUSANDS | | | | | DAYS OF BED DISABILITY PER 100 PERSONS PER YEAR | | | | |
| BOTH SEXES | | | | | | | | | | |
| ALL ACUTE CONDITIONS | 611,150 | 84,030 | 144,765 | 213,375 | 168,989 | 316.0 | 359.2 | 331.4 | 310.5 | 293.4 |
| INFECTIVE AND PARASITIC DISEASES | 64,456 | 14,851 | 33,309 | 23,780 | 12,556 | 43.7 | 63.5 | 76.2 | 34.6 | 21.8 |
| RESPIRATORY CONDITIONS | 315,636 | 51,959 | 86,933 | 97,839 | 78,906 | 163.2 | 222.1 | 199.0 | 142.4 | 137.0 |
| UPPER RESPIRATORY CONDITIONS | 149,465 | 29,115 | 48,636 | 44,795 | 26,924 | 77.3 | 124.5 | 111.3 | 65.2 | 46.7 |
| INFLUENZA | 132,857 | 13,756 | 32,668 | 47,093 | 39,281 | 68.7 | 59.0 | 74.8 | 68.5 | 68.2 |
| OTHER RESPIRATORY CONDITIONS | 33,310 | 9,049 | 5,609 | 5,951 | 12,701 | 17.2 | 38.7 | 12.8 | 8.7 | 22.1 |
| DIGESTIVE SYSTEM CONDITIONS | 33,287 | 3,867 | 5,598 | 11,083 | 12,739 | 17.2 | 16.5 | 12.8 | 16.1 | 22.1 |
| INJURIES | 88,651 | 9,011 | 8,522 | 37,855 | 37,263 | 45.8 | 21.4 | 19.5 | 55.1 | 64.7 |
| ALL OTHER ACUTE CONDITIONS | 89,087 | 8,341 | 13,404 | 42,818 | 27,524 | 46.1 | 35.7 | 23.8 | 62.3 | 47.8 |
| MALE | | | | | | | | | | |
| ALL ACUTE CONDITIONS | 266,635 | 44,824 | 70,175 | 79,842 | 69,795 | 283.9 | 374.7 | 316.9 | 246.4 | 261.1 |
| INFECTIVE AND PARASITIC DISEASES | 39,752 | 7,412 | 16,975 | 10,356 | 5,049 | 42.7 | 62.0 | 76.7 | 32.0 | 18.9 |
| RESPIRATORY CONDITIONS | 138,781 | 26,293 | 42,800 | 37,981 | 30,487 | 246.9 | 236.5 | 189.7 | 117.3 | 114.0 |
| UPPER RESPIRATORY CONDITIONS | 67,945 | 15,281 | 24,713 | 18,544 | 9,407 | 72.9 | 127.7 | 111.6 | 57.3 | 35.2 |
| INFLUENZA | 55,203 | 6,944 | 14,939 | 17,089 | 16,191 | 59.2 | 58.0 | 67.6 | 52.8 | 60.6 |
| OTHER RESPIRATORY CONDITIONS | 15,632 | 4,069 | 2,906 | 2,348 | 4,888 | 16.7 | 50.7 | 10.4 | 7.3 | 18.3 |
| DIGESTIVE SYSTEM CONDITIONS | 16,021 | 2,870 | 2,677 | 4,415 | 6,059 | 17.2 | 24.0 | 12.1 | 13.6 | 22.7 |
| INJURIES | 44,432 | 2,199 | 4,654 | 22,187 | 15,391 | 47.7 | 18.4 | 21.0 | 68.5 | 57.6 |
| ALL OTHER ACUTE CONDITIONS | 25,630 | 4,050 | 3,869 | 4,903 | 12,808 | 27.5 | 33.9 | 17.5 | 15.1 | 47.9 |
| FEMALE | | | | | | | | | | |
| ALL ACUTE CONDITIONS | 344,523 | 39,206 | 74,590 | 133,533 | 99,194 | 345.9 | 343.1 | 346.2 | 367.3 | 321.4 |
| INFECTIVE AND PARASITIC DISEASES | 24,704 | 7,435 | 16,334 | 13,425 | 7,507 | 44.6 | 65.1 | 75.8 | 36.9 | 24.3 |
| RESPIRATORY CONDITIONS | 176,875 | 25,666 | 44,133 | 59,858 | 48,419 | 176.9 | 207.1 | 208.6 | 164.7 | 156.9 |
| UPPER RESPIRATORY CONDITIONS | 81,524 | 13,834 | 23,923 | 26,251 | 17,516 | 81.4 | 121.1 | 111.0 | 72.2 | 56.7 |
| INFLUENZA | 77,654 | 6,812 | 17,708 | 30,003 | 23,090 | 77.5 | 60.0 | 82.2 | 82.5 | 74.8 |
| OTHER RESPIRATORY CONDITIONS | 17,697 | 2,980 | 3,301 | 3,604 | 7,812 | 17.7 | 26.1 | 15.3 | 9.9 | 25.3 |
| DIGESTIVE SYSTEM CONDITIONS | 17,266 | * | 2,921 | 6,668 | 6,680 | 17.2 | * | 13.6 | 18.3 | 21.6 |
| INJURIES | 44,220 | 2,612 | 5,867 | 15,669 | 21,872 | 44.1 | 24.6 | 17.9 | 43.1 | 70.9 |
| ALL OTHER ACUTE CONDITIONS | 63,457 | 4,291 | 6,535 | 37,919 | 14,716 | 63.3 | 37.5 | 30.3 | 104.3 | 47.7 |



TABLE 8. DAYS LOST FROM WORK ASSOCIATED WITH ACUTE CONDITIONS AND DAYS LOST FROM WORK PER 100 CURRENTLY EMPLOYED PERSONS PER YEAR, BY AGE, SEX, AND CONDITION GROUP: UNITED STATES, 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| SEX AND CONDITION GROUP | ALL AGES-17 & OVER | 17-44 | 45 & OVER | ALL AGES 17 & OVER | 17-44 | 45 & OVER |
|---|---|---|---|---|---|---|
| | DAYS LOST FROM WORK IN THOUSANDS | | | DAYS LOST FROM WORK PER 100 CURRENTLY EMPLOYED PERSONS PER YEAR | | |
| BOTH SEXES | | | | | | |
| ALL ACUTE CONDITIONS | 258,791 | 160,267 | 98,524 | 343.9 | 354.8 | 327.5 |
| INFECTIVE AND PARASITIC DISEASES | 20,957 | 14,658 | 6,299 | 27.8 | 32.4 | 20.9 |
| RESPIRATORY CONDITIONS | 102,740 | 58,575 | 44,165 | 136.5 | 129.7 | 146.8 |
| UPPER RESPIRATORY CONDITIONS | 46,189 | 28,535 | 17,655 | 61.4 | 63.2 | 58.7 |
| INFLUENZA | 47,013 | 26,777 | 20,236 | 62.5 | 59.3 | 67.3 |
| OTHER RESPIRATORY CONDITIONS | 9,538 | 3,264 | 6,274 | 12.7 | 7.2 | 20.9 |
| DIGESTIVE SYSTEM CONDITIONS | 13,385 | 7,801 | 5,585 | 17.8 | 17.3 | 18.6 |
| INJURIES | 83,706 | 55,630 | 28,076 | 111.2 | 123.1 | 93.3 |
| ALL OTHER ACUTE CONDITIONS | 38,003 | 23,604 | 14,398 | 50.5 | 52.3 | 47.9 |
| MALE | | | | | | |
| ALL ACUTE CONDITIONS | 156,602 | 99,911 | 62,692 | 326.6 | 329.4 | 327.4 |
| INFECTIVE AND PARASITIC DISEASES | 14,035 | 9,506 | 4,529 | 29.5 | 33.3 | 23.7 |
| RESPIRATORY CONDITIONS | 61,905 | 33,586 | 28,319 | 129.9 | 117.8 | 147.9 |
| UPPER RESPIRATORY CONDITIONS | 26,567 | 16,144 | 10,422 | 55.7 | 56.6 | 54.4 |
| INFLUENZA | 29,231 | 15,450 | 13,782 | 61.3 | 54.2 | 72.2 |
| OTHER RESPIRATORY CONDITIONS | 6,106 | 2,042 | 4,065 | 12.8 | 7.2 | 21.2 |
| DIGESTIVE SYSTEM CONDITIONS | 8,388 | 3,564 | 4,824 | 17.6 | 12.5 | 25.2 |
| INJURIES | 56,676 | 40,830 | 15,846 | 118.9 | 143.2 | 82.8 |
| ALL OTHER ACUTE CONDITIONS | 15,598 | 6,426 | 9,172 | 32.7 | 22.5 | 47.9 |
| FEMALE | | | | | | |
| ALL ACUTE CONDITIONS | 102,189 | 60,357 | 35,832 | 370.2 | 398.1 | 327.8 |
| INFECTIVE AND PARASITIC DISEASES | 6,922 | 5,152 | 1,770 | 25.1 | 30.5 | 16.2 |
| RESPIRATORY CONDITIONS | 40,835 | 24,989 | 15,846 | 147.9 | 149.9 | 145.0 |
| UPPER RESPIRATORY CONDITIONS | 19,622 | 12,390 | 7,232 | 71.1 | 74.3 | 66.2 |
| INFLUENZA | 17,781 | 11,327 | 6,454 | 64.4 | 68.3 | 58.6 |
| OTHER RESPIRATORY CONDITIONS | 3,432 | * | 2,210 | 12.4 | * | 20.2 |
| DIGESTIVE SYSTEM CONDITIONS | 4,997 | 4,237 | * | 18.1 | 25.4 | * |
| INJURIES | 27,030 | 14,799 | 12,231 | 97.9 | 88.8 | 111.9 |
| ALL OTHER ACUTE CONDITIONS | 22,404 | 17,179 | 5,226 | 81.2 | 103.1 | 47.8 |

Table 9. Number and percent distribution of persons with limitation of activity due to chronic conditions, by degree of limitation according to sex and age: United States, 1967

[Data are based on household interviews of the civilian noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| Sex and age | Total population | With activity limitation | With limitation in major activity[1] | With no activity limitation | Total population | With activity limitation | With limitation in major activity[1] | With no activity limitation |
|---|---|---|---|---|---|---|---|---|
| | Number in thousands | | | | Percent distribution | | | |
| Both sexes | | | | | | | | |
| All ages | 193,403 | 22,248 | 16,805 | 171,155 | 100.0 | 11.5 | 8.7 | 88.5 |
| Under 17 years | 67,078 | 1,418 | 712 | 65,660 | 100.0 | 2.1 | 1.1 | 97.9 |
| 17-44 years | 68,726 | 4,994 | 3,245 | 63,732 | 100.0 | 7.3 | 4.7 | 92.7 |
| 45-64 years | 39,370 | 7,493 | 5,637 | 32,077 | 100.0 | 18.9 | 14.2 | 81.1 |
| 65+ years | 18,229 | 8,343 | 7,212 | 9,885 | 100.0 | 46.3 | 40.0 | 53.7 |
| Male | | | | | | | | |
| All ages | 93,212 | 11,372 | 9,098 | 81,839 | 100.0 | 12.2 | 9.8 | 87.8 |
| Under 17 years | 34,106 | 789 | 384 | 33,316 | 100.0 | 2.3 | 1.1 | 97.7 |
| 17-44 years | 32,373 | 2,537 | 1,787 | 29,837 | 100.0 | 7.8 | 5.5 | 92.2 |
| 45-64 years | 18,924 | 3,894 | 3,113 | 15,030 | 100.0 | 20.6 | 16.5 | 79.4 |
| 65+ years | 7,809 | 4,153 | 3,814 | 3,656 | 100.0 | 53.2 | 48.8 | 46.8 |
| Female | | | | | | | | |
| All ages | 100,191 | 10,876 | 7,707 | 89,315 | 100.0 | 10.9 | 7.7 | 89.1 |
| Under 17 years | 32,972 | 629 | 328 | 32,343 | 100.0 | 1.9 | 1.0 | 98.1 |
| 17-44 years | 36,353 | 2,457 | 1,458 | 33,896 | 100.0 | 6.8 | 4.0 | 93.2 |
| 45-64 years | 20,447 | 3,599 | 2,523 | 17,047 | 100.0 | 17.4 | 12.2 | 82.6 |
| 65+ years | 10,219 | 4,190 | 3,398 | 6,029 | 100.0 | 41.0 | 33.3 | 59.0 |

[1]Major activity refers to ability to work, keep house, or engage in school or preschool activities.

NOTE: For official population estimates for more general use, see Bureau of the Census reports on the civilian population of the United States, in Current Population Reports: Series P-20, P-25, and P-60.



Table 10. Number of persons injured and number of persons injured per 100 persons per year, by class of accident, sex, and age: United States, 1967

[Data are based on household interviews of the civilian noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| Sex and age | Total | Class of accident | | | | |
|---|---|---|---|---|---|---|
| | | Moving motor vehicle | | While at work | Home | Other |
| | | Total | Traffic | | | |
| | Number of persons injured in thousands | | | | | |
| Both sexes | | | | | | |
| All ages | 52,967 | 3,780 | 3,628 | 9,203 | 23,012 | 18,607 |
| Under 6 years | 8,852 | * | * | ... | 6,068 | 2,557 |
| 6-16 years | 12,863 | * | * | ... | 5,117 | 7,514 |
| 17-44 years | 19,832 | 2,427 | 2,355 | 5,971 | 6,792 | 5,554 |
| 45-64 years | 8,610 | * | * | 3,006 | 3,125 | 2,436 |
| 65 years and over | 2,810 | * | * | * | 1,929 | * |
| Male | | | | | | |
| All ages | 30,465 | 1,578 | 1,545 | 8,032 | 10,378 | 11,772 |
| Under 6 years | 5,229 | * | * | ... | 3,509 | 1,581 |
| 6-16 years | 8,283 | * | * | ... | 2,890 | 5,330 |
| 17-44 years | 11,494 | 1,085 | 1,085 | 5,477 | 2,627 | 3,352 |
| 45-64 years | 4,338 | * | * | 2,368 | 909 | 1,213 |
| 65 years and over | 1,121 | * | * | * | * | * |
| Female | | | | | | |
| All ages | 22,502 | 2,202 | 2,084 | 1,171 | 12,633 | 6,835 |
| Under 6 years | 3,623 | * | * | ... | 2,560 | 977 |
| 6-16 years | 4,580 | * | * | ... | 2,227 | 2,184 |
| 17-44 years | 8,339 | 1,342 | 1,269 | * | 4,166 | 3,201 |
| 45-64 years | 4,272 | * | * | * | 2,216 | 1,323 |
| 65 years and over | 1,689 | * | * | * | 1,284 | * |
| | Number of persons injured per 100 persons per year | | | | | |
| Both sexes | | | | | | |
| All ages | 27.4 | 2.0 | 1.9 | 4.8 | 11.9 | 9.6 |
| Under 6 years | 37.8 | * | * | ... | 25.9 | 10.9 |
| 6-16 years | 29.4 | * | * | ... | 11.7 | 17.2 |
| 17-44 years | 28.9 | 3.5 | 3.4 | 8.7 | 9.9 | 8.1 |
| 45-64 years | 21.8 | * | * | 7.6 | 7.9 | 6.2 |
| 65 years and over | 15.6 | * | * | * | 10.7 | * |
| Male | | | | | | |
| All ages | 32.7 | 1.7 | 1.7 | 8.6 | 11.1 | 12.6 |
| Under 6 years | 43.7 | * | * | ... | 29.3 | 13.2 |
| 6-16 years | 37.4 | * | * | ... | 13.1 | 24.1 |
| 17-44 years | 35.5 | 3.4 | 3.4 | 16.9 | 7.5 | 10.4 |
| 45-64 years | 22.9 | * | * | 12.5 | 4.8 | 6.4 |
| 65 years and over | 14.4 | * | * | * | * | * |
| Female | | | | | | |
| All ages | 22.5 | 2.2 | 2.1 | 1.2 | 12.6 | 6.8 |
| Under 6 years | 31.7 | * | * | ... | 22.2 | 8.5 |
| 6-16 years | 21.3 | * | * | ... | 10.3 | 10.1 |
| 17-44 years | 22.9 | 3.7 | 3.5 | * | 12.0 | 9.1 |
| 45-64 years | 20.7 | * | * | * | 10.7 | 5.9 |
| 65 years and over | 16.5 | * | * | * | 12.6 | * |

NOTE: Excluded from these statistics are all conditions involving neither restricted activity nor medical attention. The sum of data for the four classes of accidents may be greater than the total because the classes are not mutually exclusive.

Table 11. Days of restricted activity associated with injury' and days of restricted activity per 100 persons per year, by class of accident, sex, and age: United States, 1967

[Data are based on household interviews of the civilian noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| Sex and age | Total | Class of accident | | | | |
|---|---|---|---|---|---|---|
| | | Moving motor vehicle | | While at work | Home | Other |
| | | Total | Traffic | | | |
| | Days of restricted activity in thousands | | | | | |
| **Both sexes** | | | | | | |
| All ages | 552,118 | 120,118 | 112,953 | 143,389 | 169,583 | 150,724 |
| Under 6 years | 12,864 | 2,741 | 2,176 | ... | 6,167 | 4,521 |
| 6-16 years | 49,511 | 4,635 | 4,551 | ... | 16,098 | 28,750 |
| 17-44 years | 213,571 | 61,734 | 59,180 | 72,265 | 44,694 | 50,218 |
| 45-64 years | 166,040 | 33,501 | 31,072 | 58,393 | 48,825 | 35,927 |
| 65 years and over | 110,132 | 17,488 | 15,975 | 12,731 | 53,801 | 31,300 |
| **Male** | | | | | | |
| All ages | 281,524 | 55,065 | 52,092 | 118,241 | 44,942 | 87,021 |
| Under 6 years | 6,569 | * | * | ... | 3,074 | 3,359 |
| 6-16 years | 31,777 | 2,956 | 2,853 | ... | 9,818 | 19,003 |
| 17-44 years | 123,458 | 30,984 | 29,992 | 61,210 | 11,837 | 32,106 |
| 45-64 years | 82,753 | 11,957 | 11,228 | 45,947 | 9,469 | 22,067 |
| 65 years and over | 36,964 | 9,032 | 7,884 | 11,084 | 10,744 | 10,485 |
| **Female** | | | | | | |
| All ages | 270,594 | 65,053 | 60,862 | 25,148 | 124,642 | 63,703 |
| Under 6 years | 6,298 | 2,606 | 2,061 | ... | 3,093 | * |
| 6-16 years | 17,733 | 1,699 | 1,699 | ... | 6,279 | 9,755 |
| 17-44 years | 90,113 | 30,748 | 29,188 | 11,055 | 32,858 | 18,112 |
| 45-64 years | 83,284 | 21,544 | 19,844 | 12,445 | 39,355 | 13,860 |
| 65 years and over | 73,168 | 8,434 | 8,091 | 1,448 | 43,057 | 20,814 |
| | Days of restricted activity per 100 persons per year | | | | | |
| **Both sexes** | | | | | | |
| All ages | 285.5 | 62.1 | 58.4 | 74.1 | 87.7 | 77.9 |
| Under 6 years | 55.0 | 11.7 | 9.3 | ... | 26.4 | 19.3 |
| 6-16 years | 113.3 | 10.7 | 10.4 | ... | 36.8 | 65.8 |
| 17-44 years | 310.8 | 89.8 | 86.1 | 105.1 | 65.0 | 73.1 |
| 45-64 years | 419.6 | 84.7 | 78.5 | 147.6 | 123.4 | 90.8 |
| 65 years and over | 610.9 | 97.0 | 88.6 | 70.6 | 298.4 | 173.6 |
| **Male** | | | | | | |
| All ages | 302.0 | 59.1 | 55.9 | 126.9 | 48.2 | 93.4 |
| Under 6 years | 54.9 | * | * | ... | 25.7 | 28.1 |
| 6-16 years | 143.5 | 13.4 | 12.9 | ... | 44.3 | 85.8 |
| 17-44 years | 381.4 | 95.7 | 92.6 | 189.1 | 36.6 | 99.2 |
| 45-64 years | 437.3 | 63.2 | 59.3 | 242.8 | 50.0 | 116.6 |
| 65 years and over | 473.4 | 115.7 | 101.0 | 141.9 | 137.6 | 134.3 |
| **Female** | | | | | | |
| All ages | 270.1 | 64.9 | 60.7 | 25.1 | 124.4 | 63.6 |
| Under 6 years | 55.1 | 22.8 | 17.9 | ... | 27.1 | * |
| 6-16 years | 82.3 | 7.9 | 7.9 | ... | 29.1 | 45.3 |
| 17-44 years | 247.9 | 84.6 | 80.3 | 30.4 | 90.4 | 49.8 |
| 45-64 years | 403.4 | 104.3 | 96.1 | 60.3 | 190.6 | 67.1 |
| 65 years and over | 716.0 | 82.7 | 79.2 | 14.1 | 421.3 | 203.7 |

[1]Includes disability days associated with current injuries and impairments due to injury.

NOTE: The sum of data for the four classes of accidents may be greater than the total because the classes are not mutually exclusive.



Table 12. Days of bed disability associated with injury' and days of bed disability per 100 persons per year, by class of accident, sex, and age: United States, 1967

[Data are based on household interviews of the civilian noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| Sex and age | Total | Class of accident | | | | |
|---|---|---|---|---|---|---|
| | | Moving motor vehicle | | While at work | Home | Other |
| | | Total | Traffic | | | |
| | Days of bed disability in thousands | | | | | |
| **Both sexes** | | | | | | |
| All ages | 140,135 | 33,834 | 32,448 | 33,943 | 40,378 | 40,046 |
| Under 6 years | 4,239 | * | * | ... | 1,924 | 1,767 |
| 6-16 years | 8,943 | 1,375 | * | ... | 2,116 | 5,252 |
| 17-44 years | 54,244 | 15,680 | 15,302 | 19,980 | 9,830 | 12,188 |
| 45-64 years | 41,548 | 9,854 | 9,744 | 12,654 | 11,143 | 11,589 |
| 65 years and over | 31,162 | 5,612 | 5,384 | * | 13,365 | 9,250 |
| **Male** | | | | | | |
| All ages | 69,597 | 13,458 | 13,355 | 27,272 | 9,723 | 23,562 |
| Under 6 years | 2,199 | * | * | ... | * | 1,520 |
| 6-16 years | 5,125 | * | * | ... | * | 3,441 |
| 17-44 years | 30,302 | 6,214 | 6,214 | 16,613 | 2,087 | 8,281 |
| 45-64 years | 19,717 | 3,626 | 3,626 | 9,351 | * | 7,074 |
| 65 years and over | 12,054 | 2,977 | 2,977 | * | 4,868 | 3,244 |
| **Female** | | | | | | |
| All ages | 70,538 | 20,376 | 19,094 | 6,671 | 30,655 | 16,484 |
| Under 6 years | 2,039 | * | * | ... | * | * |
| 6-16 years | 3,818 | * | * | ... | * | 1,811 |
| 17-44 years | 23,741 | 9,466 | 9,088 | 3,368 | 7,743 | 3,906 |
| 45-64 years | 21,832 | 6,228 | 6,118 | 3,303 | 9,898 | 4,515 |
| 65 years and over | 19,108 | 2,635 | 2,407 | * | 10,697 | 6,004 |
| | Days of bed disability per 100 persons per year | | | | | |
| **Both sexes** | | | | | | |
| All ages | 72.5 | 17.5 | 16.8 | 17.6 | 20.9 | 20.7 |
| Under 6 years | 18.1 | * | * | ... | 8.2 | 7.6 |
| 6-16 years | 20.5 | 3.6 | * | ... | 4.8 | 12.0 |
| 17-44 years | 78.9 | 22.8 | 22.3 | 29.1 | 14.3 | 17.7 |
| 45-64 years | 105.0 | 24.9 | 24.6 | 32.0 | 28.2 | 29.3 |
| 65 years and over | 172.8 | 31.1 | 29.9 | * | 83.2 | 51.3 |
| **Male** | | | | | | |
| All ages | 74.7 | 14.4 | 14.3 | 29.3 | 10.4 | 25.3 |
| Under 6 years | 18.4 | * | * | ... | * | 12.7 |
| 6-16 years | 23.1 | * | * | ... | * | 15.5 |
| 17-44 years | 94.2 | 19.2 | 19.2 | 51.3 | 6.4 | 25.6 |
| 45-64 years | 104.2 | 19.2 | 19.2 | 49.4 | * | 37.4 |
| 65 years and over | 134.4 | 38.1 | 38.1 | * | 59.8 | 41.6 |
| **Female** | | | | | | |
| All ages | 70.4 | 20.3 | 19.1 | 6.7 | 30.6 | 16.5 |
| Under 6 years | 17.8 | * | * | ... | * | * |
| 6-16 years | 17.7 | * | * | ... | * | 8.4 |
| 17-44 years | 65.3 | 26.0 | 25.0 | 9.3 | 21.3 | 10.7 |
| 45-64 years | 105.7 | 30.2 | 29.6 | 16.0 | 47.9 | 21.9 |
| 65 years and over | 187.0 | 25.8 | 23.6 | * | 104.7 | 58.8 |

[1]Includes disability days associated with current injuries and impairments due to injury.

NOTE: The sum of data for the four classes of accidents may be greater than the total because the classes are not mutually exclusive.

TABLE 13. NUMBER OF DISCHARGES FROM SHORT-STAY HOSPITALS, NUMBER OF DISCHARGES PER 100 PERSONS PER YEAR, NUMBER OF HOSPITAL DAYS, AND AVERAGE LENGTH OF STAY, BY SEX AND AGE: UNITED STATES, BASED ON DATA COLLECTED IN HEALTH INTERVIEWS IN 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| AGE | BOTH SEXES | MALE | FEMALE | BOTH SEXES | MALE | FEMALE |
|---|---|---|---|---|---|---|
| | NUMBER OF DISCHARGES IN THOUSANDS | | | NUMBER OF DISCHARGES PER 100 PERSONS PER YEAR | | |
| ALL AGES | 23,756 | 9,479 | 14,278 | 12.3 | 10.2 | 14.3 |
| UNDER 17 YEARS | 4,345 | 2,460 | 1,888 | 6.5 | 7.2 | 5.7 |
| 17-24 YEARS | 3,811 | 832 | 2,978 | 16.3 | 7.8 | 23.6 |
| 25-34 YEARS | 3,455 | 791 | 2,665 | 15.7 | 7.5 | 23.0 |
| 35-44 YEARS | 2,984 | 1,127 | 1,856 | 12.8 | 10.1 | 15.3 |
| 45-64 YEARS | 5,614 | 2,596 | 3,018 | 14.2 | 13.7 | 14.6 |
| 65 & OVER YEARS | 3,543 | 1,670 | 1,873 | 19.7 | 21.4 | 18.3 |
| | NUMBER OF HOSPITAL DAYS IN THOUSANDS | | | AVERAGE LENGTH OF STAY | | |
| ALL AGES | 201,881 | 96,981 | 104,899 | 8.5 | 10.2 | 7.3 |
| UNDER 17 YEARS | 23,075 | 13,000 | 10,075 | 5.5 | 5.6 | 5.3 |
| 17-24 YEARS | 26,769 | 7,849 | 18,144 | 7.5 | 9.2 | 6.4 |
| 25-34 YEARS | 27,632 | 9,246 | 18,686 | 8.1 | 8.6 | 9.9 |
| 35-44 YEARS | 25,039 | 12,702 | 12,937 | 8.6 | 11.3 | 7.0 |
| 45-64 YEARS | 82,759 | 34,294 | 28,465 | 11.2 | 13.2 | 9.4 |
| 65 & OVER YEARS | 47,612 | 23,290 | 24,572 | 13.5 | 13.9 | 13.1 |

NOTE: These statistics are based on data collected in health interviews. They will differ from those reported by the Hospital Discharge Survey because of differences in population covered and types of hospitals included.



Table 14. Population, number, and percent distribution of persons with short-stay hospital episodes, by number of episodes according to sex and age: United States, based on data collected in health interviews in 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| Sex and age | Population | Number of hospital episodes | | | | Population | Number of hospital episodes | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | None | 1 | 2 | 3+ | | None | 1 | 2 | 3+ |
| **Both sexes** | Number of persons in thousands | | | | | Percent distribution | | | | |
| All ages | 193,403 | 174,458 | 16,184 | 2,174 | 586 | 100.0 | 90.2 | 8.4 | 1.1 | 0.3 |
| Under 17 years | 67,078 | 63,524 | 3,191 | 300 | 63 | 100.0 | 94.7 | 4.8 | 0.4 | 0.1 |
| 17-24 years | 23,344 | 20,216 | 2,762 | 308 | 58 | 100.0 | 86.6 | 11.8 | 1.3 | 0.2 |
| 25-34 years | 22,062 | 19,057 | 2,622 | 310 | 73 | 100.0 | 86.4 | 11.9 | 1.4 | 0.3 |
| 35-44 years | 23,319 | 20,880 | 2,062 | 289 | 88 | 100.0 | 89.5 | 8.8 | 1.2 | 0.4 |
| 45-64 years | 39,570 | 35,334 | 3,485 | 577 | 175 | 100.0 | 89.3 | 8.8 | 1.5 | 0.4 |
| 65+ years | 18,029 | 15,447 | 2,062 | 390 | 129 | 100.0 | 85.7 | 11.4 | 2.2 | 0.7 |
| **Male** | | | | | | | | | | |
| All ages | 93,212 | 85,854 | 6,216 | 885 | 257 | 100.0 | 92.1 | 6.7 | 0.9 | 0.3 |
| Under 17 years | 34,106 | 32,108 | 1,788 | 170 | * | 100.0 | 94.1 | 5.2 | 0.5 | * |
| 17-24 years | 10,712 | 10,031 | 598 | 70 | * | 100.0 | 93.6 | 5.6 | 0.7 | * |
| 25-34 years | 10,498 | 9,871 | 534 | 82 | * | 100.0 | 94.0 | 5.1 | 0.8 | * |
| 35-44 years | 11,163 | 10,281 | 725 | 115 | * | 100.0 | 92.1 | 6.5 | 1.0 | * |
| 45-64 years | 18,924 | 16,954 | 1,639 | 240 | 90 | 100.0 | 89.6 | 8.7 | 1.3 | 0.5 |
| 65+ years | 7,809 | 6,609 | 932 | 208 | 61 | 100.0 | 84.6 | 11.9 | 2.7 | 0.8 |
| **Female** | | | | | | | | | | |
| All ages | 100,191 | 88,604 | 9,968 | 1,290 | 329 | 100.0 | 88.4 | 9.9 | 1.3 | 0.3 |
| Under 17 years | 32,972 | 31,416 | 1,403 | 130 | * | 100.0 | 95.3 | 4.3 | 0.4 | * |
| 17-24 years | 12,632 | 10,184 | 2,164 | 238 | * | 100.0 | 80.6 | 17.1 | 1.9 | * |
| 25-34 years | 11,565 | 9,186 | 2,089 | 329 | 61 | 100.0 | 79.4 | 18.1 | 2.8 | 0.5 |
| 35-44 years | 12,156 | 10,600 | 1,337 | 174 | * | 100.0 | 87.2 | 11.0 | 1.4 | * |
| 45-64 years | 20,647 | 18,380 | 1,845 | 336 | 85 | 100.0 | 89.0 | 8.9 | 1.6 | 0.4 |
| 65+ years | 10,219 | 8,838 | 1,131 | 182 | 68 | 100.0 | 86.5 | 11.1 | 1.8 | 0.7 |

NOTE: For official population estimates for more general use, see Bureau of the Census reports on the civilian population of the United States, in Current Population Reports: Series P-20, P-25, and P-60.

Table 15. Number of short-stay hospital days and number of days per person with 1+ episodes, by number of episodes, sex, and age: United States, based on data collected in health interviews in 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| Sex and age | Number of hospital episodes | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | All episodes | 1 | 2 | 3+ | All episodes | 1 | 2 | 3+ |
| | Hospital days in thousands | | | | Days per person with episodes | | | |
| Both sexes | | | | | | | | |
| All ages | 186,937 | 124,235 | 42,039 | 20,663 | 9.9 | 7.7 | 19.3 | 35.3 |
| Under 17 years | 22,524 | 16,725 | 4,159 | 1,641 | 6.3 | 5.2 | 13.9 | 26.0 |
| 17-24 years | 19,041 | 13,992 | 3,978 | 1,072 | 6.1 | 5.1 | 12.9 | 18.5 |
| 25-34 years | 20,887 | 14,393 | 4,268 | 2,227 | 7.0 | 5.5 | 13.8 | 30.5 |
| 35-44 years | 24,869 | 16,156 | 5,977 | 2,736 | 10.2 | 7.8 | 20.7 | 31.1 |
| 45-64 years | 56,003 | 36,473 | 12,664 | 6,866 | 13.2 | 10.5 | 21.9 | 39.2 |
| 65+ years | 43,612 | 26,497 | 10,993 | 6,122 | 16.9 | 12.9 | 28.2 | 47.5 |
| Male | | | | | | | | |
| All ages | 88,555 | 56,909 | 20,984 | 10,663 | 12.0 | 9.2 | 23.7 | 41.5 |
| Under 17 years | 13,049 | 9,364 | 2,674 | 1,011 | 6.5 | 5.2 | 15.7 | * |
| 17-24 years | 6,317 | 4,483 | 1,543 | 291 | 9.3 | 7.5 | 22.0 | * |
| 25-34 years | 5,642 | 3,724 | 1,377 | 540 | 9.0 | 7.0 | 16.8 | * |
| 35-44 years | 11,900 | 7,149 | 3,238 | 1,512 | 13.5 | 9.9 | 28.2 | * |
| 45-64 years | 29,999 | 19,878 | 5,979 | 4,143 | 15.2 | 12.1 | 24.9 | 46.0 |
| 65+ years | 21,648 | 12,310 | 6,172 | 3,165 | 18.0 | 13.2 | 29.7 | 51.9 |
| Female | | | | | | | | |
| All ages | 98,382 | 67,327 | 21,055 | 10,000 | 8.5 | 6.8 | 16.3 | 30.4 |
| Under 17 years | 9,475 | 7,361 | 1,485 | 629 | 6.1 | 5.2 | 11.4 | * |
| 17-24 years | 12,724 | 9,508 | 2,435 | 780 | 5.2 | 4.4 | 10.2 | * |
| 25-34 years | 15,246 | 10,669 | 2,890 | 1,687 | 6.4 | 5.1 | 12.6 | 27.7 |
| 35-44 years | 12,968 | 9,006 | 2,739 | 1,223 | 8.3 | 6.7 | 15.7 | * |
| 45-64 years | 26,004 | 16,596 | 6,685 | 2,724 | 11.5 | 9.0 | 19.9 | 32.0 |
| 65+ years | 21,965 | 14,187 | 4,821 | 2,956 | 15.9 | 12.5 | 26.3 | 43.5 |



TABLE 16. DAYS OF DISABILITY AND DAYS OF DISABILITY PER PERSON PER YEAR, BY SEX AND AGE: UNITED STATES, 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

| SEX AND AGE | RESTRICTED-ACTIVITY DAYS | BED-DISABILITY DAYS | WORK-LOSS DAYS[1] |
|---|---|---|---|
| | DAYS OF DISABILITY IN THOUSANDS | | |
| BOTH SEXES | | | |
| ALL AGES | 2,953,202 | 1,109,428 | 406,005 |
| UNDER 17 YEARS | 617,567 | 270,892 | ... |
| 17-24 YEARS | 231,201 | 100,551 | 59,142 |
| 25-44 YEARS | 627,374 | 232,125 | 154,522 |
| 45-64 YEARS | 831,531 | 282,447 | 170,043 |
| 65 & OVER YEARS | 645,529 | 223,413 | 22,298 |
| MALE | | | |
| ALL AGES | 1,296,362 | 464,461 | 251,652 |
| UNDER 17 YEARS | 322,351 | 135,529 | ... |
| 17-24 YEARS | 89,337 | 35,396 | 30,937 |
| 25-44 YEARS | 238,338 | 85,939 | 92,199 |
| 45-64 YEARS | 390,735 | 126,285 | 113,303 |
| 65 & OVER YEARS | 257,600 | 81,309 | 15,213 |
| FEMALE | | | |
| ALL AGES | 1,656,840 | 644,967 | 154,353 |
| UNDER 17 YEARS | 295,215 | 135,363 | ... |
| 17-24 YEARS | 141,864 | 65,151 | 28,205 |
| 25-44 YEARS | 391,036 | 146,186 | 62,323 |
| 45-64 YEARS | 440,796 | 156,163 | 58,740 |
| 65 & OVER YEARS | 387,929 | 142,104 | 7,085 |
| | DAYS OF DISABILITY PER PERSON PER YEAR | | |
| BOTH SEXES | | | |
| ALL AGES | 15.3 | 5.7 | 5.4 |
| UNDER 17 YEARS | 9.2 | 4.0 | ... |
| 17-24 YEARS | 9.9 | 4.3 | 4.2 |
| 25-44 YEARS | 13.8 | 5.1 | 5.[illegible] |
| 45-64 YEARS | 21.[illegible] | [illegible].1 | [illegible].6 |
| 65 & OVER YEARS | 35.8 | 12.4 | 8.7 |
| MALE | | | |
| ALL AGES | 13.9 | 5.0 | 5.3 |
| UNDER 17 YEARS | 9.5 | 4.0 | ... |
| 17-24 YEARS | 8.3 | 3.3 | 4.0 |
| 25-44 YEARS | 10.9 | 4.0 | 4.5 |
| 45-64 YEARS | 20.6 | 6.7 | 6.7 |
| 65 & OVER YEARS | 33.0 | 10.4 | 6.9 |
| FEMALE | | | |
| ALL AGES | 16.5 | 6.4 | 5.6 |
| UNDER 17 YEARS | 9.0 | 4.1 | ... |
| 17-24 YEARS | 11.2 | 5.2 | 4.6 |
| 25-44 YEARS | 16.5 | 6.2 | 5.9 |
| 45-64 YEARS | 21.3 | 7.6 | 5.8 |
| 65 & OVER YEARS | 38.0 | 13.9 | 6.4 |

[1]Work loss reported for currently employed persons aged 17 years and over.

PLAINTIFFS' EXHIBIT NO. 88A
Statement of Dr. Andre Hellergers, filed on December 1, 1971 with the FCC, Docket No. 19413, in the matter of Petitions filed by the EEOC

BEFORE THE
FEDERAL COMMUNICATION COMMISSION
WASHINGTON, D.C. 20544

In the Matter of:

Petitions filed by the
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, et al.

DOCKET NO. 19143

STATEMENT OF ANDRE E. HELLEGERS FILED WITH FEDERAL COMMUNICATION COMMISSION ON DECEMBER 1, 1971

My name is Andre E. Hellegers. I am presently Professor of Obstetrics-Gynecology, Professor of Physiology-Biophysics as well as the Director of Population Research at Georgetown University. In addition I am currently president of the Perinatal Research Society. A listing of my further qualifications can be found in the complete curriculum vita attached hereto.

There are to my knowledge no physiological data which warrant a rule that women in pregnancies should cease working. It should be recognized that if a woman were to develop diabetes, hypertension, or certain other conditions in pregnancy, then it would be possible that a stoppage of work would become necessary, but this in no way differentiates pregnancy from nonpregnancy, since this statement would be equally true for nonpregnant



women, or indeed for men. No medical evidence can be adduced for the need to cease working in pregnancy. Indeed this may be deleterious in some circumstances in which:

1. Loss of income would occur, which might decrease the quality of the diet consumed in pregnancy.
2. A woman has several children, in which case her house work is likely to put more strain on her than a regular job in the labor force.
3. The psychological stress of doing nothing could be worse than that of being gainfully employed.

The Georgetown Obstetrical Service's advice regarding the desireability of working in pregnancy is individualized for every patient as it would be for non-pregnant patients, male or female, who ask whether they are capable of doing a particular job.

It is of some significance that women doctors and nurses, who are working on the obstetrical and other services at the hospital often continue working right up to the day of delivery. This of course would not be so if the medical profession thought that working in pregnancy was contra-indicated.

Finally, in the only large-scale analysis of work in pregnancy, involving close to four million women, women without incomes had a poorer outcome of pregnancy than women with incomes. The positive correlation between higher social classes and incomes with better pregnancy outcome, and lower social classes and income with worse pregnancy outcome is of course well known.

Knowingly, and in the absence of disease, to remove the opportunity for the income-producing activity from women is therefore to expose women and their unborn children to unnecessary reproductive stresses, unless financial compensation is given.

PLAINTIFFS' EXHIBIT NO. 88B
Testimony of Dr. Andre E. Hellegers on February 14, 1972 before the Federal Communications Commission, Docket No. 19143, in the Matter of Petitions filed by the EEOC.

BEFORE THE
FEDERAL COMMUNICATION COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:

Petitions filed by the
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, et al.

DOCKET NO. 19143

TESTIMONY OF DR. ANDRE E. HELLEGERS

PRESIDING EXAMINER: The hearing will be in order.
MR. COPUS: I would like to have a document which is entitled "Testimony of Dr. Andre E. Hellegers marked as EEOC 13.

I have given two copies to the Reporter and copies have been previously distributed to all the parties.
PRESIDING EXAMINER: It will be so identified.
(The document referred to was marked EEOC Exhibit No. 13 for identification.)

Whereupon, ANDRE E. HELLEGERS was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COPUS:

Q. Would you state your name, please? A. Andre E. Hellegers.



Q. What is your business address? A. 3800 Reservoir Road, Georgetown University Hospital.

Q. What do you do there? A. I am Professor of Obstetrics and Gynecology.

Q. Do you have before you a document entitled "Testimony of Andre E. Hellegers"? A. I do.

Q. Did you prepare that document or was it prepared under your direction? A. I prepared it.

Q. Do you have any changes or corrections to make at this time? A. No, I don't.

Q. Do you, then, adopt this testimony as your own testimony and is it true and correct to the best of your information, knowledge and belief? A. That is correct.
MR. COPUS: I now offer Dr. Hellegers for Voir Dire and Cross-Examination.

VOIR DIRE EXAMINATION

BY MR. LEVY:

Q. Dr. Hellegers, is your present position as stated in the curriculum vita just identified?
What type of work does this – are you involved in?
A. I ought to explain what the setup is at Georgetown. There was created, as you may have read in the paper, the Kennedy Institute for Population Studies. It has three subdivisions, one center for population research which does demography and sociology One is a division of bioethics which deals with ethics in medicine and one is a division of reproductive biology which deals with genetics, fetal physiology and so forth. That, incidentally, happened after this testimony was prepared.

Q. Do you direct all three of those divisions?
A. Yes, I am Director of the Institute and each sub-center has a head of its own.

Q. Does this research include analysis of differences in perinatal mortality, prematurity, child spacing, all kinds of problems like that? A. It does not deal fundamentally – intellectual differences between the races?

Q. Your reference is to infant mortality? A. Yes, fetal mortality.

* * *

Q. Is it concentrated essentially on the infant or fetal level, Doctor, rather than the adult or late childhood level? A. Yes, I would say what are the various the biological interests to which your research is directed? in the quality of reproduction, firstly.

Q. Your curriculum vita also indicates that you are a past President of a Perinantal Research Society.
A. That is correct.

Q. Can you tell us what is perinatal research?
A. Perinatal research is that research which deals with the perinatal period, around birth, namely before and after, so the society is composed of three groups of Professions–obstetricians who are mainly interested in the fetus; pediatricians, who are mainly interested in the newborn, and neonatology and basic scientists who are interested in embryology and the development of the fetus, and so on.

* * *



CROSS-EXAMINATION

BY MR. LEVY:

Q. At pages one and two of your testimony, you mention diabetes, hypertension or certain other conditions in pregnancy as making it possible that a work stoppage would become necessary. Wouldn't such conditions as diabetes and hypertension make it probable if not mandatory to stop work? A. It would depend on how you would define the diabetes and the hypertension. There are a lot of non-pregnant men and women with diabetes and hypertension working. That in itself is not a contra-indication to work. If it were, I think a lot of executives would be out of jobs.

PRESIDING EXAMINER: How about lawyers.

THE WITNESS: Yes, and doctors.

BY MR. LEVY:

Q. Can you identify for us the certain other conditions to which you refer in that sentence? A. Congenital heart disease, heart failure, cancer, any kind of thing that would make anybody stop working. Let me put it that way.

PRESIDING EXAMINER: Are those types that would be aggravated by a pregnancy?

THE WITNESS: No, not necessarily. I am sorry, I did not have in mind a particular aggravation by pregnancy. I had in mind there are obviously pregnant women who should not work as obviously there are men who should not work.

BY MR. LEVY:

Q. Dr. Hellegers, at page two, you seem to state categorically that there is no medical evidence for the need

to cease working in pregnancy on the one hand and Services policy of being individualized for every patient. Are these two statements not inconsistent? A. No, I don't think so. Perhaps I can explain it a little lower down, even. One has to individualize in every man and in every woman who comes to consult you, whether they should or should not work. What I am trying to say here is there is nothing inherent in the pregnant state that prevent some from working and the individualization simply means I would say to someone with a massive brain tumor who cannot see straight they might be better off not driving a car. That is what I meant by individualization.

Q. What are the bases on which the Georgetown Obstetrical Services make an individualized determination whether a patient is capable of doing a job?
A. I would say if a patient has hypertension which is out of control, if a person has diabetes which is out of control, and requires administration to a hospital and administration of insulin, then obviously, you would admit her to a hospital. You would do the same thing for a man.

Q. Does pregnancy commonly put stress on such organs as the kidney and the liver? A. No, it doesn't; I think it is more by virtue of weight and not by virtue of pregnancy. It is akin to an obesity situation.

Q. Couldn't continuation at a job involve exposure to toxic substances which would produce no harm to a normal non-pregnant woman prove to be harmful to a pregnant woman? A. It is an interesting question. My answer to that would be factually yes, providing that the exposure be in the first 12 weeks of pregnancy which is



namely when the organs are being formed. The difficulty with obstetrical practice is that we have yet to see patients after the time for the damage of irradiation in chemicals has gone by. It is an embryological problem that arises in the first 12 weeks.

Q. I was asking that question as to harm to the pregnant woman herself rather than the fetus she was carrying. A. I don't think that pregnancy increases the harm which a noxious agent can do to a woman. Let me put it that way.

Q. But you would say that continuation of jobs involving potential exposure to various kinds of radiation or toxic matters or ultra-sound could be potentially harmful to the fetus? A. Ultra-sound I would not go along with because as you know, we use it as a major tool in obstetrics diagnosis. I certainly don't think anybody should be exposed in pregnancy to irradiation for several reasons. One, I don't think anybody should be exposed to irradiation, period. That would be number one. The second problem, obviously, is the fetus in utero would have developing gonads and you would certainly not like to see developing gonads exposed to irradiation any more than I would like to see my gonads exposed to radiation. From that standpoint, you are best to be beyond the reproductive age.

Q. Can't continuation of certain jobs involving physical agility, stamina or dexterity, and by that I mean, for example, jobs which would involve truck driving, climbing poles or ladders, bending, lifting, squatting, working in confined manholes—can't such jobs and the continuation in such jobs tend to increase the risk of accident as pregnancy progresses?

A. Yes, I imagine that it would be very difficult to fit a 9-months pregnancy between you and the steering wheel of a truck. I think common sense would say it is a problem of a 25 weight if you would like being interposed between you and a telephone pole.

Q. I was not asking so much, Doctor, about discomfort or inconvenience or crowding as I was about the likelihood of jobs which involve such physical stresses increasing the risk of accident to the person as pregnancy progresses. Not by virtue of the pregnant state; by virtue of the mass, yes, indeed. You cannot get away from the fact that you are carrying a 25-pound pack on the front of your abdomen. There is obviously a logistic problem having a 25-pound weight sitting in front of one's abdoman. I would think this would be also for a gastric tumor, if you like, anything that represents a weight interposed between you and another object. It is there. Common sense would say that.

Q. Particularly in pregnancy, such weight can tend to lessen agility, speed of reaction, speed of movement, can it not, Doctor? A. I would say that that is true for anybody with a 20-pound weight on his stomach.

Q. When you make your individualized determination of capability to continue in a job, do you do so only from the point of view of the patient's health, but from the point of view of the employer's interest in efficient and satisfactory job performance as well? A. Obviously, as a physician, you do it from the point of view of the patient's health. You would find what kind of position the patient was in and then make a determination whether it was reasonable. You mentioned a moment ago going down a manhole. I have a suspicion I would ask my



patient how big is the manhole before I individualized her to squeeze through or not squeeze through. It is largely determined by common sense.

Q. Can't factors associated with normal pregnancy such as increased fluid retention, nausea, swollen ankles, bladder pressure, generally lessen agility because of this 25-pound weight?Can't some or all of these result in serious diminution in the speed and efficiency required for the performance of certain jobs? A. Let me put it this way: The water retention in pregnancy is amniotic fluid is 1000 CCs which would be two pounds of water sitting there and then by and large something like five pounds of water which is excess retained in pregnancy and excreted afterwards, so we are talking about something like seven pounds of water which is a heck of a sight less than is carried by most obese men. I cannot ascribe it to pregnancy but I can ascribe seven pounds of water retained in pregnancy. I cannot ascribe any differences then from men who have had nephritis, to beer drinkers, whatever else retains water, or even salt eaters. If someone has a particular predilection for salt, they are going to stash away a few pounds of water.

Q. What about some of the other factors that I mentioned?Is morning sickness or nausea fairly common or at least not uncommon in the first trimester of pregnancy? A. That is correct, yes.

Q. Could that result in diminution of the efficiency required for the satisfactory performance of certain jobs? A. Yes, I would think it would be in the same ball park as men with ulcers, burping, nausea. Understand me, I am in favor of good health. My testimony was not directed to whether there aren't changes in a woman's

body in pregnancy. Obviously there are. My testimony was directed to the question of work.

Q. I am just trying to explore certain parameters of your views. What about bladder pressure?Is it not uncommon for the developing fetus to impose greater pressure on the bladder than in the normal non-pregnant state? A. Yes, it does but women, by and large, void less than men. If voiding in frequency and quantity of urine becomes an issue, then people would say men are in more trouble than women because they void more. That is if terms of CCs of urine produced per day is more than women. I cannot ascribe that to a disease.

Q. If there were a job that required continued attendance at a station for let us say hour-long intervals and a normally pregnant woman could not sustain the bladder pressure for that long. This could interfere, could it not, with the efficiency of that operation?
A. Yes, if you have to go to the john, you have to go to the john, man, woman, pregnant woman or anyone else. I must agree.

Q. Again, Doctor, are swelling of the ankles fairly common in pregnancy? A. Yes, it is.

Q. Can that not possibly have an effect on the satisfactory performance of certain jobs which would call for speed of movement, locomotion? A. It is impossible to answer that.

Q. You are using void in a different sense.
A. Yes. It is a kind of theoretical statement which asks are our ankles which are four inches in circumference any better than ankles which are six inches in circumference. It is an impossible question for me to answer. I don't know if any job specification goes to the circumference of ankles except in the chorus line.

Q. At page 2 of your testimony, Doctor, you suggest



that it is of some significance that woman doctors and nurses at the hospital often continue right up to the day of delivery. Are not the job requirements and potential hazardous exposures quite different from those of telephone workers than doctors and nurses?
A. That is not within my competence to answer. That would mean I know the full telephone business which I do not. I am saying there is nothing inherently in the pregnant state that eliminates work as a factor and it is best shown that those who most deal with pregnancy, namely obstetricians, nurses, pediatric interns, continue right up to delivery time.

Q. On page 3 of your testimony, Doctor, you refer to a large-scale analysis of work in pregnancy which compares results of pregnancy outcome between women with higher social classes and incomes and those with lower social classes and incomes. What is the study to which you refer? A. It is a study mentioned by an A. W. Didle–can I consult the exact reference for a moment?
PRESIDING EXAMINER: Yes, surely.
THE WITNESS: It is in the Journal of Occupational Medicine, January, 1970, Volume 2, Number 1, page 10 to 15, by A. W. Diddle, Gravid Women at Work, Fetal and Maternal Morbidity, Employment Policy, and Medicolegal Aspects.
BY MR. LEVY:

Q. Was that study conducted by or under the auspices of the government? A. Yes, Vital Health Statistics. The person who did it, I think, was Mary Jane Covar.

* * *

Q. Doctor, in that study which I have just had a moment to glance at quickly, is lower income identified as the sole and crucial factor in the correlations involved?
A. That is one of the core problems in all of the studies. Of course, you can get studies in every single way about work, who works, and who does not work. One of the problems involved in unraveling who works and who does not work so you can show a direct cause and effect relationship, it is precisely because I don't know of any study that has ever been able to keep all the variable constant and manipulate only one which would be the proper scientific design. I don't know of any study that has done that. So that what we are talking about here is that there is a constant association between income and bad pregnancy outcome.

Q. But it is possible that the positive correlation to which you refer between social class and pregnancy outcome may be the result of many different variables including but even apart from income per se.
A. That is a priori scientifically always true that associations between two phenomena may be due to third and fourth phenomena that we have not considered yet like the phase of the moon, whether you were born under Capricorn. All I can say is scientifically there is no data at the present time which shows anything but that low income always leads to that outcome. Excuse me, let me correct that. Low income does not always lead to that outcome. All studies show correlationship between low income and high income. It is the problem of the Negro, the poor, and so on. That is constant.

* * *

Q. Doctor, what about differences in diet apart from income?Would they not possibly correlate?



A. The difficulty is precisely that diet is so heavily related to income that it has always been assumed in medicine that that is precisely why the income is so important. It allows you to buy first-rate proteins and this kind of thing. It is precisely why one would not wish to cut someone off from their income if that will be their source of first-class proteins, and doctors have expenses. It is always nice to be able to afford your own.

Q. What about differences in health education or knowledgeability between higher and lower social classes?
A. Clear correlations at any given time between higher social economic classes and higher income, higher degree of learning, more years of college and so forth, better diets, that is precisely the problem of poverty at any time.

Q. Is there generally a correlation also between higher social class and better preparation care, better pre- and post-delivery case as compared to lower socio-economic scales? A. Yes. If you can pay your own way you are better off than going to D.C. General and waiting several hours in the wings. There is no question about it.
MR. LEVY: I have no further questions.
PRESIDING EXAMINER: On this page 3, Dr. Hellegers, you refer to poorer outcome of pregnancy and better outcome. Is this in terms of live versus stillborn?
THE WITNESS: Live versus newborn, neonatal newborn, and non-premature deaths and mature versus premature.
PRESIDING EXAMINER: Thank you. Mrs. Baker?
BY MRS. BAKER:

Q. You mentioned in your responses earlier that during the first trimester the danger seemed the greatest. Was that to the child or to both the mother and the child? A. To the child.

Q. I think we are talking perhaps about three different

areas of possible danger and harm. One would be to the baby, one would be to the mother and the third one might be others resulting from the mother's condition. For instance, a woman who may be operating and might faint, might cause some harm to her fellow workmen. The question is: Would this harm be any greater than if a man fainted on a job?Is there something particular about pregnancy which means when something happens to the woman it is any worse than if it happens to a non-pregnant human being? A. Let me answer two ways: For the pregnant woman to faint and fall is to herself apart from the fetus no more dangerous than it is for a man to fall.

Q. To those around her? A. My sort of crazy mind would say would you rather have a 100 pound woman fall on top of you or a 250 pound man?More to the point would be your third category which is the fetal category and from the falling point of view, if fainting or falling in the first trimester could make you miscarry or something like that, you know we wouldn't have the abortion legislation fights that we have now today because every woman would drop down and abort it. Unfortunately, or fortunately, one cannot expel a fetus by falling or all legal abortionists would be out of business.

Q. Do you find that all women lose tremendous amount of dexterity, stamina, during pregnancy, or is this subject to individual variation? A. It is individual. It depends on the weight gained and it depends on the starting weight. Let me try to explain this. If a woman is pregnant and weighs 160 pounds to start with, the 20-pound weight gain on her represents obviously much less of a problem than if the 20-pound weight were to start in a girl who weighed 80 pounds. It is a



fraction of weight carried so one can already begin to individualize on that one in very much the same way as sudden weight gain among men. A 100 pound man who turns obese is affected more than the man who is obese to start with.

Q. Are all pregnant women subject to a tremendous amount of edema? A. No, it is usually that category of women who have what is called toxemia.

Q. Is exercise contraindicated in edema? A. No.

Q. Can a pregnant woman lift, let us say, 20 pounds when pregnant if she is capable of doing so?Will it harm her or her child if she is lifting 20 pounds four times a day and she keeps lifting 20 pounds four times a day, should she be able to do this through her pregnancy?It is like lifting a cow, you can never start that way.

A. I am bothered by the generality of the question. Lifting 20 pounds of weight is different for the 80-pound woman from the 160-pound woman. Now let me answer it is contraindicated to lift children anyone can go into any American home where there is a first child and the second child and you see pregnant woman lifting children. Or, you can go to the supermarket and find pregnant women holding onto two pounds. There are pregnant nurses who lift their patients. They are more savvy, of course, about lifting.

Q. Can pregnant women overreach with their arms?Is there anything about pregnancy than would indicate that a woman should not reach right through pregnancy?

A. There is nothing in the pregnancy that tells she could not reach but I remind you again she does carry the weight in front of her and that is an obvious fact. Nothing can happen to her. She can't have the baby or go into labor.

Q. And that would depend on the woman's own

feeling to do it every day Provided they can get up to the desk or whatever, if they are physically capable because of the weight in front of them–

A. There is nothing short in the pregnancy other than the physical mass that contraindicates, bending, lifting, and so on.

Q. Just because a woman is nine months pregnant, there is tremendous variation on how much incapacitated, if any, they are? A. So many women have babies of which we say, gosh, I hardly knew she was pregnant. She does not show, is the common expression. Others show very clearly.

Q. Would the same thing go for bending or spending a number of hours sitting? A. Sure. Pregnant women do hardly anything but that when they are home, bend, lift – that is the common state of a pregnant woman.

MRS. BAKER: I think that is all.

PRESIDING EXAMINER: Do you have anything further, Mr. Copus?

MR. COPUS: No, Mr. Examiner, we have no questions on redirect.

PRESIDING EXAMINER: Thank you, Doctor. You are excused. (Witness excused)

PRESIDING EXAMINER: Do I understand that is all we have in the way of testimony today?

MR. COPUS: Yes, sir.

PRESIDING EXAMINER: We will adjourn at this time until 9 o'clock on Wednesday morning.

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PLAINTIFFS' EXHIBIT NO. 89
Maternity Benefits Provisions for Employed Women, U.S. Dept. of Labor

IV

## LEGISLATION AND REGULATION IN THE UNITED STATES

The United States has more legislation that provides maternity protection for women workers than is generally realized. Well-known laws are the Federal Railroad Unemployment Insurance Act providing weekly cash maternity benefits to women in the railroad industry; the Rhode Island Cash Sickness Compensation Act providing weekly cash maternity benefits to women workers in that State; and the laws of six States and Puerto Rico prohibiting employment for specified periods before and after childbirth–in Puerto Rico with half-pay.

Less familiar are laws and regulations making protection available to many thousands of other women workers. Included in these provisions are income tax deductions for sick pay received during illness in pregnancy; leave with pay for over half a million Federal civilian women employees; and maternity medical care for women in the armed services, in several Federal civilian agencies, and, after July 1, 1960, in all Federal civilian agencies.

Included also are provisions for women workers who benefit indirectly, i.e., not through their own connections with a job but as dependents. Such provisions apply to 98,000 employed wives of men in the armed services, to the working wives of men in certain Federal civilian agencies, and–after July 1, 1960–to the wives of all men in the Federal civilian Government who elect family coverage.

Still other women who benefit, also, not directly as workers but as "medically needy" when they must give up their jobs because of pregnancy, are thousands of beneficiaries of Federal, State, and local provisions for maternity medical care.

More detailed information regarding the above laws and regulations, as well as experience under them, follows.

## Federal Legislation and Regulations

### Federal Income Tax Deduction

Applicable to all women workers whose employment entitles them to sick pay is a provision of the Federal income tax law allowing a deduction from taxable income for sick pay received while a worker is absent because of illness during pregnancy. Pay received for periods of absence due *solely* to pregnancy is not deductible; but if the absence is due to *illness during pregnancy*, part or all of the sick pay received is deductible, whether the illness was the result of pregnancy or of some other cause. There is a waiting period of 1 week for which sick pay is not deductible, unless the employee is hospitalized; if she is hospitalized even for a day, sick pay for the entire period of her absence from work is deductible. No more than $100 a week is deductible, however, even if a larger amount of sick pay is received.

### Railroad Unemployment Insurance Act [15]

The Railroad Unemployment Insurance Act provides for unemployment, sickness, and special maternity weekly cash benefits. The basic formula by which the amounts of benefits are determined is the same for all three types of benefits.



The Act has been amended several times, most lately on May 19, 1959, effective immediately. [16] The main purpose of amendments after 1946 has been to raise benefits so that they would keep pace with earnings, and to adjust the financing of the program to the cost experience.

Under the 1959 Amendment, a woman must have earned at least $500 of railroad wages in a base year (calendar year) in order to qualify for maternity benefits in the benefit year, which begins the following July 1. If her earnings were at least $500 in 1958, she is qualified in the period July 1, 1959–June 30, 1960.

Her daily benefit rate will be determined in one of two ways, whichever will provide the higher rate, though in neither case may it exceed $10.20. Her rate will either be:

(a) Sixty percent of her daily rate of pay on her last railroad job in the base year; or

(b) Based on the following schedule:

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[15] 52 Stat. 1094. As originally enacted in 1938, effective July 1, 1939, the law provided for the payment of benefits only to unemployed railroad workers who were "available for work." In 1946, effective July 1, 1947, the Act was amended (Public Law 572. 79th Cong., 2d sess, 1946) to provide weekly cash benefits for railroad workers who are unable to work because of sickness; also provided are special maternity benefits to women railroad workers.

[16] June 23, 1948: 62 Stat. 576 578; Oct. 30, 1951: 65 Stat. 691; May 15, 1952; 66 Stat. 700; Aug. 31, 1951: 68 Stat. 1011; Aug. 12 1955: 69 Stat. 716; May 19, 1959: Public Law 86 28, 86th Cong., 1st sess., (H.R. 5610), 1959.

For Employed Women

| *Employee's creditable basic-year earnings* | *Daily benefit rate* |
|---|---|
| $500 to $699.99 | $ 4.50 |
| $700 to $999.99 | 5.00 |
| $1,000 to $1,299.99 | 5.50 |
| $1,300 to $1,599.99 | 6.00 |
| $1,600 to $1,899.99 | 6.50 |
| $1,900 to $2,199.99 | 7.00 |
| $2,200 to $2,499.99 | 7.50 |
| $2,500 to $2,799.99 | 8.00 |
| $2,800 to $3,099.99 | 8.50 |
| $3,100 to $3,499.99 | 9.00 |
| $3,500 to $3,999.99 | 9.50 |
| $4,000 and over | 10.20 |

The new rates are retroactive to July 1, 1958.

There is no waiting period for maternity benefits. To receive benefits, the claimant must file pertinent information, including statements from a doctor on the expected and on the actual date of birth of her child.

Benefits are payable for a total of 116 days, or approximately 16½ weeks. They may begin 57 days (about 8 weeks) before the *expected* delivery date, but in no case may the claimant be paid for more than 84 days before *actual* childbirth. If the full 84 days before the date of delivery are paid, days paid after delivery may not exceed 31.

Since the first 14 days of the maternity period and the 14 days immediately after the birth of the child are paid for at 1½ times the daily rate, the total maximum benefit available is equal to 130 times the daily allowance. Total benefits available therefore range from $485, payable to women with earnings between $500 and $699.99 in the base year, to $1,326 to women who have earned $4,000 or more.

During the 11 years the 1946 Amendment establishing



sickness and maternity benefits has been operative,[17] the number of women railroad workers who have received maternity benefits has fluctuated in a relatively small range centering around 4,000. In the 1957-58 benefit year they numbered 3,900, and they then represented about 4 percent of all qualified women.

Women are only a small proportion of all railroad workers–6 percent in 1956, or 97,800 out of a total of 1,627,900. The majority of these women (two-thirds in 1955) are office workers–in 1957, nine out of ten.

The occupations of the 3,900 women who were beneficiaries in the 1957-58 benefit year were:

| *Occupation* | *Number of employees* |
|---|---|
| Office employees: | |
| Executives, supervisors, and professionals | 100 |
| Station agents and telegraphers | 100 |
| Clerks and other office employees | 3,400 |
| All other employees | 300 |

The great majority of beneficiaries that year were under age 35 and were divided evenly between women 25 to 34 years old and those under age 25, as the following grouping shows:

| *Age group* | *Number* |
|---|---|
| Under 25 | 1,700 |
| 25–34 | 1,700 |
| 35–44 | 400 |
| 45 and over | 100 |

[17] Information in this section on the operation of the maternity benefit provisions of the Railroad Unemployment Insurance Act are from: (1) Railroad Retirement Board, The Monthly Review, Feb. 1959; and (2) Railroad Retirement Board, *Annual Report 1958* for the Fiscal Year Ended June 30, 1958.

The average duration of benefits, that is, the average number of days benefits were paid per beneficiary, have ranged from 102 to 113 (109 in 1957–58); and the average total amount of benefit has risen from $456 in 1947–48 to $963 in 1957–58. Benefits in 1957–58 were distributed as follows:

| | *Maternity beneficiaries* | |
|---|---|---|
| | *Number* | *Percent* |
| Total | 3,900 | 100 |
| Less than $400 | (1) | 1 |
| $400 to $499 | 100 | 2 |
| $500 to $599 | 200 | 4 |
| $600 to $699 | 100 | 2 |
| $700 to $799 | 200 | 5 |
| $800 to $899 | 300 | 7 |
| $900 to $999 | 800 | 20 |
| $1,000 to $1,099 | 1,400 | 38 |
| $1,100 to $1,105 | 800 | 21 |

[1]Fewer than 50

Eighty-one percent of the pregnancy claims were not terminated until completion of the 116 days limitation period.

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PLAINTIFFS' EXHIBIT NO. 90
Railroad Retirement Board Annual Report - 1971



Sickness

Some 85,900 railroad workers were paid sickness benefits totaling $50.1 million in 1970–71. The number of beneficiaries (6 percent less than in the preceding year) was the smallest in the history of the sickness program. The amount paid was down 13 percent from the near-record total paid in 1969–70. The percentage decrease was about the same for normal and extended benefits; extended payments accounted for 18 percent of the total amount paid both in 1969–70 and in 1970–71. Benefits continued to average $63 for a full week of sickness, before adjustments for withholdings or recoveries due to receipt of other payments. After adjustment, the average weekly amount was approximately $56.

* * *

The median age of all sickness beneficiaries was 54 years, compared with 49 years for employees qualified in the 1970–71 benefit year. Even though extended sickness benefits are not payable to beneficiaries who have attained age 65, the median age of those on the extended rolls was higher–57 years. The 7,500 women beneficiaries had a median age of 45 years. Almost one-fourth of them were paid for conditions associated with pregnancy and childbirth.

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PLAINTIFFS' EXHIBIT NO. 91
Railroad Retirement Board Annual Report 1969.

Sickness

Sickness benefit totals in 1968–69 were above the levels of the 2 preceding years, despite a decline of about 25,000 from 1967–68 in the number of qualified employees.

* * *

The total number of beneficiaries included about 300 women who were paid maternity benefits for days before July 1, 1968. The 1968 amendments eliminated maternity benefits as such, but some 1,900 women received regular sickness benefits for days in 1968–69 because of pregnancy, miscarriage, or childbirth. About 2,000 women had received maternity benefits in the preceding year.

* * *



PLAINTIFFS' EXHIBIT NO. 92
Beneficiaries Under the RUIA, Railroad Retirement Board Quarterly Review, January-March, 1972.



Table 2.—Beneficiaries, benefit averages, and related data for 1970-71 sickness, by major sickness group

| International list no. | Type of sickness group | Beneficiaries | | | | | Average per beneficiary | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | Number | | Percent | | | | | | |
| | | Total | Female | Exhausting normal benefits | Paid both normal and extended benefits[1] | Affected by adjustments for other payments | Median age at end of 1970 | Creditable days of sickness | Daily benefit | Amount of benefits for year |
| | Total | 79,200 | 7,300 | 15 | 13 | 13 | 54 | 91 | $11.21 | $689 |
| 000-136 | Infective and parasite diseases | 1,800 | 200 | 11 | 9 | 9 | 51 | 71 | 11.62 | 540 |
| 140-239 | Neoplasms | 3,200 | 600 | 14 | 12 | 11 | 56 | 90 | 11.62 | 699 |
| 240-279 | Endocrine, nutritional and metabolic diseases | 2,000 | 200 | 21 | 21 | 21 | 56 | 111 | 10.90 | 820 |
| 280-289 | Diseases of the blood and blood-forming organs | 400 | 100 | (2) | (2) | (2) | (2) | (2) | (2) | (2) |
| 290-315 | Mental disorders | 2,800 | 500 | 20 | 17 | 13 | 49 | 112 | 11.09 | 840 |
| 320-389 | Diseases of the nervous system and sense organs | 3,100 | 200 | 18 | 16 | 20 | 56 | 103 | 10.80 | 750 |
| 390-458 | Diseases of the circulatory system | 14,800 | 700 | 22 | 21 | 24 | 57 | 116 | 10.55 | 832 |
| 460-519 | Diseases of the respiratory system | 7,700 | 600 | 13 | 12 | 13 | 55 | 76 | 10.90 | 546 |
| 520-577 | Diseases of the digestive system | 10,500 | 600 | 7 | 7 | 7 | 53 | 70 | 11.85 | 545 |
| 580-629 | Diseases of the genito-urinary system | 3,900 | 300 | 5 | 5 | 7 | 56 | 59 | 11.67 | 443 |
| 680-709 | Diseases of the skin and subcutaneous tissue | 1,100 | 100 | 12 | 9 | 5 | 52 | 72 | 11.87 | 559 |
| 710-738 | Diseases of the musculoskeletal system and connective tissues | 5,900 | 400 | 23 | 21 | 20 | 56 | 113 | 10.72 | 824 |
| 780-796 | Symptoms and ill-defined conditions | 5,700 | 500 | 15 | 14 | 11 | 52 | 88 | 11.37 | 668 |
| 800-999 | Accidents, poisoning and violence | 14,700 | 700 | 14 | 11 | 9 | 47 | 86 | 11.80 | 675 |
| (3) | Pregnancy, childbirth, and the puerperium | 1,700 | 1,700 | 13 | 1 | (4) | 25 | 110 | 12.69 | 947 |

[1] Extended benefits either preceding or following normal benefits.

[2] Number in sample too small to yield reliable data.

[3] Includes normal pregnancies and childbirths plus a small number of cases involving morbidities classified under numbers 630-678.

[4] Less than 0.5.

NOTE. Data based on a 20 percent sample of beneficiaries. Type of sickness is determined by first sickness for which payment was made or waiting-period credit given. Classification by sickness group is in accordance with *Manual of the International Statistical Classification of Diseases, Injuries, and Causes of Death*, Eighth Revision, World

The number of women on the sickness rolls (7,300) was about the same as in 1969–70 and women again accounted for 9 percent of the beneficiaries. Their Beneficiary rate remained at 15 per 100 qualified employees while the beneficiary rate for men declined from 11 to 10 per 100. Women had a longer average duration of disability and received a higher average amount than men even though the percentage receiving extended benefits was higher for men than women. Pregnancy accounted for a slightly higher percentage (23 percent) of the female sickness beneficiaries than in 1969–70. The median age for women beneficiaries declined to 44 years from 46 in the previous year while the median age for men remained at 54 years.

* * *





Table 2. Beneficiaries, benefit averages, and related data for 1969-70 sickness, by major sickness group

| International list no. | Type of sickness group | Beneficiaries | | | | | | Average per beneficiary | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | Number | | Percent | | | Median age at end of 1969 | Creditable days of sickness | Daily benefit | Amount of benefits for year |
| | | Total | Female | Exhausting normal benefits | Paid both normal and extended benefits [1] | Affected by adjustments for other payments | | | | |
| | Total | 85,400 | 7,300 | 18 | 15 | 10 | 54 | 99 | $11.17 | $740 |
| 001-138 | Infective and parasitic diseases | 1,400 | 200 | 10 | 9 | 5 | 51 | 68 | 11.83 | 525 |
| 140-239 | Neoplasms | 3,300 | 600 | 17 | 16 | 8 | 56 | 98 | 11.51 | 757 |
| 240-289 | Allergic, endocrine system, metabolic, and nutritional diseases | 2,600 | 200 | 22 | 20 | 13 | 56 | 109 | 10.95 | 807 |
| 290-299 | Diseases of the blood and blood-forming organs | 200 | 100 | (2) | (2) | (2) | (2) | (2) | (2) | (2) |
| 300-326 | Mental, psychoneurotic, and personality disorders | 3,000 | 600 | 20 | 17 | 8 | 48 | 105 | 11.54 | 814 |
| 330-398 | Diseases of the nervous system and sense organs | 4,600 | 200 | 31 | 28 | 19 | 57 | 139 | 10.48 | 988 |
| 400-468 | Diseases of the circulatory system | 14,200 | 800 | 29 | 25 | 19 | 57 | 135 | 10.40 | 957 |
| 470-527 | Diseases of the respiratory system | 9,900 | 700 | 12 | 10 | 8 | 55 | 69 | 11.21 | 508 |
| 530-587 | Diseases of the digestive system | 11,800 | 600 | 9 | 7 | 6 | 54 | 75 | 11.73 | 581 |
| 590-637 | Diseases of the genito-urinary system | 3,800 | 300 | 10 | 8 | 9 | 56 | 70 | 10.99 | 505 |
| 690-716 | Diseases of the skin and cellular tissue | 1,200 | 100 | 12 | 8 | 3 | 51 | 68 | 12.02 | 538 |
| 720-749 | Diseases of the bones and organs of movement | 6,200 | 500 | 27 | 21 | 15 | 55 | 123 | 10.84 | 902 |
| 780-795 | Symptoms, senility, and ill-defined conditions | 5,000 | 400 | 15 | 13 | 8 | 53 | 88 | 11.39 | 665 |
| 800-999 | Accidents, poisonings, and violence | 16,600 | 700 | 16 | 13 | 7 | 48 | 94 | 11.90 | 744 |
| (3) | Pregnancy, childbirth, and the puerperium | 1,500 | 1,500 | 9 | 1 | (4) | 25 | 107 | 12.66 | 922 |

[1] Extended benefits either preceding or following normal benefits.

[2] Number in sample too small to yield reliable data.

[3] Includes normal pregnancies and childbirths plus a small number of cases involving morbidities classified under numbers 640-689.

[4] Less than 0.5.

NOTE—Data based on a 20-percent sample of beneficiaries. Type of sickness is determined by first sickness for which payment was made or waiting period credit given. Classification by sickness group is in accordance with *Manual of the International Statistical Classification of Diseases, Injuries, and Causes of Death*, Seventh Revision, World Health Organization. Includes all major groups in which there were 50 or more beneficiaries.

As in 1968-69, women accounted for 9 percent of the beneficiaries. The median age of the men was 54 years and that of the women 46 years, both the same as in the preceding year. The most common causes of disability among the men were injuries, circulatory diseases, and digestive ailments, in that order. Among the women, pregnancy and childbirth were the most common conditions for which benefits were paid, followed by circulatory ailments.

PLAINTIFFS' EXHIBIT NO. 95
Washington State Human Rights Commission,
New Employment Regulations, Maternity Leave
Policy, adopted 6-22-72, effective 7-26-72.

## WASHINGTON STATE HUMAN RIGHTS COMMISSION
## NEW EMPLOYMENT REGULATIONS
## MATERNITY LEAVE POLICY

*WAC 162-30-020.* MATERNITY. (1) *Findings and Purposes.* Childbearing is an expectable incident in the life of a woman. Practices such as terminating pregnant women from employment and not hiring young women for responsible jobs because they may become pregnant and have to be terminated have contributed substantially to present conditions of lack of job opportunity for women limitation of women to low-paying clerical jobs, and lack of opportunity for women to advance to levels of employment enjoyed by men of equal ability. It is the objective of the law against discrimination in employment because of sex, Chapter 49.60 RCW, to equalize employment opportunity for men and women. This regulation defines how that law applies to childbearing by women workers.

* * *



(5) *Leave Benefits.* Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the availability of extensions of leave time, the accrual of benefits and privileges, such as seniority, retirement, pension rights, and other service credits and benefits, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(6) *Insurance Benefits.* If an employer provides maternity insurance coverage to wives of male employees, the same coverage must also be provided to female employees.

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PLAINTIFFS' EXHIBIT NO. 97
U.S. Dept. of Health, Education and Welfare
National Center for Health Statistics, Series 22,
No. 15, Infant Mortality Rates: Relationship
with Mother's Reproductive History (GPO 1973).

# Infant Mortality Rates: Relationship With Mother's Reproductive History

Table 17. Estimated average annual number of live births and infant deaths per 1,000 live births, by live-birth order, family income, and race of infant: United States, 1964-66 legitimate, single births

| Race and live-birth order | Live births | | | | Infant deaths | | | |
|---|---|---|---|---|---|---|---|---|
| | All infants | Family income | | | All infants | Family income | | |
| | | Less than $3,000 | $3,000-$4,999 | $5,000 or more | | Less than $3,000 | $3,000-$4,999 | $5,000 or more |
| All races | Number in thousands | | | | Rate per 1,000 live births | | | |
| All birth orders | 3,417 | 679 | 767 | 1,971 | 21.7 | 30.5 | 23.7 | 17.9 |
| First | 1,004 | 247 | 230 | 526 | 18.1 | 22.9 | 18.4 | 15.6 |
| Second | 857 | 146 | 201 | 510 | 22.0 | 32.6 | 23.9 | 18.2 |
| Third | 610 | 87 | 139 | 385 | 22.2 | 40.2 | 25.9 | 16.8 |
| Fourth | 392 | 58 | 86 | 248 | 21.2 | 26.7 | 23.4 | 19.1 |
| Fifth | 228 | 44 | 48 | 136 | 25.2 | 33.9 | 25.9 | 22.2 |
| Sixth or more | 326 | 98 | 64 | 165 | 29.7 | 38.8 | 36.4 | 21.8 |



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| | | | | | | | |
|---|---|---|---|---|---|---|---|
| White | | | | | | | |
| All birth orders | 2,961 | 461 | 660 | 1,840 | 19.5 | 26.0 | 20.8 | 17.5 |
| First | 907 | 205 | 210 | 492 | 16.3 | 20.5 | 15.4 | 15.0 |
| Second | 759 | 103 | 176 | 480 | 20.1 | 25.0 | 23.3 | 17.8 |
| Third | 536 | 56 | 118 | 362 | 20.1 | 36.3 | 22.6 | 16.7 |
| Fourth | 342 | 33 | 70 | 239 | 19.5 | 19.1 | 21.9 | 18.8 |
| Fifth | 191 | 25 | 43 | 123 | 20.5 | 22.4 | 17.1 | 21.4 |
| Sixth or more | 226 | 39 | 43 | 144 | 28.8 | 51.0 | 34.0 | 21.1 |
| Black | | | | | | | | |
| All birth orders | 402 | 202 | 94 | 106 | 37.6 | 40.4 | 44.6 | 26.1 |
| First | 83 | 40 | 19 | 25 | 38.1 | 36.0 | * | 31.4 |
| Second | 81 | 39 | 19 | 22 | 39.4 | 49.2 | * | * |
| Third | 66 | 28 | 17 | 20 | 39.5 | 45.5 | * | * |
| Fourth | 45 | 23 | 14 | 8 | 34.2 | * | * | * |
| Fifth | 33 | 17 | 5 | 11 | 51.4 | * | * | * |
| Sixth or more | 94 | 55 | 20 | 19 | 31.1 | 32.3 | * | * |

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PLAINTIFFS' EXHIBIT NO. 98
Variations in Birth Weight, Legitimate Live Births, United States 1963.

# Variations in Birth Weight

## Legitimate Live Births

Table 3. Average birth weight, number of births, and percent distribution, by birth-weight interval according to family income in 1962 and color of mother: United States, 1963 legitimate live births

| 1962 family income and color | Average birth weight | Births | Birth weight | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | Total | 2,500 grams or less | 2,501-3,000 grams | 3,001-3,500 grams | 3,501-4,000 grams | 4,001 grams or more |
| All incomes | Grams | Number in thousands | Percent distribution | | | | | |
| Total | 3,280 | 3,797 | 100.0 | 7.2 | 19.4 | 39.2 | 26.1 | 8.0 |
| White | 3,300 | 3,315 | 100.0 | 6.5 | 18.8 | 39.1 | 27.1 | 8.5 |
| Nonwhite | 3,130 | 482 | 100.0 | 11.8 | 23.7 | 40.0 | 19.8 | 4.7 |
| Under $3,000 | | | | | | | | |
| Total | 3,180 | 819 | 100.0 | 10.4 | 21.6 | 39.2 | 23.2 | 5.6 |
| White | 3,200 | 570 | 100.0 | 8.8 | 20.1 | 38.9 | 26.3 | 5.9 |
| Nonwhite | 3,080 | 249 | 100.0 | 14.0 | 25.0 | 39.8 | 16.2 | 5.0 |
| $3,000-$4,999 | | | | | | | | |
| Total | 3,280 | 1,030 | 100.0 | 7.7 | 18.7 | 39.8 | 25.0 | 8.8 |
| White | 3,300 | 879 | 100.0 | 6.9 | 18.2 | 40.2 | 25.0 | 9.7 |
| Nonwhite | 3,160 | 151 | 100.0 | 12.4 | 21.7 | 37.1 | 24.8 | 3.9 |
| $5,000-$6,999 | | | | | | | | |
| Total | 3,310 | 920 | 100.0 | 5.7 | 18.1 | 39.6 | 28.2 | 8.4 |
| White | 3,310 | 876 | 100.0 | 6.0 | 17.8 | 39.1 | 28.4 | 8.6 |
| Nonwhite | 3,300 | 44 | 100.0 | - | 22.4 | 50.4 | 23.5 | 3.7 |
| $7,000 and over | | | | | | | | |
| Total | 3,330 | 973 | 100.0 | 5.5 | 19.6 | 38.0 | 28.4 | 8.6 |
| White | 3,330 | 930 | 100.0 | 5.4 | 19.5 | 38.0 | 28.6 | 8.6 |
| Nonwhite | 3,190 | 34 | 100.0 | 9.6 | 23.3 | 37.6 | 21.6 | 7.9 |
| $7,000-$9,999 | | | | | | | | |
| Total | 3,330 | 667 | 100.0 | 5.0 | 20.5 | 36.8 | 29.1 | 8.6 |
| White | 3,340 | 645 | 100.0 | 4.8 | 20.3 | 36.9 | 29.1 | 8.8 |
| Nonwhite | 3,190 | 22 | 100.0 | 9.7 | 25.5 | 32.0 | 29.4 | 3.5 |
| $10,000 and over | | | | | | | | |
| Total | 3,310 | 306 | 100.0 | 6.8 | 17.6 | 40.6 | 26.6 | 8.5 |
| White | 3,320 | 294 | 100.0 | 6.7 | 17.5 | 40.3 | 27.4 | 8.2 |
| Nonwhite | * | * | * | * | * | * | * | * |
| Unknown | | | | | | | | |
| Total | 3,300 | 55 | 100.0 | 3.5 | 20.9 | 45.8 | 18.4 | 11.3 |
| White | 3,320 | 51 | 100.0 | 3.8 | 20.3 | 43.9 | 19.8 | 12.2 |
| Nonwhite | * | * | * | * | * | * | * | * |

Table 11. Average birth weight, number of births, and percent distribution, by birth-weight intervals according to family income in 1962 and trimester of first visit for medical care: United States, 1963 legitimate live births

| 1962 family income and trimester of first visit | Average birth weight | Births | Birth weight | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | Total | 2,500 grams or less | 2,501-3,000 grams | 3,001-3,500 grams | 3,501-4,000 grams | 4,001 grams or more |
| | Grams | Number in thousands | Percent distribution | | | | | |
| **All incomes** | | | | | | | | |
| All trimesters | 3,280 | 3,797 | 100.0 | 7.2 | 19.4 | 39.2 | 26.1 | 8.0 |
| First | 3,300 | 2,246 | 100.0 | 6.7 | 18.2 | 39.4 | 27.2 | 8.5 |
| Second | 3,230 | 724 | 100.0 | 7.5 | 20.4 | 41.7 | 23.9 | 6.6 |
| Third | 3,250 | 679 | 100.0 | 8.6 | 23.2 | 35.3 | 25.8 | 7.2 |
| No prenatal care | 3,250 | 79 | 100.0 | 11.5 | 12.0 | 41.9 | 24.1 | 10.5 |
| Trimester unknown | 3,370 | 69 | 100.0 | 1.7 | 21.0 | 44.6 | 21.3 | 11.5 |
| **Under $3,000** | | | | | | | | |
| All trimesters | 3,180 | 819 | 100.0 | 10.4 | 21.6 | 39.2 | 23.2 | 5.6 |
| First | 3,140 | 348 | 100.0 | 11.9 | 21.2 | 38.5 | 23.6 | 4.8 |
| Second | 3,160 | 212 | 100.0 | 11.0 | 20.8 | 42.0 | 22.2 | 4.0 |
| Third | 3,220 | 215 | 100.0 | 8.6 | 25.3 | 37.0 | 21.8 | 7.2 |
| No prenatal care | 3,420 | 35 | 100.0 | 5.9 | 10.4 | 39.9 | 29.0 | 14.8 |
| Trimester unknown | * | * | * | * | * | * | * | * |
| **$3,000-$4,999** | | | | | | | | |
| All trimesters | 3,280 | 1,030 | 100.0 | 7.7 | 18.7 | 39.8 | 25.0 | 8.8 |
| First | 3,310 | 562 | 100.0 | 6.7 | 17.7 | 39.8 | 26.0 | 9.8 |
| Second | 3,260 | 233 | 100.0 | 5.3 | 21.3 | 42.1 | 22.8 | 8.5 |
| Third | 3,200 | 208 | 100.0 | 12.3 | 19.2 | 38.0 | 24.7 | 5.8 |
| No prenatal care | 3,150 | 21 | 100.0 | 17.8 | 12.5 | 33.0 | 27.2 | 9.6 |
| Trimester unknown | * | * | * | * | * | * | * | * |
| **$5,000-$6,999** | | | | | | | | |
| All trimesters | 3,310 | 920 | 100.0 | 5.7 | 18.1 | 39.6 | 28.2 | 8.4 |
| First | 3,320 | 615 | 100.0 | 5.6 | 17.5 | 39.4 | 29.0 | 8.6 |
| Second | 3,270 | 151 | 100.0 | 6.8 | 14.7 | 46.0 | 25.6 | 6.8 |
| Third | 3,320 | 140 | 100.0 | 4.5 | 23.9 | 32.9 | 29.3 | 9.3 |
| No prenatal care | * | * | * | * | * | * | * | * |
| Trimester unknown | * | * | * | * | * | * | * | * |
| **$7,000 and over** | | | | | | | | |
| All trimesters | 3,330 | 973 | 100.0 | 5.5 | 19.6 | 38.0 | 28.3 | 8.6 |
| First | 3,340 | 718 | 100.0 | 5.2 | 17.8 | 39.5 | 28.5 | 9.0 |
| Second | 3,260 | 126 | 100.0 | 6.4 | 24.4 | 35.1 | 26.9 | 7.1 |
| Third | 3,220 | 115 | 100.0 | 6.7 | 25.8 | 29.3 | 30.9 | 7.3 |
| No prenatal care | * | * | * | * | * | * | * | * |
| Trimester unknown | * | * | * | * | * | * | * | * |
| **Unknown** | | | | | | | | |
| Total | 3,300 | 55 | 100.0 | 3.5 | 20.9 | 45.8 | 18.4 | 11.3 |

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Table 12. Average birth weight, number of births, and percent distribution, by birth-weight intervals according to family income in 1962 and number of visits: United States, 1963 legitimate live births

| 1962 family income and number of visits | Average birth weight | Births | Birth weight | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | Total | 2,500 grams or less | 2,501-3,000 grams | 3,001-3,500 grams | 3,501-4,000 grams | 4,001 grams or more |
| | Grams | Number in thousands | Percent distribution | | | | | |
| All incomes | | | | | | | | |
| All visits | 3,280 | 3,797 | 100.0 | 7.2 | 19.4 | 39.2 | 26.1 | 8.0 |
| No visits | 3,230 | 79 | 100.0 | 11.5 | 12.0 | 41.9 | 24.1 | 10.5 |
| 1-4 visits | 3,170 | 676 | 100.0 | 10.2 | 26.0 | 34.8 | 22.7 | 6.3 |
| 5-9 visits | 3,200 | 699 | 100.0 | 10.6 | 19.5 | 39.5 | 24.5 | 5.9 |
| 10-14 visits | 3,310 | 1,132 | 100.0 | 5.6 | 19.2 | 38.9 | 28.4 | 7.9 |
| 15-19 visits | 3,360 | 697 | 100.0 | 3.9 | 17.3 | 42.1 | 26.7 | 10.1 |
| 20 visits or more | 3,350 | 430 | 100.0 | 6.1 | 14.0 | 41.4 | 28.2 | 10.3 |
| Unknown | 3,310 | 83 | 100.0 | 5.2 | 22.4 | 39.9 | 22.9 | 9.6 |
| Under $1,000 | | | | | | | | |
| All visits | 3,180 | 819 | 100.0 | 10.4 | 21.6 | 39.2 | 23.2 | 5.6 |
| No visits | 3,420 | 35 | 100.0 | 5.9 | 10.4 | 39.9 | 29.0 | 14.8 |
| 1-4 visits | 3,130 | 217 | 100.0 | 12.8 | 26.1 | 34.7 | 20.5 | 5.9 |
| 5-9 visits | 3,120 | 203 | 100.0 | 13.7 | 20.0 | 42.0 | 20.4 | 4.0 |
| 10-14 visits | 3,230 | 198 | 100.0 | 8.2 | 21.2 | 36.6 | 28.5 | 5.5 |
| 15-19 visits | 3,230 | 104 | 100.0 | 5.9 | 21.3 | 43.6 | 21.7 | 7.6 |
| 20 visits or more | 3,200 | 52 | 100.0 | 10.0 | 15.4 | 49.4 | 23.4 | 1.9 |
| Unknown | * | * | * | * | * | * | * | * |
| $1,000-$4,999 | | | | | | | | |
| All visits | 3,280 | 1,030 | 100.0 | 7.7 | 18.7 | 39.8 | 25.0 | 8.8 |
| No visits | 3,150 | 21 | 100.0 | 17.8 | 12.5 | 33.0 | 27.2 | 9.6 |
| 1-4 visits | 3,150 | 206 | 100.0 | 11.0 | 23.0 | 40.1 | 21.3 | 4.5 |
| 5-9 visits | 3,220 | 225 | 100.0 | 9.0 | 20.4 | 37.2 | 27.4 | 6.1 |
| 10-14 visits | 3,330 | 284 | 100.0 | 5.2 | 16.4 | 43.5 | 26.3 | 8.6 |
| 15-19 visits | 3,320 | 174 | 100.0 | 6.6 | 20.6 | 40.4 | 20.0 | 12.4 |
| 20 visits or more | 3,440 | 112 | 100.0 | 5.5 | 10.9 | 35.5 | 31.8 | 16.3 |
| Unknown | * | * | * | * | * | * | * | * |
| $5,000-$6,999 | | | | | | | | |
| All visits | 3,310 | 920 | 100.0 | 5.7 | 18.1 | 39.6 | 28.2 | 8.4 |
| No visits | * | * | * | * | * | * | * | * |
| 1-4 visits | 3,160 | 115 | 100.0 | 9.0 | 29.2 | 28.2 | 26.7 | 6.9 |
| 5-9 visits | 3,220 | 162 | 100.0 | 8.4 | 17.4 | 43.8 | 26.1 | 4.4 |
| 10-14 visits | 3,360 | 313 | 100.0 | 5.0 | 17.6 | 36.6 | 30.8 | 10.0 |
| 15-19 visits | 3,390 | 193 | 100.0 | 2.1 | 14.2 | 44.7 | 29.5 | 9.5 |
| 20 visits or more | 3,330 | 118 | 100.0 | 5.2 | 16.1 | 43.2 | 25.9 | 9.6 |
| Unknown | * | * | * | * | * | * | * | * |
| $7,000 and over | | | | | | | | |
| All visits | 3,330 | 973 | 100.0 | 5.5 | 19.6 | 38.0 | 28.3 | 8.6 |
| No visits | * | * | * | * | * | * | * | * |
| 1-4 visits | 3,280 | 138 | 100.0 | 6.3 | 27.1 | 32.4 | 25.0 | 9.0 |
| 5-9 visits | 3,260 | 107 | 100.0 | 11.8 | 20.2 | 32.8 | 24.6 | 10.5 |
| 10-14 visits | 3,300 | 335 | 100.0 | 4.8 | 21.8 | 38.7 | 28.0 | 6.7 |
| 15-19 visits | 3,430 | 225 | 100.0 | 2.3 | 15.7 | 40.1 | 31.9 | 10.0 |
| 20 visits or more | 3,340 | 148 | 100.0 | 6.0 | 14.2 | 41.5 | 29.1 | 9.2 |
| Unknown | * | * | * | * | * | * | * | * |
| Income unknown | | | | | | | | |
| Total | 3,300 | 55 | 100.0 | 3.5 | 20.9 | 45.8 | 18.4 | 11.3 |

PLAINTIFFS' EXHIBIT NO. 99
U.S. Dept. of HEW, National Center for Health Statistics. Series 22, No. 12, Health Insurance Coverage for Maternity Care: Legitimate Live Births, U.S. 1964-1966 (GPO 1971)

NCHS

# Health Insurance Coverage for Maternity Care: Legitimate Live Births

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Among mothers of legitimate live births during 1964-1966 there was an annual average of 59 percent of mothers who had insurance to pay the physician bills for office visits or home calls during pregnancy, the physician bills for delivery of the baby, or the bills for hospital care at the time of delivery (table 2).

• • •

PLAINTIFFS' EXHIBIT NO. 100

EEOC Guidelines on Advance of Sick Leave

N-566
May 25, 1973

1. SUBJECT. GUIDELINES ON ADVANCE OF SICK LEAVE

2. PURPOSE. This Notice provides the CSC prescribed guidelines which the Personnel Division follows in acting on an employee's request for advance of sick leave. This Notice supplements EEOC Manual Section 911, Leave (November 15, 1968; revised July 25, 1969).

3. ORIGINATOR. Personnel Division, Office of Management.

4. GUIDELINES. U.S. Civil Service Commission regulations indicate that advance of sick leave should be granted in cases of serious disability only. A serious disability would, in most instances, require a period of hospital confinement. Accordingly, requests for advance of sick leave will be approved providing the following conditions exist:

(a) necessity for hospital confinement;

(b) reasonable expectation that the person will recover from the disability and return to full duty status;

(c) reasonable cause to believe the employee will remain with the Federal government for a sufficient period to repay the advance of sick leave;

(d) recommending official deems the granting of the advance of sick leave to be in the best interest of the Federal Government and requests approval.

Requests for advance of sick leave for reasons of pregnancy and confinement should be treated the same as requests for advance of sick leave in other cases of serious disability regardless of the maternity aspect.



The EEOC maternity leave policy permits up to six months of leave – sick, annual, leave without pay, or any combination thereof. In some instances, the time period can be extended.

5. REQUESTING ADVANCE OF SICK LEAVE. Requests for approval of the advance of sick leave are to be forwarded to the Personnel Division with a doctor's certificate attached. Failure to adhere to the above will result in the request for advance sick leave being denied.

6. OBSOLETE DATA. Memoranda from Ronald B. Krueger, Personnel Office, subject: Advanced Sick Leave (12/20/72) and Advance Sick Leave (1/26/73).

Approved: Yvette D. Butler
Director, Office of Management

Approved: T.G. Cody
Executive Director

PLAINTIFFS' EXHIBIT NO. 101

Department of Transportation, Office of the Secretary, Order re Absence and Leave 10-12-72 (OST 3600.1)

CHAPTER III SICK LEAVE

21. *ACCRUAL AND CREDIT*

a. *Amount of accrual*

(1) Full-time employees earn sick leave at the rate of 4 hours for each full biweekly pay period.

(2) Part-time employees with a regular tour of duty prescribed in advance earn sick leave at the rate of 1 hour for each 20 hours in a pay status not to exceed 4 hours in any full biweekly pay period.

b. *Maximum accrual.* There is no limitation as to the amount of sick leave that employees may accumulate. Unused sick leave remains to an employee's credit and is available for use in succeeding years.

22. *TRANSFER AND RECREDIT OF SICK LEAVE.* An employee's accrued sick leave will be transferred when the employee moves without a break in service between positions subject to the Leave Act. Unused sick leave will be recredited at the time of reemployment following a break in service of not more than 3 years. Sick leave will be transferred on an adjusted basis when an employee moves between different leave systems.

23. *USE AND GRANTING OF SICK LEAVE*

a. Sick leave is a form of "income protection insurance" provided by the Leave Act that permits employees to remain in a pay status while absent from duty because of illness, injury, pregnancy and confinement, or to obtain required medical, psychiatric, dental, or optical examination or treatment. It is also available to cover absences



from duty when an employee is required to give care and attendance to an immediate family member who has a contagious disease, or when through exposure to a contagious disease an employee's presence on duty would jeopardize the health of others.

b. Normally, employees absent because of illness will make reasonable efforts to notify their supervisors within a reasonable time, generally two hours after the time they are scheduled to report for duty. A medical certificate is normally required for absences of more than three work days and may be required for shorter absences because of illness when there is an indication of employee abuse of sick leave.

c. In cases of serious disability or ailment and when the exigencies of the situation require, not to exceed 30 days' sick leave may be advanced to a full-time employee.

d. Part-time employees with a regular scheduled tour of duty may be advanced sick leave on a pro-rata basis. For example, a part-time employee whose scheduled tour of duty is 20 hours per week, one-half that of a full-time employee, may be advanced 15 days of sick leave, one-half the advance that may be made to a full-time employee.

e. In determining if an advance should be made, the following guidelines must be observed:

(1) the absence is expected to last 5 or more consecutive workdays although the advance may be for less than the total absence;

(2) employees in a probationary or trial period may not be advanced more sick leave than they will earn in the remainder of their current service year unless it is determined that there is reasonable expectation that the employee's service will continue beyond the end of the year;

(3) the request for advanced sick leave must be in writing and accompanied by a medical certificate giving a diagnosis and a prognosis, including the physician's estimate of the date when the employee will be able to resume his regular duty; and

(4) the total amount of sick leave that may be advanced to an employee serving under a limited appointment or one which will be terminated on a specified date, may not exceed the amount that will be earned during the remainder of the appointment.

f. Advanced sick leave shall not be granted to an employee:

(1) who is absent because a member of the employee's immediate family has a contagious disease;

(2) who has filed an application for disability retirement; or

(3) who has signified an intention to resign or otherwise leave the Department.

g. Sick leave will be charged in one-hour units or multiples thereof. The minimum charge to sick leave for an absence is one hour.

## CHAPTER IV MATERNITY LEAVE

31. *USE OF MATERNITY LEAVE.* Childbirth, and recovery from childbirth, for all job-related purposes, are temporary disabilities and should be treated as such for granting sick leave. Maternity leave is a period of approved absence for pregnancy and confinement. Sick leave, annual leave, and/or leave without pay may be granted to cover a period of absence for maternity reasons. Employees are encouraged to advise their supervisors soon after pregnancy is determined so that there will be maximum opportunity to plan for the later absence on maternity leave. If there is a question as to the physical ability of an employee to perform her job without hazard to her health, a medical



certificate from the employee's attending physician should form the basis for a decision as to when maternity leave shall commence. Normally, the period of maternity leave is about fourteen weeks. This period generally begins about six weeks before the expected date of delivery and extends about eight weeks beyond the date of delivery. If incapacitation continues for more than eight weeks after delivery, the normal rules for granting sick leave apply.

32. *APPROVAL OF LEAVE.* The approval of a request for maternity leave is contingent on the employee's intention to return to duty, the kind and amount of leave required, the instructions governing leave for maternity reasons and the requirements of management.

33. *GRANTING SICK LEAVE.* An employee who is pregnant shall be granted the sick leave to her credit upon presentation of a statement from her physician certifying that she is incapacitated for duty. The medical certificate should indicate the date after which continued presence at work is expected to be detrimental to the employee's health, the expected date of confinement, and the date through which the physician considers the employee probably will be incapacitated for duty after confinement.

34. *ADVANCING SICK LEAVE.* Requests for advance sick leave associated with normal pregnancy and confinement usually should be denied. However, in the event of complications arising from pregnancy or childbirth, the approving official must apply standards of judgment similar to those governing granting of advance sick leave in other cases of serious disability regardless of the maternity aspect.

PLAINTIFFS' EXHIBIT NO. 102

1973-1976 GE-IUE
Settlement Agreement

MEMORANDUM OF SETTLEMENT

BETWEEN

GENERAL ELECTRIC COMPANY

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS (AFL-CIO)

General Electric Company, hereafter referred to as "Company" and the International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereafter referred to as "Union", acting for itself and on behalf of each of its Locals in settlement of their current collective bargaining negotiations, hereby agree as follows:

(1) The Union and Company agree upon a 1973-1976 Settlement Agreement, the provisions of which will be identical with the provisions of the 1970-1973 Settlement Agreement but with the modifications set forth in the appendices A, B, C, D and E attached hereto.

* * *

IN WITNESS WHEREOF the parties have set their hand and seal on this 6th day of June 1973

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO

David C. Fitzmaurice
John H. Stanton

GENERAL ELECTRIC COMPANY
John R. Baldwin
C. R. Grisey
William G. Aregall



Appendix B

GE-IUE Benefit Increases 1973-76

*Pensions*

full retirement at age 62, with a reduction of 6% at age 61, and 12% at age 60 (7/1/73);

* * *

a new supplemental payment of up to $150 per month for those retiring between ages 60 and 62 (7/1/73);

* * *

*Sick Pay*

2 days from 1 to 4 years of service–1 day now and 1 more day beginning 1/1/74;

accumulate and carry forward a maximum of 10 days (1/1/74);

use of absences other than personal illness (snow storms, floods, inventory days, etc.) (1/1/74).

*Death in Family*

expand paid absences to cover grandparent-in-law, brother-in-law, sister-in-law, stepparent, and grandchild (7/1/73).

*Insurance*

raise lifetime maximum medical benefits from $100,000 to $250,000 (7/1/73);

expand dental coverage to include gingival curretage (7/1/74);

* * *

*Income Extension Aid*

can be used to supplement unemployment compensa-

tion in event of layoff to bring total IEA and UC to 50% of normal weekly pay (7/1/73);

special continued aid to older employees (55 to 62) with 10 years of service affected by plant closings (7/1/74);

life and medical insurance continued for one year instead of three months in plant closings (7/1/74).

*Military Pay Differential*

unused summer encampment time can be used to cover weekend duty (7/1/73);

pay for holiday which occurs during military encampment period (7/1/73);

use Federal fiscal year for annual encampment differential (7/1/73).

* * *

*Jury Duty*

payment for a holiday that falls during jury duty (7/1/73).

*Savings and Security Program* (1/1/76)

educational withdrawals – expand definition of "child" to include child living in home of employee;

educational withdrawals – include schools for handicapped children;

optional additional unmatched savings up to 3% more (i.e. 3% beyond the 6% or 7% present matched maximums);

Payroll Deduction Savings (the individual's own savings) may be put into Retirement Option – as well as the Company's Matching Payment;

* * *



Income Extension Aid

ARTICLE XXII – IUE AGREEMENT

(Weekly Payment Option – Supplementing Unemployment Compensation to 50% of Pay)

Delete Subsection (3) (1) (a) covering weekly payments after exhaustion of unemployment compensation and substitute the following:

"(a) The employee, while on layoff from the Company and so long as he is unemployed, may elect to receive a weekly payment from the Income Extension Aid payable to him, in such amounts and upon such conditions as set forth in this subsection. Payment may begin only after a one week waiting period following the commencement of layoff.

Prior to the exhaustion of his entitlements to federal and state unemployment compensation benefits, the weekly payment shall be in that amount (if any) which, when added to the total federal and state unemployment compensation benefits received for that week, equals one-half of his weekly pay as defined in Section 2, provided however, that payment shall be made only if the employee has applied for and received unemployment compensation benefits for that week and only if he has provided the Company with satisfactory proof of the total of such benefits received for the week.

After exhaustion of his entitlement to federal and state unemployment compensation benefits, the weekly payment shall be in that amount which equals one-half of his weekly pay as defined in Section 2.

* * *

Modify Article XXII, Section 4 to add (5) effective July 1, 1974, to read:

(5) "In lieu of any other benefits under this Section, an employee whose employment is terminated because of a plant closing and who was age 55 or more at the time of such plant closing and had at least 10 years continuous service at such time, may elect to receive, no later than the date of the plant closing, a monthly Special Continued Income Extension Aid benefit.

* * *



## SICK PAY

## ARTICLE XXVII

1. An hourly employee with one or more years of continuous service, absent because of (a) personal business, (b)* a temporary layoff as a result of fire, snow storm, power failure or physical inventory, or (c) personal illness for which weekly disability benefits are not payable under the General Electric Insurance Plan, or under Workmen's Compensation, will, with the Manager's approval, receive Sick Pay for each absence of a half day or longer, up to the number of days applicable in accordance with the following schedule:

| Continuous Service | Maximum Days of Sick Pay for Each Calendar Year |
|---|---|
| 1 through 4 years | 1 day (effective 7/1/73) |
| 1 through 4 years | 1 day (effective 1/1/74) |
| 5 through 9 years | 2 days |
| 10 through 14 years | 3 days |
| 15 through 24 years | 4 days |
| 25 years and over | 5 days |

2. *Accumulation of Sick Pay:**

An employee who has any unused Sick Pay remaining at the end of a calendar year will have such unused Sick Pay, up to a maximum of ten (10) days, carried forward to the following calendar year for use in the event of approved absences.

APPENDIX E

June 6, 1973

Mr. John H. Shambo
GE-IUE Conference Board
15 East 41 Street
New York, New York 10017

Dear Mr. Shambo:

In compliance with the Union's request, the Company agrees to indemnify the Union against any liability that may arise from the application of that part of the 1970-1973 and 1973-1976 GE-IUE Pension and Insurance Agreements which excludes absences due to pregnancy or resulting childbirth or to complications in connection therewith from benefits under weekly sickness and accident insurance.

Very truly yours,

John R. Baldwin

AGREED TO



PLAINTIFFS' EXHIBIT NO. 103

Letter GE to IUE dated June 6, 1973, agreeing to indemnify IUE

(Plaintiffs' Exhibit No. 103 is Appendix E to the 1973-1976 GE-IUE Settlement Agreement which is Plaintiffs' Exhibit No. 102 and is printed as part of that exhibit at p. *supra*.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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**No. 74-1589**

GENERAL ELECTRIC COMPANY,
*Petitioner*,

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.

---

**No. 74-1590**

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,
*Petitioners*,

v.

GENERAL ELECTRIC COMPANY.

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**On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR PETITIONER, GENERAL ELECTRIC COMPANY

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THEOPHIL C. KAMMHOLZ
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No. 74-1589

GENERAL ELECTRIC COMPANY,
*Petitioner*,

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.

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No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,
*Petitioners*,

v.

GENERAL ELECTRIC COMPANY.

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**On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR PETITIONER, GENERAL ELECTRIC COMPANY

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## OPINIONS BELOW

The opinion of the court of appeals (Supp. Br. Jt. Pet. 1a-14a)[1] is reported at 519 F.2d 661. The opinion of the District Court for the Eastern District of Virginia (Jt. Pet. 2a-38a) is reported at 375 F. Supp. 367.

## JURISDICTION

On June 17, 1975, all parties in the court below filed a joint petition requesting that a writ of certiorari issue in advance of the judgment of the court of appeals.[2] Thereafter, on June 27, 1975, the court of appeals issued its judgment (Supp. Br. Jt. Pet. 15a-16a), affirming the judgment of the district court. On October 6, 1975, the Court granted the joint petition for certiorari. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether the exclusion of pregnancy-related disabilities from coverage under an employer disability

[1] References designated "Supp. Br. Jt. Pet." are to the Supplemental Brief Of All Parties To The Joint Petition For A Writ Of Certiorari; references designed "Jt. Pet." are to the latter petition.

The printed Single Appendix is in four volumes and is paginated consecutively; references thereto will, for exemple, be as follows: "I App. 36."

[2] The parties to the joint petition for certiorari stated therein (p. 1, n. 1) they had agreed, subject to the Court's approval, that General Electric Company would be treated as petitioner with respect to the briefing and oral argument in this Court if certiorari were granted. The parties have been informed by the Court's clerk to proceed as thus agreed.



income protection plan constitutes sex discrimination proscribed by Title VII of the Civil Rights Act of 1964, as amended.

## STATUTE INVOLVED

The relevant statutory provision is Section 703 of Title VII of the Civil Rights Act of 1964, as amended (78 Stat. 253, 86 Stat. 103, 42 U.S.C. § 2000e, *et seq.*), which in pertinent part provides as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex
>
> . . . .
>
> * * * *

## STATEMENT

In March 1972, a complaint was filed against petitioner General Electric Company ("GE") in the United States District Court for the Eastern District of Virginia, in which it was in substance alleged that GE provides disability insurance for all its employees covering non-occupational sickness and accidents, but excluding disabilities arising from pregnancy, miscarriage or childbirth; that each of seven named individual plaintiffs[3] was pregnant during the years

[3] Plaintiffs in the action were seven named female persons; International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC ("the IUE"); and the latter's affiliate, Local 161, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC ("Local 161"). The seven

1971 or 1972, and made claim for sickness and accident insurance benefits during the period of absence from work as the result of pregnancy; and that GE failed to satisfy such claims, and thereby, in violation of Title VII of the Civil Rights Act of 1964, discriminated against the named individual plaintiffs because of their sex. The district court determined that the suit could be maintained as a class action on behalf of all GE female employees, whether represented by plaintiff unions, by other unions, or whether unrepresented (I App. 118, 128-31; Jt. Pet. 4a).

The case was tried before the district court on July 24, 25, and 26, 1973. On April 13, 1974, the district court rendered an opinion in which it held that GE's failure to pay sickness and accident benefits to plaintiffs and the members of the class they represent for work absences due to pregnancy-related disabilities constitutes sex discrimination in violation of Title VII (Jt. Pet. 2a-38a).[4]

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individually named plaintiffs are present or former hourly paid production employees at GE's plant in Salem, Virginia. The IUE, and/or a number of its Locals, is the collective bargaining representative of hourly-paid production and maintenance employees at a number of GE plants in the United States. Plaintiff Local 161 is a joint collective bargaining representative, with the IUE, of the hourly-paid production and maintenance employees at GE's Salem Plant (I App. 18-19).

[4] The district court entered an order, *inter alia*, enjoining GE from discriminating against its female employees by failing to pay weekly disability benefits for absences from work due to pregnancy-related disabilities, and stating that monetary judgments, in amounts to be determined by the court, would be entered in favor of the affected female employees (Jt. Pet. 76a). On May 9, 1974, the district court entered an order (Jt. Pet. 50a) staying enforcement of its injunction.



On June 27, 1975, the court of appeals, 2-1, affirmed the district court's judgment (Supp. Br. Jt. Pet. 1a-14a).

## I. THE FACTS

### A. GE's Insurance Coverage

As part of a comprehensive insurance package, which provides life insurance and insurance against medical, surgical, and hospital expenses, GE also provides weekly non-occupational sickness and accident insurance for all its employees in an amount equal to 60 percent of an employee's normal straight-time weekly earnings up to a maximum weekly benefit of $150. Benefit payments are paid to employees who become totally disabled; such payments start with the eighth day of an employee's total disability (or with the first day of an employee's confinement in a hospital as a bed patient, if earlier), and continue during the employee's total disability up to a maximum of 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related cause or causes. Benefit payments are not payable, however, for any absence due to pregnancy or resulting childbirth or to complications in connection therewith (III App. 1064-65).

GE's weekly non-occupational sickness and accident insurance is included in a collective bargaining agreement with plaintiff IUE and its affiliated Locals and applies to employees represented by those unions. The insurance is also applicable to certain other GE employees who are represented by unions other than the IUE and its affiliated Locals pursuant to collective bargaining agreements between GE and such unions (I App. 175, 193-95).

### B. Reasons Underlying GE's Pregnancy Exclusion

A number of reasons underlie GE's decision to exclude pregnancy from coverage under the sickness and accident insurance it provides employees: (1) the insurance is intended to take care of disabilities resulting from sickness or accident—that is, disabilities caused by sudden and unforeseen events—and pregnancy, which is voluntary and subject to planning, is neither a sickness nor an accident (II App. 595); (2) GE's insurance plan follows standard insurance practice which, for the most part, does not cover pregnancy under sickness and accident insurance (II App. 595); (3) pregnancy coverage would not be a reasonable or rational use of benefits money, in that it would be subject to abuse resulting from prolonged absences because of pregnancy, and would likely be an incentive to an increased number of pregnancies (II App. 595-96); (4) because females are absent from work more frequently than are males and have absences of greater duration, female employees receive a greater proportion of sickness and accident benefits than do male employees,[5] and the inclusion of pregnancy coverage would accentuate such imbalance (II App. 600); (5) approximately 40 percent of GE's female employees who have babies do not return to work, and therefore to provide them with sickness and accident benefits would, in effect, be according them a form of

[5] In 1970, GE's average cost per insured employee of total benefits paid under sickness and accident insurance was $82.57 for females and $45.76 for males; in 1971, the average cost was $112.91 for females and $62.08 for males (I App. 198-99).



severance pay not available to other employees (II App. 600-601).[6]

### C. Insurance Industry Practice; The Cost of Pregnancy Coverage

Uncontradicted actuarial testimony [7] concerning insurance industry practice and experience with respect

[6] In 1970, of 3,548 pregnancies among GE female empolyees (3,401 of which resulted in childbirths, and 147 of which were aborted or resulted in miscarriages), 1,956 women returned to work after pregnancy-caused absences and 1,592 did not return; in 1971, of 2,781 pregnancies (2,601 of which resulted in childbirths, and 180 of which were aborted or resulted in miscarriages), 1,634 women returned to work after pregnancy-caused absences and 1,147 did not return (I App. 191, 253-54).

Statistics reflecting general turnover of employees in GE plants are in contrast to the 40 percent non-return rate among GE females who have babies: a study of the 1972 employee turnover in seven GE plants selected for their large female population (GE Exh. 41A, II App. 570-74, III App. 840-43) revealed that the female "quits as percentage of total employment" was 18 percent, as compared with 11 percent for the male employees. A second study of four plants (GE Exh. 41B, II App. 570-74, III App. 844-45) showed a 10 percent quit rate for females as compared with a 6 percent quit rate for males. (In accordance with the local rules of the district court, the parties submitted to the court in advance of trial lists of proposed exhibits they intended to offer. Although these lists have not been reproduced in the joint appendix, their filing dates are noted in the Docket Entries (I App. 6, 8, 12). At the start of the trial, the court ruled upon plaintiffs' exhibits (I App. 309-10). Subsequently, the court admitted in evidence defendant GE's offered exhibits (II App. 451)).

[7] By actuary Paul Jackson, a Fellow in the Society of Actuaries. Mr. Jackson has worked in the area of disability in-

to disability insurance demonstrated that approximately 40 percent of the workforce in the United States under age 65, or some 32,000,000 employees, is covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 percent of the plans provide 13 weeks benefit coverage; 50 percent provide coverage for 26 weeks; and only 5 percent provide coverage for 52 weeks (II App. 528; GE Exh. 42, III App. 846-48). Only 40 percent of these plans, covering about 12,800,000 employees, provide a pregnancy benefit, and such coverage is almost always limited to six weeks (II App. 529). At the time of trial, moreover, the cost per unit of benefit under the existing insurance for a female employee was approximately 170 percent of that for a male employee even where no maternity benefit was provided; where a six-weeks maternity benefit was provided, the female cost per unit of benefit ran to 210 percent of the male employee cost; and the latter percentage increased to 300-330 percent of the male employee cost per unit of benefit where full maternity coverage was provided (II App. 536).

According to actuarial calculations, the annual cost of adding maternity benefits to the sickness and accident disability income plans in effect in the United States at the time of trial would be $1,353,000,000 [8] (II App. 537; GE Exh. 42, III App. 848).[9]

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surance since 1956. His *Curriculum Vitae* is found in GE Exh. 51, II App. 522-23, 526. A list of his published writings is found in GE Exh. 47, III App. 850-55.

[8] This figure was predicated upon plans then existent in the United States (II App. 537).

[9] Another actuarial study in evidence in the case put the additional cost per year for a 20 weeks maternity benefit at



There are features unique to pregnancy claims which, from an actuarial standpoint, increase the relative cost of pregnancy insurance coverage: First, the fact that income loss will occur at a predictable time "well off in the future" allows for disability "planning" and opens the possibility of claim abuse (II App. 532-33). Second, pregnancy, unlike most sickness and accidents, is not wholly beyond the control of the insured (II App. 533). Third, the duration of ordinary disability and maternity claims is different, the median duration of the former being two weeks and the latter 13 weeks (II App. 533).[10] Fourth, concern for the child and initial child care requirements act as incentives for the mother to put off resumption of work (II App. 533). Finally, in maternity cases, "approximately half of the female employees who have children do not return to work,"

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$1,005 million; for a 25 weeks benefit at $1,313 million; and for a 30 weeks benefit at $1,620 million (GE Exh. 13, II App. 737-38). This study was made by Alexander J. Bailie, a Fellow in the Society of Actuaries since 1960, who is the actuary in charge of actuarial functions pertaining to group insurance for Metropolitan Life Insurance Company.

[10] GE's experience regarding the duration of pregnancy absences *prior to the date of delivery* (exclusive of data concerning ectopic pregnancies, caesarian births, abortions, and miscarriages) is as follows: in 1971, when there were 2,476 pregnancy absences, some 361, or only 15 percent, were less than 5 weeks duration; some 718, or 29 percent, were between 8 and 11 weeks duration; and some 558, or some 22 percent, were between 12 and 15 weeks duration. In 1970, when there were 3,261 pregnancy absences, some 395, or only 15 percent, were less than 5 weeks duration; some 983, or 30 percent, were between 8 and 11 weeks duration; and some 710, or 21 percent, were between 12 and 15 weeks duration (I App. 199-200).

whereas generally 100 percent of those employees who recover from short term disabilities return to work (II App. 532).

### D. The Unique Nature of Pregnancy

#### 1. *Pregnancy Is Not A Sickness.*

Three medical experts, Doctors Forrest, Hellegers, and Wilbanks, testified in the case.[11] All agreed that pregnancy is a "normal physiological function," which is not a sickness,[12] disease, or illness (I App. 345, 362, II App. 488, 492, 674, 685-86). For example, Dr. Hellegers testified that the most common definition of disease is "that which, if not corrected, would continue leading to further disability and ultimately to death" (II App. 458). Contrasting pregnancy and disease, Dr. Hellegers testified graphically (II App. 488):

> I seem to recall saying that I thought it would be strange if the human race survived on the basis of a disease.

---

[11] Dr. David Forrest, a Richmond physician who specializes in obstetrics and gynecology (I App. 313-14, 315), and Dr. Andre Hellegers, professor at Georgetown University, who practices in the field of obstetrics (II App. 452-53, 455), testified on behalf of plaintiffs. The testimony of Dr. George D. Wilbanks, Chairman of the Department of Obstetrics and Gynecology, Rush Presbyterian-St. Lukes Medical Center, Chicago, and a practicing obstetrician and gynecologist (II App. 670-77, 678), was presented by way of deposition on behalf of GE.

[12] Dr. Wilbanks testified that the period after childbirth was not a period of illness; it was rather "a period of return of the altered state of physiology back to the more usual state . . . to the pre-pregnancy state" (II App. 686).



Dr. Wilbanks testified that the term " 'disease' would be the medical term and 'illness' and 'sickness' would be the lay terms for the similar condition," and that in general the terms are "synonomous" (II App. 679). He also testified that "most women probably do benefit from having a child" (II App. 686).

Approximately 10 to 15 percent of women have complications associated with pregnancy (I App. 344, II App. 492),[13] but not all such complications require a women to stop work (I App. 323-24): only 1 percent to 2 percent of the women with complications have those that could be classified as "major" (I App. 344), and of this very small percentage only some require hospitalization (I App. 344-45).

#### 2. *Pregnancy Is A Voluntarily Induced And Maintained Condition.*

Pregnancy can be avoided through the use of contraceptive devices. Dr. Wilbanks testified: "I would

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[13] Ten percent of all pregnancies terminate in miscarriage or "spontaneous abortions" (II App. 461). Ninety percent occur prior to the thirteenth week of pregnancy (II App. 493). Miscarriages are usually not disabling, nor is hospitalization usually required: "by and large" most are an "in and out phenomenon within one day" (II App. 492).

The second category of "complications" are those preexisting conditions or underlying tendencies that are aggravated or brought out by the weight gain which routinely accompanies pregnancy (II App. 456-57, 495-98). At least one half do not require hospitalization (II App. 499). Usually the treatment is, like the treatment of the disease itself, unaffected by the pregnancy (II App. 468).

The third category are those complications which result simply from the presence of the fetus or placenta (I App. 351-53). At least a half of these do not require hospitalization (I App. 353-54, II App. 499).

say that we really have a pretty much unlimited method of contraception or virtually foolproof methods of contraception if you use some type of contraceptive" (II App. 690-91); the pill, Dr. Forrest said, "reduce[s] the chances of pregnancy to practically zero" (I App. 342); Dr. Hellegers testified that considering the way the population uses the pill, there would be "one pregnancy in 100 years of exposure to intercourse" (II App. 477); and Dr. Wilbanks stated that the pill, if taken properly, "is virtually a hundred percent" effective (II App. 690). Dr. Forrest, moreover, testified that the pill is commonly regarded in the obstetrics community as being safer than childbirth (I App. 342-43).

The IUD is a medically acceptable alternative method of contraception. As to the IUD, Dr. Wilbanks testified that it "perhaps is a little less effective" than the pill, noting, moreover, that new models are even more effective (II App. 690). Dr. Hellegers testified that the IUD failure rate can be reduced to about "four per 100 years of exposure" to intercourse (II App. 478)."[14]

[14] Dr. Wilbanks testified that in addition to birth control pills and intrauterine devices, other "standard methods" of contraception are the diaphragm, the vaginal diaphragm, the condom, creams, foam, or rhythm (II App. 690). The use of these latter methods, he testified, resulted in "relatively little if any serious problem" (II App. 716). Moreover, Dr. Wilbanks testified that "rhythm can be used by certain couples very satisfactorily . . ." (II App. 709). Dr. Hellegers also testified that alternative methods of contraception such as "barrier methods, diaphragm, foams, condoms, and so forth . . ." are available (II App. 478). Dr. Hellegers made reference to a study on the use of the diaphragm among a group in Indianapolis wherein it was found that there was only a two percent failure rate (II App. 478).



There is also a back-up method to avoid pregnancy —the "morning after" pill. The "morning after" pill has been accepted by the Food and Drug Administration, and it is quite effective if used properly (II App. 690). In addition, there is a safe, convenient, and widely used method to terminate pregnancy —abortion. Dr. Wilbanks testified that under proper conditions and safeguards abortions are safe and effective (II App. 690). One method, menstrual extraction, requires just a few minutes, and is commonly called the "lunch hour treatment" (II App. 691).

### E. The Historic EEOC Position On The Exclusion Of Pregnancy Coverage From Disability Insurance Plans

Although the current EEOC sex discrimination guideline relating to pregnancy and childbirth disability provides that pregnancy-caused disabilities should be covered by disability insurance plans (29 C.F.R. 1604.10), this has been the EEOC position only since April 1972. See 37 Fed. Reg. 6835. Prior to the latter date, and beginning in November 1965, the EEOC issued, and periodically amended, a series of guidelines on discrimination because of sex, but such guidelines were completely silent with respect to the treatment of disabilities resulting from pregnancy or childbirth. See 30 Fed. Reg. 14926; 33 Fed. Reg. 3344; and 34 Fed. Reg. 13367.

In 1966, the General Counsel of the EEOC, Charles Duncan (II App. 654-55), issued a series of opinion letters which stated: (1) that the EEOC did not regard pregnancy to be comparable to illness or injury; (2) that an employer need not provide the same fringe benefits for pregnancy as are provided

for illness; and (3) that a disability insurance benefit plan that excluded pregnancy coverage was not discriminatory (GE Exh. 12, II App. 732-36).[15]

Mr. Duncan testified in this case without contradiction: (1) that the letters reflected the official 1965-1966 EEOC policy and position arrived at after thorough discussion and consideration, including an inquiry into pertinent legislative history underlying Title VII; and (2) that, in the course of its 1965-1966 deliberations, the EEOC discussed and considered adopting a policy reflected in the current guideline on the treatment of pregnancy-caused disabilities under disability insurance plans, but deliberately rejected this alternative (II App. 656-57, 661-63, 664-65).[16]

One of the opinion letters issued by Mr. Duncan as EEOC General Counsel was dated October 17, 1966, was released by the EEOC on December 9, 1966, and was published in CCH Employment Practices Guide under date of December 21, 1966. It stated in part (II App. 720-22):

> You have requested our opinion whether the above exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.
>
> In a recent opinion letter regarding pregnancy, we have stated, "The Commission policy in this area does not seek to compare an employer's

[15] The letters are quoted, in part, *infra*, pp. 42-43.

[16] Mr. Duncan's testimony is summarized at greater length, *infra*, pp. 43-44.



> treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees." Therefore, it is our opinion that according to the facts stated above, a company's group insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.

CCH continued to publish this letter in Employment Practices Guide until May 1971 (II App. 590), with a summary of the letter being published on April 22, 1971 (GE Exh. 5, II App. 722).

### F. GE's Determination That The Exclusion Of Pregnancy Was Lawful

After Title VII was enacted, GE's Labor Relations Counsel, Thomas F. Hilbert, Jr., undertook a review of GE's contracts and practices, including the pregnancy exclusion in its sickness and accident policy, to seek out "any potential problem" (II App. 586-87). He concluded that the exclusion did not violate Title VII, basing his conclusion on: (1) his reading of the October 17, 1966, letter of the EEOC General Counsel, *supra*, p. 14 (II App. 588); (2) prior acceptance of the exclusion by state agencies in the face of state anti-discrimination statutes (II App. 587); and (3) sex discrimination guidelines issued by Federal agencies other than the EEOC (II App. 590-91).

## II. THE DISTRICT COURT'S OPINION

In holding that GE's failure to pay sickness and accident benefits to plaintiffs and the members of the class they represent for work absences due to pregnancy-related disabilities constitutes sex discrimination in violation of Title VII (Jt. Pet. 2a-38a), the district court found: (1) pregnancy, *per se*, is not a disease, and is "perhaps most often voluntary" (Jt. Pet. 20a); (2) the exclusion of pregnancy-related disabilities from coverage under GE's sickness and accident insurance coverage is "inextricably sex-linked" in that "it excludes from coverage a unique disability which affects only members of the female sex" (Jet. Pet. 29a, 31a); (3) the EEOC's construction of Title VII, as manifested in its 1972 sex guideline, "in the absence of evidence to the contrary" expressed the will of Congress (Jet. Pet. 28a);[17] and (4) the payment of pregnancy benefits would increase GE's sickness and accident costs by a large but "at this time" indeterminable amount (Jt. Pet. 23a), but that such increased costs were neither a relevant argument nor a defense to sex discrimination (Jt. Pet. 31a).

## III. THE COURT OF APPEALS' OPINION

The majority of the court of appeals expressly adopted the EEOC's construction of Title VII and

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[17] In so finding, however, the district court's decision completely ignored the fact that the 1972 guideline constituted a reversal of the EEOC's long-standing prior construction of the statute; nor did the district court advert in any way to the testimony (see *supra*, p. 14) of Mr. Duncan, EEOC General Counsel during 1965-1966, explicating such prior construction.



held that the pregnancy exclusion from GE's disability insurance was "inextricably sex-linked" and consequently violative of Title VII (Supp. Br. Jt. Pet 4a). In the view of the majority, the holding in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), that disparity in treatment between pregnancy-related and other disabilities was not sex discrimination, was not controlling in this case (Supp. Br. Jt. Pet. 7a-11a). *Geduldig*, the majority stated, was decided under the equal protection clause of the Fourteenth Amendment and was, therefore, not applicable in a Title VII context (Supp. Br. Jt. Pet. 7a).

Judge Widener, in dissent, deemed the majority decision as precluded by this Court's opinion in *Geduldig*, which he regarded as written "not in a vacuum and not with self-imposed blinkers," but rather with "an eye to Title VII cases certain to come" (Supp. Br. Jt. Pet. 14a). Noting that in *Geduldig* the Court had stated, *inter alia*, that there was a lack of identity between the exclusion of pregnancy from a disability insurance plan and gender as such, he viewed *Geduldig* as holding that such an exclusion did not constitute sex discrimination (Supp. Jt. Pet. 13a). Such a non-discriminatory exclusion therefore, Judge Widener said, could "no more support a finding of discrimination under Title VII than under the equal protection clause," because the "test for validity under Title VII is not different from the test of validity under the fourteenth amendment" (Supp. Br. Jt. Pet. 13a). He further noted that the application of different tests for discrimination under Title VII and the equal protection clause was illogical and would generate inconsistent results (Supp. Br. Jt. Pet. 14a).

Concluding, Judge Widener stated that "Title VII seeks to equalize opportunity, not to create an advantage for either men or women. If Congress wishes to legislate in favor of pregnant women, I see no constitutional impediment. . . . But, I submit, Congress did not so undertake in Title VII" (Id.).

## SUMMARY OF THE ARGUMENT

### I.

A. The threshold inquiry in this case is whether the exclusion of pregnancy-related disabilities from coverage under a private employer's sickness and accident insurance plan for its employees constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), established that the question should be answered negatively. In *Geduldig*, the Court said that there is a "lack of identity" between gender and the exclusion of pregnancy from disability coverage, and held that a pregnancy exclusion from a state (California) disability insurance plan for the employees of private employers was not sex discrimination so long as the exclusion was not discriminatorily motivated. *Geduldig* further held that the pregnancy exclusion in California's plan did not violate the equal protection clause of the Fourteenth Amendment. In this latter connection, the Court noted the presence of a number of considerations which made California's plan rationally supportable, namely, that the plan was established "in accordance with insurance concepts," and that California was concerned with maintaining the fiscal integrity of its program and avoiding harmful cost consequences. The Court noted further that there was no record



evidence showing that the selection of the risks insured under the plan worked to discriminate against any definable group or class in terms of aggregate risk protection derived by that group or class from the program.

The majority of the court of appeals did not come to grips with the proposition, made clear in *Geduldig*, that there is a lack of identity between gender and the exclusion of pregnancy from disability coverage; instead, the majority summarily, and erroneously, dismissed *Geduldig* as a controlling precedent on the ground that *Geduldig* was a constitutional decision which was not decisive in the Title VII context here involved. However, as Judge Widener stated in his dissent below, because *Geduldig* established that the exclusion of pregnancy from disability insurance coverage for employees does not constitute discrimination on the basis of sex, it is irrelevant whether Title VII has a broader sweep than does the equal protection clause. Furthermore, as Judge Widener also stated, the test of validity with respect to sex discrimination is the same under both Title VII and the equal protection clause. There is, moreover, no language of limitation or reservation in *Geduldig*, a fact which indicates that this Court intended that the case should be read as controlling in the context of both the equal protection clause and Title VII. Finally, the decision of the majority of the court of appeals would bring about the incongruous result of allowing the exclusion of pregnancy under a state disability insurance plan for the employees of private employers, but would require the state to provide pregnancy coverage under a disability benefit plan for its own employees.

B. There is nothing either in Title VII's language or in its legislative history to support the view that it is unlawful to exclude pregnancy from disability insurance coverage. Thus there is an absence of specific legislative history underlying the sex discrimination prohibition provision contained in Title VII; moreover, what relevant legislative history there is with respect to Title VII indicates that such a pregnancy exclusion is not unlawful. Also relevant in the construction of Title VII is the Congressional legislative history underlying the proposed Equal Rights Amendment ("ERA") to the Constitution. That legislative history shows that the ERA would not prohibit a reasonable classification which relates to a physical characteristic unique to one sex. A pregnancy exclusion such as one on which this case centers would therefore be valid under the ERA, and, consequently, to treat it as sexually discriminatory under Title VII would be anomalous.

C. The majority of the court below erred in attaching weight to the EEOC's current guideline which requires that pregnancy-related disabilities be considered as such under temporary disability insurance plans. That guideline, issued in 1972, reversed the EEOC's previous policy and position which was first enunciated and issued in 1966, and which remained in effect thereafter until 1972. Charles Duncan, the EEOC's General Counsel in 1965-1966, testified in this case without contradiction that the EEOC's original position on the treatment of pregnancy-caused disabilities was arrived at by the Commission after thorough discussion and deliberation, in the course of which the Commission considered the legislative history undelying Title VII with respect to sex discrimination.



The EEOC's current guideline on pregnancy-related disabilities is not entitled to deference because: (1) it was issued seven years after Title VII and is, therefore, not a contemporaneous construction; (2) as shown, it is inconsistent with the previous, contemporary and thoroughly considered, EEOC policy; (3) it is directly contrary to the position of other federal agencies which have dealt with the identical subject matter; (4) it is not only unsupported by expressions of specific legislative intent relating to Title VII, but it is opposed by the relevant Congressional intent underlying the Equal Rights Amendment; and (5) there are, in the words of *Espinoza* v. *Farah Manufacturing Company*, 414 U.S. 86, 94-95 (1973), ". . . 'compelling indications' [that the guideline is] . . . wrong." Accordingly, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), is not a dispositive precedent in this case. *Griggs* accorded "great deference" to the EEOC guidelines dealing with *racial* (as distinguished from *sexual*) discrimination, but only after a thorough review of the legislative history underlying Title VII's race discrimination prohibition—a history which clearly supported the EEOC's constructon. By contrast, no such comparable legislative history underlies Title VII's sex discrimination prohibition.

## II.

The objective of Title VII, as made plain in *Griggs*, *supra*, is to eliminate practices, procedures, and policies which deny individuals job or promotion opportunities because of their race, sex, religion, or nationality. Less significant, under Title VII are other matters, like employee benefits, which relate,

not to job or promotion opportunities, but rather to the incidents of the job. Title VII's sex discrimination prohibition must be realistically interpreted, and the interpretation must recognize the distinction between job and promotion opportunities, on the one hand, and job incidents, on the other. The distinction is one of degree—especially so in this case which involves only one aspect of the many insurance benefits that GE provides for its employees. *Geduldig, supra*, implicitly recognized these principles in upholding the legality of the pregnancy exclusion there involved on the ground that the state had demonstrated, on the basis of cost and other considerations, that the exclusion was rationally supportable. As in *Geduldig*, there are sound business considerations that justify and rationally support GE's pregnancy exclusion.

A. Employers (and unions) seek to achieve a balanced benefits package, and to utilize benefits dollars in the best way to satisfy overall employee needs. One reason for GE's decision to exclude pregnancy is that the payment of a pregnancy benefit would not be a rational and prudent use of benefits money. Weekly sickness and accident insurance is intended to soften the blow to employees of an unintended sickness or accident; pregnancy, however, is a voluntarily induced and maintained condition which is not a sickness, and therefore the payment of a pregnancy benefit would not satisfy the purpose of the insurance. The payment of a pregnancy disability benefit would be at odds with GE's objective of using benefits money rationally and prudently for these additional reasons: (1) a pregnancy benefit would be particularly subject to abuse because of



the mother's concern for her fetus and her newborn child; (2) as approximately 40 percent of GE's female employees who have babies do not return to work, a pregnancy benefit would be tantamount to a grant of severance pay to such employees; (3) the payment of a pregnancy benefit would be likely to cause a demand for paid childcare leave for male employees, and would further accentuate an existing imbalance in favor of GE's female employees (compared to male employees) in the receipt of sickness and accident benefits; and (4) the non-payment of a pregnancy benefit adversely affects only a relatively small number of GE's female employees, whereas its payment would disadvantage the larger number of female employees.

Another important consideration underlying GE's pregnancy exclusion is the fact that GE's insurance plan follows standard insurance practice which, for the most part, does not cover pregnancy under sickness and accident insurance. Under such insurance, even where no pregnancy benefit is provided, the cost per unit of benefit for a female employee is considerably greater than that for a male employee; were a full pregnancy benefit to be provided, the cost for the female benefit would be 300-330 percent of that for the male benefit. The annual cost, in 1973, of adding maternity benefits to the disability insurance plans then in effect in the United States was $1,353,000,000.

Because GE has followed insurance practice and concepts in excluding pregnancy, and because it has sought to distribute its available benefits money in an equitable manner between its male and female

employees, GE's pregnancy exclusion is "rationally supportable" under *Geduldig*—a case which, in the context of a pregnancy exclusion, expressly recognized the relevancy of insurance concepts, "costs," and the rational distribution of "available resources" out of which disability benefits are paid. In sum, GE's pregnancy exclusion is entirely justifiable on the basis of important reasons relating to the operations of GE's business and the benefits package it provides to all its employees.

B. As stated, GE's decision to exclude pregnancy-related disabilities from coverage under its sickness and accident plan resulted from a careful weighing of crucial business considerations. That such considerations were present and underlay its actions shows that GE did not adopt its pregnancy exclusion "as a mere pretext designed to effect an invidious discrimination against" its female employees. *Geduldig, supra.* The absence of pretextual motivation is further shown by the fact that GE considered and relied upon validating governmental interpretations (state and federal) when it decided, after the enactment of Title VII, that its pregnancy exclusion was lawful.

## III.

GE's sickness and accident insurance covers disabilities from non-occupational sickness and accidents. Thus, for the insurance to apply to pregnancy, the condition must be shown to be the result of either a sickness or an accident. The medical evidence shows, however, and the district court so found, that pregnancy is not a sickness. Nor is the matter of so-called pregnancy complications an important consideration; this is a *de minimis* matter since only between 1/10 and 3/10 of one percent of the women who become pregnant have major complications which require hospital treatment. Accordingly, insofar as the sickness aspect of GE's insurance is concerned, the pregnancy exclusion is justifiable.



The medical evidence also shows that pregnancy is a voluntarily induced condition which can either be avoided or terminated through abortion. Thus it cannot be contended plausibly that pregnancy is a condition caused by an accident.

The majority of the court of appeals erred in rejecting GE's "voluntarism" defense on the ground that GE had not eliminated from disability insurance coverage all so-called voluntary disabilities. In likening pregnancy to injuries resulting from athletic competition and to disabilities arising from attempted suicides, the courts below made an ill-conceived comparison, for pregnancy is a happy event and a desirable condition. Furthermore, and contrary to the majority of the court of appeals, it is not material that GE's disability insurance covers cosmetic surgery, because such surgery is a "*de minimis* problem" which rarely occurs.

## ARGUMENT

### I. THE EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM COVERAGE UNDER AN EMPLOYEE DISABILITY INCOME PROTECTION PLAN DOES NOT CONSTITUTE SEX DISCRIMINATION.

#### A. This Case Is Controlled By The Court's Holding In *Geduldig* v. *Aiello.*

The threshold inquiry in this case must be whether GE's pregnancy exclusion constitutes unlawful sex discrimination. As Judge Widener stated in his dissent below (Supp. Br. Jt. Pet. 12a):

> The inquiry in this case must therefore focus initially on whether the exclusion of pregnancy related disability from the disability benefits plan is sex discrimination. If it is not sex discrimination, then, regardless of what test is applied, there is no Title VII violation.

What was said in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), concerning the exclusion of pregnancy from a disability insurance plan is germane to the threshold inquiry herein and, we respectfully assert, is dispositive of the question now before the Court.

In *Geduldig*, the Court held that the exclusion of disabilities attributable to normal pregnancies from coverage under a state (California) disability insurance program was not discrimination violative of the equal protection clause of the Fourteenth Amendment. The state program covered persons in private employment. The Court noted that California intended to establish its insurance program "in accordance with insurance concepts" (417 U.S. at 492), that other disabilities in addition to pregnancy were excluded from coverage (417 U.S. at 488, 494-95),[18] and that to cover the excluded risks would be "substantially more costly" (417 U.S. at 495).[19] The exclusion of pregnancy-related disabilities from disability insurance benefits coverage was not "invidious discrimination," the Court said (417 U.S. at 494), but was, instead, "rationally supportable" (417 U.S. at 495). California, the Court noted, had legitimate interests in maintaining the fiscal integrity of its program which was self-supporting and which distributed its resources so as adequately to cover all included disabilities "rather than to cover all disabilities inadequately" (417 U.S. at 496). Similarly, it was proper for California to be concerned with maintaining the contribution rate at a level that would not unduly burden



[18] The California insurance plan does not pay disability benefits until the eighth day of disability, unless an employee is hospitalized, in which case benefits commence on the first day of hospitalization; the plan does not pay benefits for more than 26 weeks for any one disability (417 U.S. at 488). GE's sickness and accident insurance plan, here involved, had similar exclusions: "Benefits will start with the eighth day you are totally disabled (or with the first day of your confinement in a hospital as a bed patient, if earlier) and will continue during your total disability up to a maximum of 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related cause or causes" (III App. 1062-63).

[19] It was noted in *Geduldig* that the parties disagreed with respect to the magnitude of the increased costs of providing a pregnancy benefit, but the Court found that "they would clearly be substantial" (417 U.S. at 493-94). Similarly, the district court in this case found that the payment of pregnancy benefits would increase GE's costs by a large but "at this time" indeterminable amount (Jt. Pet. 23a).

participating employees (Id.). Thus the policy considerations underlying California's pregnancy exclusion constituted an "objective and wholly noninvidious basis for the State's decision not to create a more comprehensive program than it has" (Id.). The Court stated (417 U.S. 496-97):

> There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of aggregate risk protection derived by that group or class from the program. *There is no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not* [Emphasis supplied; footnotes omitted].[20]

The dissenting opinion in *Geduldig* expressed the view that the state's action constituted sex discrimination, *per se*. Noting that the state paid benefits for disabilities (prostatectomies, circumcision, hemophilia, and gout) that affect "only or primarily" men (417 U.S. at 501), the dissent stated that the state had, by excluding pregnancy from disability coverage, "singl[ed] out" for less favorable treatment "a

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[20] In this context, the Court pointed out that data submitted by the State "indicated that both the annual claim rate and the annual claim cost are greater for women than for men," and expressly noted that: " Several *amici curiae* have represented to the Court that they have had a similar experience under private disability programs" (417 U.S. at 497, n. 21).

GE submitted an *amicus* brief to this Court in *Geduldig*, in which (p. 24) it set forth, *inter alia*, its, and the insurance industry's, experience with respect to the relative costs of providing disability benefits for female and male employees. See, *supra*, n. 5 and p. 8.



gender-linked disability peculiar to women" (Id.). "Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex," the dissenting opinion declared, "inevitably constitutes sex discrimination" (Id.).

However, the dissenting view that the state's action involved *per se* sex discrimination was expressly rejected by the majority of the Court (417 U.S. at 496-97, n. 20):

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71, and *Frontiero* v. *Richardson*, 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory

analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[21]

The majority of the court of appeals did not come to grips with the proposition, made clear in *Geduldig*, that there is a lack of identity between gender and the exclusion of pregnancy from disability coverage. The conceptual, and controlling, dichotomy thus formulated in *Geduldig* cannot be blotted out, moreover, as the majority below sought to do (Supp. Br. Jt. Pet.

[21] *Frontiero* and *Reed* defined sex discrimination as "dissimilar treatment for men and women who are . . . similarly situated" (404 U.S. at 77, 411 U.S. at 688, respectively)—a definition consistent with the Court's analysis of sex discrimination under Title VII. See, *Phillips* v. *Martin Marietta Corporation*, 400 U.S. 542, 544 (1971), wherein this Court stated that Title VII "requires that *persons of like qualifications* be given employment opportunities irrespective of their sex" [Emphasis supplied]. In concluding in *Geduldig* that a pregnancy disability exclusion was not sex discrimination so long as it was not discriminatorily motivated, the Court was in effect recognizing that with respect to pregnancy men and women are not "similarly situated" and do not have "like qualifications." Thus *Geduldig* is consistent with the Court's pronouncements in the earlier sex discrimination cases—a consistency pointed out by Professor Larson, former Under Secretary of Labor, in "Sex Discrimination As To Maternity Benefits," 1975 Duke L.J. 805, 811 (1975) (hereinafter cited as "1975 Duke L.J."): "The assertion in *Geduldig* that pregnancy-based discrimination is not gender-based discrimination is not casual dictum. It is an essential link in the chain of argument disassociating *Geduldig* from cases 'based upon gender as such,' such as *Reed* and *Frontiero* . . . ."



7a, 9a),[22] merely by referencing the fact that *Geduldig* involved a constitutional attack on a legislative program, and not a Title VII claim of sex discrimination. Nor, clearly, was the majority below correct in stating that the only point of difference between the majority and dissenting opinions in *Geduldig* was in identifying the standard to be used in testing gender-based classifications—i.e., whether the "rationally supportable" test or the "strict scrutiny" test should be applied (Supp. Br. Jt. Pet. 8a, n. 17).

As Judge Widener noted in his dissent below (Supp. Br. Jet. Pet. 12a-13a), because *Geduldig* establishes that a pregnancy exclusion is not sex discrimination, it is irrelevant whether or not Title VII has a broader sweep than does the equal protection clause.[23] Further, as Judge Widener also stated

[22] Other courts of appeals have similarly, but erroneously, distinguished *Geduldig*. See, e.g., *Satty* v. *Nashville Gas Co.*, —— F.2d ——, 11 FEP Cases 1, 3 (6th Cir. 1975) ("It is apparent from our reading of footnote 20 that the Court's observations are made in the particular and narrow confines of the state's power to draw flexible and pragmatic lines in the social welfare area."); *Wetzel* v. *Liberty Mutual Insurance Company*, 511 F.2d 199, 203 (3d Cir. 1975) (". . . our case is one of statutory interpretation rather than one of constitutional analysis. On this distinction alone we believe appellant's reliance on Aiello is misplaced.") See also, *Hutchison* v. *Lake Oswego School District No. 7*, 519 F.2d 961, 963 (9th Cir. 1975) (Schnacke, J., dissenting on the ground that Title VII was not violated); *Communications Workers of America, AFL-CIO* v. *American Telephone and Telegraph Co., Long Lines Department*, 513 F.2d 1024 (2d Cir. 1975).

[23] The same point was made by District Judge Knapp in *Communications Workers of America, AFL-CIO* v. *American Telephone and Telegraph Co., Long Lines Department*, 379 F.

(Supp. Br. Jt. Pet. 13a), ". . . the test of validity under Title VII is not different from the test of

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Supp. 679 (S.D. N.Y. 1974), *rev'd*, 513 F.2d 1024 (2d Cir. 1975), a suit involving the same issue as presented by this case. To the argument that *Geduldig* is distinguishable on the ground that deference is to be accorded under the Fourteenth Amendment to state legislative judgments on social welfare matters, but that no such deference is warranted under Title VII to allegedly discriminatory employer action, Judge Knapp responded (379 F. Supp. at 682):

> The flaw in this argument is that it begs the question. The threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities can be classified as discrimination because of sex (or gender). If, as footnote 20 [of *Geduldig*] seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified—or less justifiable in the employment context than in some other context—can never be reached.
>
> In other words, if the [*Geduldig*] Court had found that the California scheme did discriminate on the grounds of sex (or gender) but must nevertheless be upheld because of the deference due to California's sovereign right to make choices in methods of providing social welfare, the holding would clearly be inapplicable to a case arising under Title VII where no such deference is required. But such, as we read it, was not the holding of the Court. The holding was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). *Such a holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment.* Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with discrimination "because of . . . sex" 42 U.S.C. § 2000e(2) (a) (1) [Emphasis supplied].



validity under the Fourteenth Amendment" (*U.S.* v. *Chesterfield County School District*, 484 F.2d 70, 73 (4th Cir. 1973)). See also, *Davis* v. *Washington*, 512 F.2d 956, 958 n. 2 (D.C. Cir. 1975) ("The many decisions disposing of employment discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII."); *Castro* v. *Beecher*, 459 F.2d 725, 732-33 (1st Cir. 1972); *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1176-77 (2d Cir. 1972); *Western Addition Community Organization* v. *Alioto*, 340 F. Supp. 1351, 1353 (N.D. Cal. 1972); *Shield Club* v. *City of Cleveland*, 370 F. Supp. 251, 253-54 (N.D. Ohio 1972).[24]

Not to apply *Geduldig* in the context of Title VII, moreover, would lead to incongruous results, one of which was thus pointed out by Judge Widener (Supp. Br. Jt. Pet. 14a):

> . . . a state's disability benefit plan for its own employees covered by Title VII, 42 USC § 2000e (b), would, under our holding, not be allowed to exclude pregnancy from its coverage. However, such an exclusion could be made freely in a state plan for employees of private employers such as that in *Geduldig*. I fail to see the justification for the inconsistency.

Finally, the absence of any language of reservation or limitation in *Geduldig*, confining footnote 20 of the Court's opinion to an equal protection context,

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[24] See also *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974), holding that the substantive proscription against discrimination contained in Title VII is no broader than that found in anti-discrimination Executive Orders.

persuasively suggests, we submit, that the Court intended that its conclusion in *Geduldig* with respect to sex discrimination should be read as controlling in the context of both the equal protection clause and Title VII.[25]

### B. Neither The Language Of Title VII Nor Pertinent Legislative History Supports The View That The Failure To Cover Pregnancy Is Unlawful.

Title VII of the Civil Rights Act of 1964, as amended in 1972, prohibits most private and public employers from discriminating against any individual in his employment, or from otherwise treating an employee adversely or unfairly, "because of [the] individual's . . . sex" (42 U.S.C. 2000e-2(a)), except "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" (42 U.S.C. 2000e-2(e)(1)). No-

[25] The majority below also viewed "the consequences" of GE's pregnancy exclusion as violative of Title VII (Supp. Br. Jt. Pet. 4a). The majority's reliance in this context on *Griggs, supra,* a case involving racial discrimination, is, however, misplaced. In *Griggs,* the Court emphasized the explicit and plenary legislative history underlying Title VII's prohibition against racial discrimination. See, e.g., 401 U.S. at 434-36. However, as explained *infra,* pp. 35-41, no comparable history underlies Title VII's sex discrimination prohibition, and, indeed, the legislative history underlying the proposed Equal Rights Amendment indicates that the "race" analogy is inapposite here. The *Griggs* analogy is even less persuasive, moreover, when it is recognized that the Court, in contrast to its treatment of race, has been reluctant to treat sex as a suspect classification. See, e.g., *Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *Schlesinger* v. *Ballard,* —— U.S. ——, 41 L.Ed.2d 610 (1975).



where in the Act is there any indication of what is meant by the term "discriminating;" and, of course, there is no specific reference in Title VII to pregnancy, much less to a pregnancy exclusion in the disability insurance context.

There is, moreover, nothing in the legislative history underlying Title VII's sex discrimination prohibition that impels a finding that the pregnancy exclusion here in issue is unlawful. If anything, we submit, the legislative history shows that such exclusion is lawful. The amendment prohibiting sex discrimination was first offered by Congressman Smith (D., Va.), probably in an attempt to defeat the passage of the bill.[26] In fact, several of the leading proponents of the bill spoke in opposition to the amendment.[27]

The amendment was proposed on the House floor and quickly adopted after hasty debate covering only nine pages of the Congressional Record.[28] Every male member of the House voicing support for the inclu-

[26] 110 Cong. Rec. 2577 (1964); see also Comment, Civil Rights Act of 1964: *An Exception To Prohibitions on Employment Discrimination,* 55 Iowa L. Rev. 509, 511 (1969); Note: *Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964,* 1968 Duke L.J. 671, 676 n.35 (hereinafter cited as "1968 Duke L. J.").

[27] 110 Cong. Rec. 2577-2584 (1964). Among those speaking in opposition to the amendment were Representatives Celler (D. N.Y.), Chairman of the House Committee on the Judiciary, Roosevelt (D., Cal.), Green (D., Ore.), and Lindsey (R., N.Y.).

[28] Id.

sion of the amendment ultimately voted against the civil rights bill.[29]

In the Senate, Senator Humphrey, the effective manager of the pending Senate bill, explained that the Bennett Amendment[30] to the Senate bill (now part of Sec. 703(h) of Title VII, 42 U.S.C. Sec. 2000e-2(h)), the purpose of which was to avoid conflicts between the sex discrimination prohibition and the Equal Pay Act, made it "unmistakably clear" that despite the latter prohibition "*differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law*" [Emphasis supplied].[31] Senator Humphrey's statement shows, we submit, that the Senate, at least, did not take the simplistic view that the sex discrimination prohibition must be applied automatically against any employer action which affects male and female employees differently.

In sum, the legislative history underlying Title VII's sex discrimination prohibition is silent with respect not only to the specific point at issue in this case, but indeed with respect to the overall matter of pregnancy itself. Judge Widener thus addressed the matter (Supp. Br. Jt. Pet. 14a): "If Congress wishes to legislate in favor of pregnant women, I see no con-

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[29] 110 Cong. Rec. 15897 (1964). See also 55 Iowa L. Rev. at 512; 1968 Duke L.J. at 677.

[30] 110 Cong. Rec. 13647 (1964).

[31] 110 Cong. Rec. 13663-4 (1964).



stitutional impediment . . . . But, I submit Congress did not so undertake in Title VII." [32]

The subsequent Congressional legislative history underlying the proposed Equal Rights Amendment to the Constitution ("ERA")[33] provides insight and is entitled to weight in determining the meaning of the earlier-enacted Title VII. See *Glidden Company* v. *Zdanok*, 370 U.S. 530, 541 (1962); *F.H.A.* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).[34] Fourteen

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[32] To the same effect, see 1975 Duke L.J. at 822-23 in response to the argument that Title VII is a more specific Congressional mandate to combat sex and race discrimination than the broad mandate of the equal protection clause of the Fourteenth Amendment:

> What counts is what Title VII in fact provides. In simplest terms, it forbids unequal treatment of the sexes as to employment, including its compensation, terms, and conditions. So does the fourteenth amendment. In each case, the key concept is equality. . . . Presumably Congress, at least under the commerce power, could expressly require employers to provide normal maternity benefits if they provide any injury or illness benefits whatsoever. *What is missing here is any proof that Congress did so in Title VII* [Emphasis added].

[33] As approved by the Congress, the ERA provides:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.
>
> Section 3. This Amendment shall take effect two years after the date of ratification.

[34] Indeed, the legislative history of the ERA was brought to the Court's attention in *Geduldig*. See GE's *amicus* brief, pp. 31-38.

of the members of the House Committee on the Judiciary who supported the original version of H. J. Res. 208, the version of the ERA ultimately approved by both houses of Congress, stated as their Separate Views on H. J. Res. 208: [35]

> The legal principle underlying the Equal Rights amendment as proposed by Mrs. Griffiths [Rep. Martha Griffiths of Michigan] is that the law must deal with the individual attributes of the particular person and not with stereotypes or over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness". *As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child bearing could only apply to women.* In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative [Emphasis added].

The majority Report of the Senate Committee on the Judiciary with regard to the ERA specifically approved this statement from H.R. Rep. No. 92-359.[36]

In her testimony before the House Sub-committee considering the proposed amendment, Rep. Griffiths explained what the amendment would *not* do: [37]

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[35] H.R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971).

[36] S. Rep. No. 92-689, 92nd Cong., 2nd Sess. 11 (1972).

[37] Hearings on H. J. Res. 35,208 and Related Bills, and H. R. 916 and Related Bills before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 1st Sess., 40 (1971). (Hereinafter cited as "ERA House Hearings.") To the same effect see testimony of Betty Friedan, founder of National Organization for Women, Hearings on S. J. Res. 61 before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, U.S. Senate, 91st Cong., 2d Sess. 493 (1970).



> Like private action, governmental action dealing with a physical characteristic unique to one sex would not be affected by the equal rights amendment. Where a law deals with a physical characteristic unique to one sex, equality between the sexes could not be achieved, for such a law could not apply in practice to both sexes. Therefore, the equal rights amendment would not affect laws dealing with a physical characteristic unique to one sex, such as laws governing childbearing, sperm donation, or criminal acts capable of being committed by members of only one sex.[38]

Representative Bella Abzug testified that the Amendment would not prevent sex-based distinctions "where the law could not possibly apply to both sexes." [39] Similarly, during the House debate, Representative William Ryan pointed out that "The basic principle underlying the equal rights amendment . . . does not

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[38] In response to questioning on whether the ERA would prohibit all classifications taking account of sex, Representative Griffiths said: "But you would have to have some distinction in laws that apply to mothers, to pregnant women, because men aren't pregnant. You don't have to have the same law applying because of different functions of the body. The bodies are not exactly the same, so there could be a difference." ERA House Hearings 51.

[39] ERA House Hearings 116.

preclude legitimate differentation [sic] based on the unique physical characteristics of the sexes." [40]

The most comprehensive analysis of the limits on the scope of the proposed ERA was presented to both the Senate [41] and House committees by Thomas I. Emerson, Lines Professor of Law, Yale Law School.[42] Professor Emerson testified before the Senate Judiciary Committee: [43]

> The fundamental legal principle underlying the equal rights amendment, then, is that the law must deal with the individual attributes of the particular person, not with a vast over-classification based upon the irrelevant factor of sex. It should be noted at this point that there is one type of situation where the law may focus on a sexual characteristic but the basic principle just stated has no application.
>
> This occurs where the legal system deals directly with a physical characteristic that is unique to one sex. In this situation it could be said that,

[40] 117 Cong. Rec. 35791 (1971). To the same effect, see remarks of Representative Drinan, *id.* at 35797; Representative Mitchell, *id.* at 35801; Representative Broyhill, *id.* at 35806; and Senator Gurney, 118 Cong. Rec. 9335 (1972).

[41] Hearings on S.J. Res. 61 and S.J. Res. 231 before the Committee on Judiciary, U.S. Senate, 91st Cong., 2d Sess. 430, n.7 (1970). (Hereinafter cited as "ERA Senate Judiciary Committee Hearings.")

[42] Professor Emerson was the successful counsel who prepared the brief and argued the precedent-making case, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), involving the important issue of the right to privacy.

[43] ERA Senate Judiciary Committee Hearings 298-99.



> in a certain sense, the individual obtains a benefit or is subject to a restriction, because he or she belongs to one or the other sex.
>
> Thus a law providing for payment of the medical costs of childbearing would cover only women, and a law relating to sperm banks would restrict only men. Such legislation cannot be said to deny equal rights to the other sex. There is no basis here for seeking or achieving equality.[44]

As shown by the foregoing analysis of the concept of sex discrimination under the ERA, the pregnancy exclusion on which the instant case centers, just as that in *Geduldig*, cannot be regarded as discriminatory on the basis of sex. Accordingly, if even the ERA would not treat such an exclusion as sexually discriminatory, it would be anomalous in the extreme to regard it as a sex discrimination violation under Title VII. The legislative history of ERA in this respect should be looked upon as the controlling substitute for the comparatively barren legislative history of Title VII on sex discrimination.

[44] In testimony before the House Subcommittee Professor Emerson said (ERA House Hearings 402):

> . . . the equal rights amendment does not preclude legislation, or other official action, which relates to a physical characteristic unique to one sex. . . . So long as the characteristics [sic] is found in all women and no men, or all men and no women, the law does not violate the basic principle of the equal rights amendment; for it raises no problem of ignoring individual characteristics in favor of a prevailing group characteristic or an average.

### C. The EEOC's Sex Discrimination Guideline Concerning Employment Policies Relating To Pregnancy And Childbirth Is Not Entitled To Judicial Deference.

#### 1. *The EEOC's "Waffling" Position*

Guidelines on Discrimination Because of Sex were originally issued by the EEOC on November 24, 1965 (30 Fed. Reg. 14926); they were amended by the EEOC on February 21, 1968 (33 Fed. Reg. 3344); were again amended on August 19, 1969 (34 Fed. Reg. 13367); and were last amended and revised effective April 5, 1972 (37 Fed. Reg. 6835). Until 1972, the guidelines expressed no view with respect to the way disabilities resulting from pregnancy or childbirth were to be treated.[45]

The first public expression by the EEOC on the treatment of pregnancy under Title VII appeared in a series of opinion letters issued by the EEOC's General Counsel in 1966. The EEOC's position as to whether pregnancy was to be treated as an illness was thus set forth:

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary

[45] In pertinent part the present guideline states (29 C.F.R. 1604.10): "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." 29 C.F.R. 1604.10. The full text of the present guideline is set forth in the Appendix hereto.



> disability unique to the female sex and more or less to be anticipated during the working life of most women employees. . . . we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness. . . .[46]

The EEOC's position on the specific question of whether pregnancy need be covered under a disability insurance benefit plan was also set forth:

> . . . an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory.[47]

Charles Duncan, EEOC General Counsel in 1965 and 1966, testified in this case without contradiction that the quoted statements from the 1966 letters reflected official EEOC policy during his incumbency

[46] Excerpt from an EEOC opinion letter dated November 15, 1966 (GE Exh. 12, II App. 736), which was identified by witness Charles Duncan as similar to letters prepared in his office and sent out by him during his incumbency as EEOC General Counsel during 1965-1966, the contents of the letters having been authorized by Mr. Duncan and the Commission (II App. 656-57).

[47] Excerpt from an EEOC opinion letter dated November 10, 1966 (GE Exh. 12, II App. 732-35), also identified by Mr. Duncan as similar in content to others he sent out during his incumbency as EEOC General Counsel. See note 46, *supra*. The November 10, 1966, letter states expressly: "This is an opinion letter issued pursuant to 29 C.F.R. 1601.30."

See also GE Exhibit 4 (II App. 720), which is a CCH reproduction of an EEOC opinion letter dated October 17, 1966, concerning the legitimacy of excluding pregnancy from disability insurance coverage. The letter is referred to *supra*, pp. 14-15.

as General Counsel (II App. 655, 661). Mr. Duncan further testified: (1) during the first year of the EEOC's existence—i.e., the year beginning July 2, 1965—questions and problems respecting sex discrimination "occupied a good deal of the Commission's attention" and "were thoroughly discussed by the Commission," and, during the same period, the treatment of pregnancy disabilities under an employer's disability insurance plan was specifically considered by the full Commission; (2) in formulating its 1965-1966 policy, the Commission considered and inquired into the legislative history underlying Title VII with respect to sex discrimination; (3) the Commission's 1965-1966 policy and position was that pregnancy could be treated differently from "medical illness," and that under an employer-sponsored employee disability insurance plan it was not necessary "to provide the same benefits for maternity absence [as] for illness-caused absence;" and (4) in the course of its 1965-1966 deliberations on sex discrimination, the Commission "extensively considered" and discussed as a possible alternative the policy reflected in the current EEOC guidelines with respect to the treatment of pregnancy-caused disabilities under employee disability insurance plans, considering such a policy in the light of the legislative history underlying Title VII, but consciously and deliberately rejecting it (II App. 656, 657-58, 660-63, 664-65).

The EEOC policy and position described by Mr. Duncan is reflected in the EEOC's First Annual Report for the fiscal year ending June 30, 1966 (sent to Congress on March 1, 1967), wherein it was said (p. 40): "The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely . . . ." It is further reflected in a Commission Decision (No. 70-360) issued on December 16, 1969, which states in part: "The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex. . . ." The 1969 Decision is reproduced in CCH EEOC Decisions ¶ 6084.[48]



Not only is the current EEOC guideline a reversal of the prior interpretation of the statute by the EEOC, but it also contradicts the position of other federal agencies. Thus, the Sex Discrimination Guidelines promulgated by the Secretary of Labor pursuant to Executive Order 11246 (3 C.F.R. 173)[49]

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[48] See also the following excerpt from a speech delivered to the Industrial Relations Research Association, Washington, D.C., Chapter by Sonia Pressman, then Senior Attorney, Office of the General Counsel, EEOC, on April 16, 1969, stating the EEOC's then position to be as follows: "The Commission . . . has not to date equated [pregnancy] with sickness. Thus, the Commission has ruled . . . that an employer may have a medical and hospital insurance plan which covers the expenses of delivery, but excludes disabilities related to pregnancy, childbirth, miscarriage, and abortion." CCH Employment Practices Guide ¶ 8004 at p. 6005 (June 19, 1969).

[49] Executive Order 11246 is a Presidential order which prohibits government contractors and subcontractors from dis-

do not require that employee medical benefit plans cover pregnancy related disabilities as long as an employer makes equal contributions to such plans for employees of both sexes (41 C.F.R. § 60-20-3(c)).[50] Moreover, regulations promulgated by the Wage and Hour Administrator under the Equal Pay Act, 29 U.S.C. 206(d), provide that payments relating to maternity are not wages for purposes of that statute (29 C.F.R. § 800.110), and further state (29 C.F.R. § 800.116(d)):

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other.[51]

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criminating in employment on the basis of race, color, religion, sex, or national origin. "Sex" as a prohibited type of discrimination was added to the order by a 1967 amendment (32 Fed. Reg. 14303). This Executive Order applies to all GE locations and all GE employees in the United States.

[50] On December 27, 1973, the Secretary of Labor published in the Federal Register (38 Fed. Reg. 35336) proposed revisions in the Guidelines which, *inter alia*, proposed that "medically verifiable disabilities which are related to pregnancy be treated as temporary disabilities." The Secretary went on to state: "The OFCC, however, recognizes the need to continue to be guided by pertinent judicial decisions, including those expected to be rendered by the United States Supreme Court during this present term." The views of interested parties were solicited, but hearings on the proposed revision have not yet been held or announced, and the Guidelines have continued in their original form.

[51] In its First Annual Report, see *supra*, p. 44, the EEOC said (pp. 41-42): ". . . an employer does not commit an unlawful employment practice by contributing to or negotiating accident insurance programs which provide different benefits for male and female employees based upon reasonable actuarial considerations, as long as the cost to the employer is the same for both groups of employees. Similarly, no violation occurs when male and female employees receive the same benefits but the employer's contribution to the plan differs according to the sex of the employee."



The EEOC, moreover, has *not* been consistent in its application of the 1972 guideline on employment policies relating to pregnancy and childbirth. This is revealed in Federal Communications Commission rate increase proceedings involving American Telephone & Telegraph Company and 24 of its associated operating companies ("Bell Companies"), FCC Case No. 19143, in which the EEOC participated as a petitioner in opposition to AT&T and the Bell Companies. The Companies provide their employees with up to 52 weeks of benefits because of absences from work due to physical disabilities caused by sickness, but exclude from benefit eligibility female employees on maternity leave who experience normal pregnancies (GE Exhs. 27, 28; III App. 761-64, 764, 769-71; I App. 192-93). Yet, on January 18, 1973, after extensive negotiations, the EEOC, the Department of Labor, and AT&T on behalf of itself and the Bell Companies, signed an Agreement providing, *inter alia*, for the entry of a consent decree in a district court, the resolution and discontinuance of all pending litigation concerning compliance by AT&T and the Bell Companies with all laws and regulations concerning equal employment opportunity, and the dismissal of the EEOC opposition to the proposed rate increases in the FCC proceedings. Although this Agreement provides that adherence to its terms

constitutes full compliance with all laws and regulations governing equal employment opportunity, it imposes no obligation on AT&T or the Bell Companies to discontinue their current policy and practice of not paying sickness benefits to their female employees who are absent from work as the result of normal pregnancies (GE Exhs. 33, 34; III App. 795-822, I App. 192-93).[52]

### 2. *The Controlling Legal Principles*

It is settled law that administrative interpretations which have not been consistently adhered to, and which are not contemporaneous with the enactment of a law, are not entitled to the judicial deference normally accorded agency interpretations. See, e.g., *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *Udall* v. *Tallman*, 380 U.S. 1, 16-23 (1965); *F.T.C.* v. *Jantzen, Inc.*, 356 F.2d 253 (9th Cir. 1966),[53] *rev'd on other grounds*, 386 U.S. 228 (1967).

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[52] A recent instance of the EEOC's inconsistent position with respect to pregnancy-related disabilities is found in an EEOC Conciliation Agreement involving a private law firm. This post-February 6, 1974, agreement provides, *inter alia*, that, while pregnancy complications are to be "treated as other temporary disabilities for sick leave purposes," normal pregnancies will only receive a flat "paid maternity leave of six weeks." See CCH Employment Practices Guide ¶ 5350 at 3709.

[53] "[W]e owe little, if any, deference to the Commission's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect. But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body. If we owe any deference to the Commission's views, it is to those that were contemporaneous with the enactment of the statute . . . ." (356 F.2d at 254, n. 4).



See also, *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), rejecting an EEOC guideline equating discrimination on the basis of citizenship with the Title VII proscription against discriminaton on the basis of national origin because: (1) the guideline position was contrary to the Congressional understanding of the term "national origin," as shown by, among other things, Congressional enactments in related areas (". . . deference [to the EEOC guideline] must have limits where, as here, application of the guideline would be inconsistent with an obvious Congressional intent not to reach the employment practice in question," 414 U.S. at 94); (2) the guideline position was inconsistent with a "general understanding" of the term's meaning, as shown by federal regulations and the statutes of various states (414 U.S. at 88, n. 2); and (3) the guideline position was contrary to an earlier Commission position expressed "through its General Counsel" (414 U.S. at 94).[54]

*Espinoza*, therefore, parallels this case and is here applicable because: (1) the 1972 EEOC guideline on pregnancy and childbirth is contrary to Congress's understanding of what is meant by sex discrimination (see *supra*, pp. 35-41); and (2) the 1972 guideline completely reverses the EEOC's earlier position,

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[54] When the *Espinoza* case was before the court of appeals, the Seventh Circuit likewise refused to follow the EEOC's guideline, saying with respect to it: "While acknowledging deference is due, blind adherence is not" (402 F.2d 1331, 1334 (7th Cir. 1972)).

as first expressed by its General Counsel, Charles Duncan (see *supra*, pp. 13-15, 42-44).[55]

Citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971), for the proposition that EEOC guidelines are "entitled to great deference," and stating that the argument here made with respect to the "waffling" by the EEOC was "effectively answered" by the Third Circuit in *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F.2d 199, the majority of the court below rejected GE's argument that judicial deference should not be accorded to the EEOC's present guideline on pregnancy (Supp. Br. Jt. Pet. 5a, n. 12).[56] In *Wetzel*, the Third Circuit also cited

[55] In *Newmon* v. *Delta Airlines, Inc.*, 374 F. Supp. 238, 245-246 (N.D. Ga. 1973), a case which presented, *inter alia*, the issue of whether Title VII's sex discrimination prohibition was violated by a company's denial of disability and other employment benefits to pregnant female employees, the Georgia court refused to follow the 1972 EEOC guideline on pregnancy disabilities. The court pointed out that the EEOC's 1972 guideline had been issued "almost eight years after the enactment of the Act," and concluded that the guideline was not worthy of judicial deference because "there appears no factual basis upon which these regulations were drawn," and no judicial determination had been made equating pregnancy with a sickness or a disability.

[56] Moreover, the majority of the court below viewed the matter of the EEOC's vacillating position on pregnancy as "beside the point," stating (Supp. Br. Jt. Pet. 5a, n. 12): "We are of the opinion . . . that the guidelines, as presently promulgated, are merely expressive of what is the obvious meaning and purpose of the Act. We entertain no doubt that it was the legislative purpose in enacting Title VII to prohibit any disparity of treatment in compensation and conditions of employment between men and women and this included any disparity that might be sex-related in fringe benefits. *And this would be our opinion whatever might be the language of the Commission's guidelines*" [Emphasis in original].

The assurance with which such reliance is placed by the majority below on "legislative purpose," is difficult to comprehend. See discussion, *supra*, pp. 34-41.



*Griggs* v. *Duke Power Co.*, and relied primarily on "the plain meaning of the statute" and the "evolutionary process . . . of our legal system" to uphold the EEOC's pregnancy guideline.

We respectfully submit, however, that the Third Circuit's approach in *Wetzel* is singularly unpersuasive. That court's analysis ignores the absence of specific or, indeed, any legislative history concerning Title VII's sex discrimination prohibition; it likewise ignores the evidence of positive Congressional legislative history underlying the ERA, which establishes that pregnancy is to be treated as a unique physical characteristic of one sex (*supra*, pp. 37-41). Additionally, it disregards the "compelling indications" (see *Wetzel*, *supra*, 511 F.2d at 205, citing, *Espinoza*, *supra*, 414 U.S. at 94-95) of administrative error by the EEOC as is shown by this Court's holding in *Geduldig* (*supra*, pp. 26-33). And clearly, as already shown, there is no foundation for the Third Circuit's bald assertion that the EEOC's guideline comports with "the plain meaning" of Title VII (511 F.2d at 205). Indeed, that the EEOC has itself been unable to discern "the plain meaning" of Title VII is manifested by its earlier contrary position.

Nor is the *Griggs* case a dispositive precedent with respect to the EEOC's pregnancy guideline. For in *Griggs* "great deference" was accorded the

EEOC's guidelines on *racial* (as distinguished from *sexual*) discrimination only after it had been demonstrated by a thorough review of the legislative history underlying Title VII's *race* discrimination prohibition provision that ". . . the Act and its legislative history support[ed] the Commission's construction," thereby "afford[ing] good reason to treat the guidelines as expressing the will of Congress." 401 U.S. at 433-34. And none of the latter elements, it is clear, may be adduced to support the guideline here in issue.

In sum, in view of the principles outlined above, the EEOC's 1972 sex discrimination guideline relating to pregnancy and childbirth is not entitled to judicial deference: First, having been issued some seven years after Title VII went into effect, the guideline does not represent a "contemporaneous construction;" and it certainly is inconsistent with the previous contemporaneous, and thoroughly considered, 1966-1971 EEOC position and policy.[57] Indeed, only the 1966-1971 EEOC policy and published construction, reflecting the judgment of those entrusted with

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[57] The dissenting opinion in *Geduldig* cites the EEOC's 1972 guidelines on pregnancy disabilities in support of the position it adopts, 417 U.S. at 501-502; in addition, the dissenting opinion sets forth a quotation from the EEOC's brief, *amicus curiae*, in *Geduldig* to the effect that the EEOC "carefully scrutinized" the matter before it issued the guideline. The EEOC held no hearings on the matter, however, and its *amicus* brief cited no evidence that was unearthed in its "scrutiny." In addition, no reference is made in the Court's opinion in *Geduldig* either to the EEOC's guideline, to the agency's asserted justification for the guideline, or to the reference to it in the dissenting opinion.



setting Title VII's machinery in motion, meet the criteria for deference as enunciated by the Supreme Court. Second, the guideline is also directly contrary to the position of other federal agencies which have dealt with the identical subject matter, and is also unsupported by, if not inconsistent with, expressions of legislative intent.

## II. SOUND BUSINESS CONSIDERATIONS UNDERLYING ITS DISABILITY INSURANCE PLAN ESTABLISH THAT GE'S PREGNANCY EXCLUSION IS REASONABLE, JUSTIFIABLE, AND NOT A MERE PRETEXT FOR SEX DISCRIMINATION.

The provisions of Title VII are aimed against practices, procedures, and policies which serve to exclude members of a certain race, sex, religion, and nationality from *opportunities* to gain jobs or job promotions. This was the objective which the Supreme Court sought to further in *Griggs* v. *Duke Power Company*, *supra*, 401 U.S. 424 ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past . . . ," 401 U.S. at 429). Thus, in the words of Judge Widener: "Title VII seeks to equalize opportunity, not create an advantage for either men or women" (Supp. Br. Jt. Pet. 14a).

Less significant and more subtle are certain marginal personnel practices which do not relate to job opportunities, but are merely incidents of a job. One such practice was involved in *Dodge* v. *Giant Foods, Inc.*, 488 F.2d 1333 (1973), where the Court of Appeals for the District of Columbia Circuit vali-

dated an employer's hair length regulations against a charge of Title VII sex discrimination. There, the court of appeals said (488 F.2d at 1336): "Title VII serves the important goal of eliminating *arbitrary* sex discrimination in employment" [emphasis added]. Then, after quoting Judge Gesell's statement in *Boyce* v. *Safeway Stores*, 351 F. Supp. 402, 404 (D. D.C. 1972), that the laws outlawing sex discrimination "must be realistically interpreted," the court of appeals went on to say (488 F.2d at 1337): "The issue in these cases is *one of degree* . . . [T]he line must be drawn somewhere between these two extremes. . ." [emphasis added]. We submit that the matter of employee benefits is also one of degree, of drawing the line somewhere between extremes—especially as here, where only one aspect of the many insurance benefits that GE provides for its employees is involved.

*Geduldig*, though couched in the language of equal protection, implicitly recognizes these principles and elements. There California's exclusion of pregnancy-related disabilities from its disability insurance coverage was upheld because the state had demonstrated, on the basis of cost and other considerations, that the exclusion was "rationally supportable," 417 U.S. at 495-96. In either case, whether the issue is viewed as one of degree, as in *Giant Foods*, or as one of rational support, as in *Geduldig*, there are sound business considerations that justify GE's exclusion of pregnancy-related disabilities from coverage under its sickness and accident insurance.



**A. Compelling Business Considerations Underlie And Justify GE's Pregnancy Exclusion.**

In creating a benefits program, the employer (and union) seeks a balanced package of many benefits which best serve overall employee needs. In effect, since no benefits package can satisfy all wants of all employees, the employer seeks to utilize his benefits dollars in the best overall way. Looked at in this way, the nature of a benefit which would maintain pay to employees for time out due to pregnancy simply would not be, GE believes, and showed, a reasonable and prudent use of benefit money. One reason for GE's belief in this respect derives from the nature of pregnancy—that it is, as shown *supra*, pp. 11-13, a voluntarily induced and maintained condition which is not a sickness. By contrast, weekly sickness and accident insurance is intended to soften the blow to employees of an unintended and unexpected sickness or accident; pregnancy, on the other hand, is not such an occurrence, and a pregnancy benefit would not satisfy this purpose.[58]

There are additional reasons which support GE's belief that the payment of a pregnancy benefit would not be a rational and prudent use of benefit money.[59]

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[58] Mr. Hilbert, GE's Labor Relations Counsel, thus explained GE's position: "[I]n todays world pregnancy is completely voluntary" (II App. 597), and is "plan[ned]" (II App. 600). In the latter context, the planning involves at least a nine months cycle, allowing financial preparation for the birth. "In a very real sense . . . planning to have a baby is financially very much like planning to take a trip or to take a course in college . . . so that we think that is a consideration that we should keep in mind and which runs against the granting of this kind of benefit" (II App. 599-600).

[59] These reasons were also axplained by Mr. Hilbert, GE's Labor Relations Counsel. See II App. 595-96, 600-601.

Thus, a maternity benefit would particularly be subject to abuse in that before delivery the natural concern of the mother for the fetus, in addition to her own discomfort, would cause an earlier departure from work than would occur in the absence of such benefit. Similarly, after delivery, the mother's natural affection and concern for the health and psycological well-being of the newborn child would tend to stretch the post-delivery absence time.[60] Furthermore, as approximately 40 percent of GE female employees who have babies do not return to work,[61] to provide these employees sickness benefits would, in effect, be according them extra severance pay. Additionally, because females are absent from work more frequently than are males, and have absences of greater duration, GE female employees receive a greater proportion of sickness and accident benefits than do male employees;[62] and for this reason a preg-

[60] In this connection, see note 10, above, setting forth GE's experience regarding the duration of pregnancy absences; and see also Mr. Jackson's testimony, summarized *supra*, pp. 9-10, that insurance industry experience shows a difference between the duration of ordinary disability and maternity claims, the latter being considerably longer; and that pregnancy claims are subject to abuse.

[61] See note 6, *supra*. See also, Mr. Jackson's testimony referred to *supra*, p. 9, that approximately 50 percent of the female employees in the United States do not return to work after having babies.

[62] See note, 5, *supra*, in which it is pointed out that in 1970 GE's average cost per insured employee of total benefits paid under its disability insurance was $82.57 for females and $45.76 for males, and that in 1971 the average cost was $112.91 for females and $62.08 for males.



nancy benefit would accentuate the imbalance. Again, the payment of pregnancy benefits would be likely to cause a demand for paid child-care leave for male employees.

Finally, the non-payment of a pregnancy benefit adversely affects but a relatively small number of GE female employees—those within the childbearing age group who are able, and elect, to have children; by contrast, the payment of such a benefit, anticipated to be of great magnitude vis-a-vis the total of all other disability benefit payments, would disadvantage the larger number of GE female employees—those who are of non-childbearing age, or who are unable or unwilling to have children—by diverting a large amount of the funds available to GE for disability benefit payments.

The fact that GE's insurance plan follows standard insurance practice which, for the most part, does not cover pregnancy under sickness and accident insurance, is another important consideration that underlies GE's pregnancy exclusion.[63] See *supra*, p. 8; II App. 595. From a general insurance viewpoint, a pregnancy benefit cannot be considered a reasonable and prudent use of benefit money. For, as the record shows, see *supra*, p. 6, the cost per unit of benefit for a female employee under existing insurance coverage where no maternity benefit is provided is 170 percent of that for a male employee;

[63] Major industrial states have recognized the significance and relevance of insurance industry practices in the context of sex discrimination provisions. See, e.g., Section 1432 of the California Fair Employment Practices Act (BNA FEP Manual 451:132) and Section XI(A) of the Illinois Sex Discrimination Guidelines (BNA FEP Manual 451:355).

the latter figure rises, moreover, to 210 percent of the male cost where a six-weeks maternity benefit is provided, and to 300-330 percent of the male cost where full maternity coverage is provided. Mr. Jackson, the insurance expert who testified in this case, put the annual cost of adding maternity benefits to disability insurance plans in effect in the United States in 1973 at $1,353,000,000.[64] (See *supra*, p. 8).[65]

In *Geduldig*, the Court expressly pointed to the fact that California intended to establish its benefit system as an insurance program in accord with "in-

[64] The $1,353,000,000 cost estimate is the figure testified to by Mr. Jackson in July 1973. Based on the increase in the Consumer Price Index since 1973, the cost estimate would, as of July 1975, be $1,650,000,000. (Thus the ratio of increase of the July 1975 Consumer Price Index (162.3) with respect to the July 1973 Consumer Price Index (132.7) is 22.3 percent; the latter percentage applied to the July 1973 cost estimate shows an increase of $297,000,000.)

[65] An article in The Wall Street Journal for November 11, 1975, p. 1, sets forth the experience of Xerox Corporation with respect to pregnancy coverage under its 26 week disability plan. The pregnancy coverage was instituted in late 1972. A study of 178 salaried employees whose pregnancies terminated in 1973 showed that the average claim was $1,544 with a total benefits cost of $274,830. Like GE's experience, Xerox found that of the group studied, 96 female employees quit after receiving disability pay while 82 female employees returned to work. Xerox determined that the average employee was "disabled" by pregnancy almost 75 days. However, time off ranged from 7 days to 226 days. Xerox found no correlation between length of service and the number of disability days. Although analysis of 1974's experience is not yet complete, Xerox has found that the per-case costs that year "increased considerably" over 1973.



surance concepts" (417 U.S. at 492). Among the factors, moreover, that led the Court to conclude that California's pregnancy exclusion was "rationally supportable" was the Court's recognition that to cover the excluded pregnancy risks "would be substantially more costly," and that California had an interest in distributing "available resources" in such a way "as to keep benefit payments at an adequate level for the disabilities that are covered rather than to cover all disabilities inadequately" (419 U.S. at 495-96). As shown, GE, too, has followed insurance practice and concepts in excluding pregnancy; it, too, has sought to distribute "available resources" in an equitable manner between male and female employees. Moreover, although the courts below refused to consider GE's cost evidence,[66] *Geduldig* expressly recognizes the relevancy of "costs" with respect to a pregnancy exclusion (417 U.S. at 492-96).

In sum, we respectfully submit, GE's pregnancy exclusion is a non-discriminatory provision, see *supra*, pp. 26-30, which is entirely justifiable on the basis of important reasons relating to the operation of GE's business and the benefits package it provides to *all* its employees.

### B. The Absence Of Pretextual Motivation

*Geduldig* established that the exclusion of pregnancy from coverage under a disability insurance

[66] The district court found it irrelevant that in not granting maternity benefits GE wished to avoid "increased costs" (Jt. Pet. 31a). The majority of the court of appeals found it "unnecessary to consider" cost evidence "[s]ince we do not consider *Geduldig* in point here" (Supp. Br. Jt. Pet. 11a, n. 23). See also, *Wetzel, supra*, 511 F.2d at 206.

program does not discriminate on the basis of sex unless it is a "mere pretext[] designed to effect an invidious discrimination against members of one sex or the other" (417 U.S. at 496-97, n. 20). As the foregoing demonstrates, GE's decision to exclude pregnancy-related disabilities from coverage under its sickness and accident insurance plan in no way resulted from a sex discrimination pretext, but rather came about through a careful weighing of crucial business considerations.[67]

The reliance GE placed on governmental interpretations validating a pregnancy exclusion underscores the absence of discriminatory intent on GE's part. Thus after Title VII's enactment, Mr. Hilbert, GE's Labor Relations Counsel, undertook a review of GE's

[67] GE did not, and does not, seek to justify its position with a "business necessity" defense under Section 703(e) of Title VII (42 U.S.C. § 2000e-2(a)) which provides that: "Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

To be sure, however, and as we show in the text, "business considerations" are among the reasons for GE's adoption of the pregnancy exclusion. Such "considerations" are material here, not for a Section 703(e) reason, but rather because of the twinfold reason that they show: (1) a "rationally supportable" justification for the pregnancy exclusion within *Geduldig's* meaning; and (2) the absence of pretextual motivation also under the *Geduldig* rationale. In view of the controlling weight of *Geduldig*, the contrary dictum of the majority of the court of appeals as to the immateriality of "business considerations" (see Supp. Br. Jt. Pet. 10a-11a, n. 23) clearly is erroneous.



labor contracts and practices. The pregnancy exclusion was specifically considered. Several factors led Mr. Hilbert to conclude that a maternity benefit was not required. First, was the fact that no state agency had ever questioned the pregnancy exclusion, even though many states had statutes outlawing sex discrimination which predated Title VII and which had been vigorously enforced. Next, the labor services, particularly CCH, published an opinion letter by the EEOC General Counsel, dated October 17, 1966, see *supra*, pp. 14-15, which "confirmed" Mr. Hilbert's belief, based on GE's experience under the state laws, that the pregnancy exclusion did not violate the law; and Mr. Hilbert so informed the GE management (II App. 587-88).[68]

Considering the weighty business reasons which guided GE's action, as well as the fact that it was supported in its position by governmental interpretations, the record before this Court clearly demonstrates that GE's exclusion of pregnancy-related disabilities from its insurance coverage was not motivated by a sex discrimination pretext.

[68] In concluding that the pregnancy exclusion was not violative of Title VII, Mr. Hilbert was also guided by, and relied upon, sex discrimination guidelines issued by the Office of Federal Contract Compliance (III App. 855), which are applicable to government contractors like GE, and which permit employers to exclude pregnancy absences from weekly disability payments (II App. 591).

## III. BECAUSE PREGNANCY IS NOT A DISEASE, SICKNESS OR ILLNESS, AND BECAUSE IT IS VOLUNTARILY INDUCED AND MAINTAINED, ITS EXCLUSION FROM COVERAGE UNDER GE'S SICKNESS AND ACCIDENT INSURANCE PLAN IS NONDISCRIMINATORY, PERMISSIBLE, AND REASONABLE.

GE's sickness and accident insurance plan covers total disability resulting from non-occupational sickness and accidents. Thus to be reimbursed under the plan an employee must be totally disabled and the disability must be caused by sickness or an accident (III App. 1064-65).[69] Admittedly, there is some total disability associated with all pregnancies, for immediately before, during, and directly after delivery a woman cannot work; viewed in terms of a nine-month pregnancy, however, the time of such disability is relatively brief. But even though pregnancy, at least peripherally, satisfies one of its conditions—disability—the insurance can apply only if the pregnancy disability is the result of a sickness or an accident. The record evidence shows: (1) that pregnancy is not a sickness; and (2) that it is a condition voluntarily induced, and not the result of an accident.

One reason for GE's exclusion from coverage of pregnancy-related disabilities is that pregnancy is

---

[69] In the Plan, the term "disability" is not specifically defined; in context, it does, however, connote a "sickness or accident [which] keeps you away from your job" (III App. 1062). The term "nonoccupational" is defined to mean "any sickness or injury not arising out of or in the course of employment and not entitling you or a covered dependent to benefits under any Workmen's Compensation or Occupational Disease Law" (III App. 1072).



not a sickness or disease. See *supra*, p. 6. The expert medical testimony shows this to be so, see *supra*, pp. 10-11, and the district court specifically found as fact that "Pregnancy *per se* is not a disease" (Jt. Pet. 20a).[70] Accordingly, insofar as the "sickness" aspect of GE's insurance coverage is concerned, the pregnancy exclusion is entirely justifiable.[71] To state the matter somewhat differently: it is evident on the record before the Court that the normal events of pregnancy are not, medically speaking, so similar to those of sickness or disease as to compel the conclusion that the basis for the lack of coverage is proscribed sex discrimination.[72]

---

[70] Accord, *Newmon* v. *Delta Airlines, Inc.*, 347 F. Supp. 238, 245 (N.D. Ga. 1973).

[71] The majority of the court of appeals erroneously rejected GE's contention that pregnancy is not a sickness. In thus "equating" pregnancy with sickness (Supp. Br. Jt. Pet. 6a), the majority below inexplicably relied on obscure cases in the field of labor arbitration, and selectively ignored applicable insurance industry precedents, the uncontradicted contrary medical testimony in this case that pregnancy is not a disease, as well as the explicit finding of the district court to the same effect.

[72] The fact that the so-called complications of pregnancy are not covered under GE's sickness and accident insurance does not significantly differentiate this case from *Geduldig* where only disabilities accompanying normal pregnancies were excluded from coverage under California's insurance plan. 417 U.S. at 490. As the record in this case shows, and as we have set forth in detail above, p. 11, only between 1/10 and 3/10 of one percent of the women who become pregnant have "major" complications which require hospital treatment. In these circumstances, the matter of pregnancy complications is, as far as this case is concerned, a matter of *de minimis* consequence.

[Footnote continued on page 64]

Additionally, GE excludes pregnancy from sickness and accident coverage because it is not the result of an accident. See *supra*, p. 6. The expert testimony adduced at trial established that pregnancy, unlike sickness and the physical conditions resulting from accidents, is a voluntarily induced condition which can either be avoided through the use of contraceptive devices [73] or terminated through abortion.[74] See, *supra*, pp. 11-13.

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[72] [Continued]

In any event, even if the complications of pregnancy are deemed sicknesses which must be covered under GE's disability insurance, it by no means follows that GE's failure to cover disabilities accompanying normal pregnancies constitutes a violation of Title VII.

[73] Catholics also "seek to plan their pregnancies, their childbirths" (II App. 601). In this connection, it is noted that the "rhythm method" of birth control is doctrinally acceptable to Catholics. Moreover, only about one forty-fifth of GE's female employees within the childbearing ages are Catholics who might have possible scruples against birth control and abortion (II App. 598-99). Thus to allow a maternity benefit on the claimed basis that childbirth is involuntary as in the case of Catholics, would be "in a sense . . . favoring one religion over another" (II App. 599).

[74] *Roe* v. *Wade*, 410 U.S. 179 (1973), held that within the first trimester elective abortions are a matter solely between the pregnant woman and her doctor, and that the states cannot prohibit or regulate the exercise of that right. At least two courts have rejected the argument that an abortion alternative to pregnancy violated a woman's First Amendment right to free exercise of religion. In *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1972), vacated on other grounds, 409 U.S. 1071 (1973), an Air Force Officer faced discharge for pregnancy under an Air Force Regulation which also permitted cancellation of the discharge



The majority of the court below rejected as a defense "this idea of voluntarism" on the ground that GE had not eliminated from disability insurance coverage all so-called voluntary disabilities, noting in this connection that GE had made its insurance applicable to such matters as injuries resulting from athletic competition and disabilities arising from attempted suicides (Supp. Br. Jt. Pet. 6a-7a). We submit, however, that in thus lumping it with matters that are so different in kind and substance, the courts below failed utterly to place pregnancy in its true context. For pregnancy is essentially a happy and desirable event, and comparisons, or analogies, such as those made by the courts below, are ill-conceived. As Dr. Forrest testified: "I think one [the act of becoming pregnant] has a very hopefully, joyous outcome and the other [becoming an alcoholic through drinking, or getting cancer through smoking] has nothing but dire circumstances" (I App. 362).[75]

---

proceedings if the pregnancy was terminated. Captain Struck argued that as a Catholic she could not have an abortion and, therefore, she was unable to take advantage of the cancellation clause. The Ninth Circuit rejected her First Amendment argument. 460 F.2d at 1377. See, also, *Gutierrez* v. *Laird*, 346 F. Supp. 289, 293 (D.C. D.C. 1972).

[75] Both the majority of the court of appeals (Supp. Br. Jt. Pet. 7a) and the district court (Jt. Pet. 28a) also regarded the fact that GE's disability insurance covers cosmetic surgery as negating GE's defense of voluntarism. But such coverage is a "de minimis problem" (II App. 608). Further showing its minimal nature is the fact that GE will not pay the *medical* expenses connected with cosmetic surgery or treatment "except to the extent necessary for correction of

In view of the foregoing, it is clear that pregnancy is not a condition which is covered by GE's sickness and accident insurance plan; for it cannot plausibly be contended, we submit, that pregnancy is either a sickness or a condition caused by an accident. Thus, pregnancy, unlike any sickness or accident, results from the cumulative, three-fold exercise of free will necessary for a woman to bear a child: (1) there must be a voluntary decision to marry, as marriage still reflects by far the current standard of morality; (2) the couple must elect that conception will result—i.e., must elect to reject the various methods available for avoiding pregnancy; and (3) if conception takes place, the couple must elect to accept the pregnancy and have the baby, and not to terminate the pregnancy by abortion. Finally, it should be noted that even for the unmarried, the latter two choices are viable alternatives to the pregnant state.[76]

---

damage caused by accidental injury while insured" (II App. 608; Pls. Exh. 6, p. 24, (not reproduced in Appendix))—thus minimizing the likelihood that an employee will be absent from work for the purpose of having cosmetic surgery performed for aesthetic reasons alone.

Furthermore, "the number of total disabilities resulting from such causes [alcoholism, drug addiction, elective surgery, etc.] are infinitesimal and payment for such disabilities rarely occurs. In addition, the same policy applies with respect to female employees" (GE Answers to Plaintiffs' Interrogatories 46-51; I App. 213, 242, 191).

[76] An article "The New Parents" in the New York Post, December 11, 1973, Magazine p. 1, describes the "mainstream" of today's thinking concerning couples having babies as follows: "Interviews with scores of expectant and recent parents, as well as statistical data make it quite plain that virtually foolproof birth control, backed up by more social acceptance of couples who choose not to have children, have



## CONCLUSION

The exclusion of pregnancy from disability insurance coverage does not constitute unlawful sex discrimination. Furthermore, employee disability insurance, which typically is only one component of a comprehensive insurance package provided by employers for the protection of employees, is intended to soften the blow of an unintended and unexpected sickness or accident. Specific insurance coverage must be carefully calculated in terms of how best to apportion finite benefit dollars. The coverage of pregnancy-related disabilities would be extremely costly, and compulsory coverage would, therefore, result in a substantial decrease in the dollars available to fund not only the disability coverage itself but the other parts of the insurance package as well. Moreover, a mandatory readjustment of insurance priorities would not contribute to the benefit of the greater number of employees; rather, it would benefit only a small segment of the work force—those women who can and do elect to become pregnant. In this case, where the insurance coverage involved is restricted to disabilities resulting from sickness and accident alone, the exclusion of pregnancy from the coverage is singularly appropriate because, as the record demon-

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made the decision to have a child just that—a decision, a choice—more than has ever before been true." The same article quoted the following statement by Dr. Charles Westoff of Princeton University, a director of the National Fertility Study of the Federal Institute of Child Health and Human Development: "We're coming closer to the 'perfect contraceptive' society where the overwhelming majority of births will occur only if and when people want them to."

strates and the district court expressly found, pregnancy is neither a sickness nor the result of a chance occurrence.

We urge therefore that the judgment of the court below be reversed.

Respectfully submitted,

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Dated: November 1975



## APPENDIX

The full text of the relevant Equal Employment Opportunity Guideline on Discrimination Because of Sex, as issued on March 30, 1972 (37 F.R. 6835), effective April 5, 1972, 29 C.F.R. 1604.10, is as follows:

> Employment Policies Relating to Pregnancy and Childbirth.—(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the ability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.
>
> (c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or

no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

---

No. 74-1589

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,

Respondents.

---

No. 74-1590

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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Errata Sheet for Brief for Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al., Respondents in No. 74-1589 and Petitioners in No. 74-1590

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The following corrections have been made in ink on copies of the Brief for Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al., Respondents in No. 74-1589 and Petitioners in No. 74-1590, which have been filed with the Clerk of the Court with his permission, for substitution for copies originally filed and on copies served on counsel for General Electric Company, in substitution for copies originally served:

| | | |
|---|---|---|
| Page iii | line 27 | at the beginning of the line preceding the words "of sex" insert the word "because" |
| Page v | line 5 | change the spelling of Tretz to Trefz |
| | line 6 | following District #101 and preceding Case insert S. Dak. |
| Page vii | line 16 | change the spelling of Cerro to Cerra |
| Page xv | line 17 | substitute for the word "States" the word "Status" |
| Page xviii | line 7 | substitute for the page number 21 the page number 30 |
| Page 22 | line 18 | change period after not to a comma and substitute a small letter o for the capital O |
| Page 33 | lines 5 to 25 | delete the three full paragraphs beginning line 5 and ending line 25 as this material is all repeated on pages 33-34 |
| Page 39 | line 29 | insert 37-38 in blank space following pp and preceding supra |
| Page 40 | line 2 | following the word "reflected" insert the words "the mandatory leave policy based on" |
| | line 3 | following the word "throughout" insert the words "the latter part of"; place a closed parenthesis and period after 22a; delete Supp. Br. Jt. |
| | line 4 | delete whole line |
| Page 54 | line 9 | at the beginning of the line preceding the word "The" insert the word "In" and change the letter "t" in the word "the" to a small letter |
| Page 60 | line 20 | substitute for the word "if" the word "of" |

| | | |
|---|---|---|
| | line 21 | substitute for the word "contribute" the word "constitute" and omit letter d from end of the word "introduced" |
| Page 62 | line 28 | substitute for the first word in the line, namely the word "period", the word"plans" |
| Page 73 | line 2 | substitute for the number 26 the number 24 |
| | line 6 | delete the words "and was not based upon" |
| | line 7 | delete the words "its concern for cost" |
| Page 74 | line 11 | following the first word in the line, namely, "sex," insert the word "and" |
| | line 26 | following the word "was" insert the word "the" |
| Page 77 | line 25 | insert a period after the word "claims" and capitalize the letter "t" on the word "To". |
| Page 82 | footnote 29 line 1 | change the spelling of Cerro to Cerra; insert following Dist., the following "299 A. 2d 277, 5 FEP Cases 480 (Pa. Sup. Ct., 1973), where the court rejected the" |
| Page 85 | line 16 | at end of line after the word "women" insert comma |
| | line 27 | substitute for the word "is" the word "are" |
| Page 86 | line 16 | following the word "other" and preceding the word "sex-linked" insert the word "statistically" |
| Page 88 | line 5 | substitute for the word "male" the word "female" |
| Page 94 | line 1 | substitute for the numbers 15-16 the numbers 13-15 |
| Page 98 | line 33 | substitute for the number 87 the number 88 |
| Page 100 | footnote 33 line 18 | following the word "work" insert the word "he" |
| | line 25 | substitute for the number 486 the number 466 |



| | | |
|---|---|---|
| | line 27 | substitute for the word "id.", the words "Wharton, The Ovarian Hormone", |
| Page 107 | line 21 | substitute for the word "erroneous" the word "various" |
| | line 23 | substitute for the number 81 the number 82; following the word "supra", insert the following "fn. 38, p."; substitute for the number 112 the number 113 |
| Page 123 | footnote line 8 | substitute for the word "enactment" the words "effective date" |
| Page 125 | line 15 | following the word "childbirth." insert the following: "See pp. 51-54, supra." |
| Page 127 | footnote 59 line 3 | delete fn. 27, p. 14 and insert instead fn. 15, pp. 53-54, |
| Page 132 | line 14 | substitute for the word "quality" the word "equality" |
| Page 135 | footnote 116 line 1 | at the beginning of the footnote and preceding the word "Since" insert asterisks to indicate matter deleted; following the word "work" and preceding the word "they" insert the word "when" |
| | footnote 116 line 4 | following the word "purpose" insert a comma |
| Page 136 | line 29 | delete the name "Dorisen" and insert the name "Dorsen" |
| Page 139 | line 21 | substitute for the number 263 the number 563 |
| Page 142 | line 7 | following the word "disability", and preceding the word "effort", insert the following words: "pregnancy claims require considerably more time," |
| Page 146 | line 3 | following the words 2% insert a closing parenthesis followed by the number $477.51; delete the closing parenthesis following female |
| Page 147 | line 3 | insert in the blank space following pp. and preceding the word "supra" the following numbers: 124-128 |

| | | |
|---|---|---|
| Page 9a | line 15 | delete the numbers 72a-73a and substitute 73a-74a |
| Page 10a | line 4 | insert in the blank space following pp. the numbers 58a-60a |

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January 7, 1975

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**On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## Brief for Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al., Respondents in No. 74-1589 and Petitioners in No. 74-1590

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No. 74-1589

GENERAL ELECTRIC COMPANY,

v. *Petitioner,*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,

*Respondents.*

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No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,

v. *Petitioners,*

GENERAL ELECTRIC COMPANY,

*Respondent.*

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**On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## Brief for Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al., Respondents in No. 74-1589 and Petitioners in No. 74-1590

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Supp. Br. Jt. Pet. 1a-14a) [1] is reported at 519 F.2d 661. The opinion of the District Court for the Eastern District of Virginia (Jt. Pet. 2a-38a) is reported at 375 F. Supp. 367. Earlier opinions of the district court with respect to venue (I App. 70-75), class certification (I App. 121-131) and joinder of third party defendants are reported respectively at 347 F. Supp. 1058, 59 F.R.D. 267 and 59 F.R.D. 273.

## QUESTIONS PRESENTED

1. Whether the exclusion of pregnancy-related disabilities from coverage under an employer disability income protection plan constitutes sex discrimination proscribed by Title VII of the Civil Rights Act of 1964, as amended.

2. Where a discriminatory attitude by GE toward its female employees was a motivating factor in its exclusion of pregnancy-related disabilities from the coverage of its disability income protection plan, does such exclusion constitute sex discrimination proscribed by Title VII of the Civil Rights Act of 1964?

3. Whether the district court erred in refusing to consider evidence of GE's discrimination in employment because of sex prior to 1965.

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[1] References designated "Supp. Br. Jt. Pet." are to the Supplemental Brief Of All Parties To The Joint Petition For A Writ Of Certiorari; references designated "Jt. Pet." are to the latter petition.

The printed Single Appendix is in four valumes and is paginated consecutively; references thereto will, for example, be as follows: "I App. 36a."



4. Whether the district court erred in receiving in evidence GE's Exhibit 12 which purported to be two letters written by the General Counsel of the EEOC dated respectively November 10 and 15, 1966, which were subsequent to his resignation and departure from EEOC, and which were never signed nor sent nor otherwise identified.

## STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Section 703 of Title VII of the Civil Rights Act of 1964, as amended (78 Stat. 253, 86 Stat. 103, 42 U.S.C. § 2000e, et seq.), are as follows:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *; or
>
> "(2) to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *
>
> * * * * * *
>
> "(e) Notwithstanding any other provision of this title,
>
> "(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, * * * on the basis of * * * sex * * * in those certain instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

The relevant provisions of the Guidelines on Discrimination Because of Sex (29 C.F.R. 1604), issued by the Equal Employment Opportunity Commission, are as follows:

"§ 1604.2 *Sex as a bona fide occupational qualification.*

"(b) Effect of sex oriented state employment legislation

"(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females * * * for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by Title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

* * * * * *

"§ 1604.9 *Fringe benefits.*

"(a) "Fringe benefits," as used herein, includes medical hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

"(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

* * * * * *



"(d) It shall be an unlawful employment practice for an employer * * * to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

"(e) It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

"§ 1604.10 *Employment policies relating to pregnancy and Childbirth.*

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in conection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

## STATEMENT

### Charges Filed with EEOC

The plaintiff Barbara Hall filed a charge with the Equal Employment Opportunity Commission on December 13, 1971 alleging that she had been absent from work due to childbirth during 1971 and filed a claim for disability benefits but GE failed to pay her claim while paying claims of males whenever disabled irrespective of the cause, thereby discriminating against her because of her sex (I App. 22, 130-131). The plaintiff Martha Gilbert and other employees filed similar charges (Jt. Pet. 47a-48a, I App. 22-23). After waiting the prescribed number of days they received suit letters (I App. 23) and filed this suit without waiting for decision by the EEOC finding cause which issued in May 18, 1973 (Jt. Pet. 47a-49a).

### The Pleadings

The complaint, as amended, alleged that the case was brought as a class suit by 43 individual named plaintiffs, employed by defendant GE respectively at specified plants located in Richmond, Portsmouth, and Salem, Virginia; Tyler, Texas; Fort Wayne and Tell City, Indiana; and Philadelphia, Pennsylvania and the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local Union No. 161 (I App. 17-19, 38-42, 69). The individual named plaintiffs sued individually and in behalf of all present and former female employees of GE, situated at all of



its plants, offices and shops wheresoever located, the number being in excess of 100,000 (I App. 17-18).

The complaint alleged: GE discriminated against each of the individual named plaintiffs because of her sex in violation of Title VII in that each of the individual named plaintiffs was absent from work during 1971 or 1972 because she was disabled by childbirth or a complication of pregnancy, either unsuccessfully sought to file or did file a claim for the weekly sickness and accident benefits regularly paid by GE for all absences due to a disability, and that GE refused to allow the claim to be filed or refused to pay the claim solely on the ground that GE does not pay weekly sickness and accident benefits in any instance where the absence was due to pregnancy, a complication thereof or childbirth (I App. 19-22, 39-42). GE has paid its male employees weekly sickness and accident benefits for all absences due to every kind and type of disability which any of its males has ever had, but has at all times refused to pay any weekly sickness and accident benefits to female employees where the absence was in any way related to pregnancy (I App. 21-22). The plaintiff IUE is the recognized bargaining representative of a national collective bargaining unit composed of employees of GE at many plants (I App. 18). Following the issuance of EEOC Decision No. 71-1474, 3 EPG Par. 6221, 3 FEP Cases 588 (March 19, 1971), holding that an employer violated Title VII by refusing to pay non-occupational sickness and accident benefits to female employees for periods of disability due to pregnancy when male employees received such benefits during all periods of disability, the IUE called this decision to the attention of GE and requested GE to make such payments to all female employees represented by IUE but GE refused (I App. 23-24).

Relief by way of injunction directing GE to pay weekly sickness and accident benefits to every employee absent because of a disability arising from pregnancy, miscarriage or childbirth, and a judgment against GE in favor of each of the plaintiffs and each member of the class for the amount of weekly sickness and accident benefits to which she was entitled, plus any damages, costs and reasonable attorney's fees, was prayed (I App. 24-26).

By answer GE admitted as to most of the individual named plaintiffs the failure to pay claims as alleged (I App. 30-32), but denied that such failure constituted discrimination within the meaning of Title VII because "pregnancy and resulting childbirth are neither sickness nor the results of accidents; they are rather normal physiological conditions that are *sui generis,* the separate recognition of which is not invidious classification by sex" (I App. 32-34).

**Decision of EEOC**

The EEOC investigated the charges filed with EEOC by several of the individual named plaintiffs and on May 18, 1973, sub nom. *Gilbert* v. *GE,* Case No. YDC 3-093, issued its decision finding that GE had discriminated against the charging parties and against its female employees as a class by excluding from the coverage of its temporary disability plan all absences occurring when an employee is disabled because of pregnancy, or childbirth, or complications thereof (Jt. Pet. 47a-49a). The EEOC's finding in this regard is as follows (Jt. Pet. 48a-49a):

> "Where a policy has an exclusive impact upon women based solely on a condition attendant to their sex, it is illegal under Title VII, except upon a showing that the policy is reasonably necessary to normal operation of that particular business.
>
> "Respondent has not sustained its burden under the exception. Moreover, the Commission has held that disabilities caused or contributed to by pregnancy are for all job-related purposes temporary disabilities and should be treated as such under any health plan or temporary disability insurance plan available in connection with employment.
>
> Accordingly, we conclude that Respondent's plan discriminates against Charging Parties and females as a class because of their sex within the meaning of Section 703(a) of Title VII."



**Class-Action Designation**

The district court found that all 100,000 female employees of GE have "a stake in the outcome of this litigation" and "all women employees" are "equally" affected by the exclusion of pregnancy-related disabilities from coverage under GE's temporary disability benefit plan (I App. 130).

The district court accordingly determined that the plaintiffs could sue on behalf of a class under F.R.C.P. 23(b)(1) and (2) (I App. 118-119, 129-131). For the purposes of declaratory and injunctive relief, the district court designated the primary class as all females employed by GE which the district court found "numbers approximately 100,000 women at hundreds of GE locations nationally" (Jt. Pet. 4a). For purposes of monetary relief, the district court certified as a subclass all members of the primary class who would be entitled to weekly sickness and accident benefits if the exclusion of pregnancy-related disabilities were held illegal (Jt. Pet. 4a, I App. 118-120, 128-131). The district court noted that at the time the district court

decided the case the number in this subclass was "uncertain" (Jt. Pet. 4a). The answers by GE to interrogatories fixed the number of pregnancies among its female employees in 1970 as 3,261, in 1971 as 2,476, and in 1972 as 2,336 (I App. 254-256). As to both the primary class and the sub class, membership in the class was limited to employment on or after September 14, 1971, which is the 90th day before the first charge was filed, plus females who have claims for benefits not time barred on September 14, 1971 (Jt. Pet. 4a, I App. 118-120, 128-131).

**Trial on the Merits**

Preceding the trial the plaintiffs propounded 79 interrogatories to defendant (I App. 204-232), which after objections (I App. 294-297) and rulings thereon (I App. 6), were in part answered by GE (I App. 233-303). A deposition *de bene esse* was taken by GE of Dr. George D. Wilbanks, GE's medical expert, in Chicago on April 12, 1973, which was received as part of the testimony in the case (I App. 669-716). The parties entered into lengthy pre-trial stipulations of fact (I App. 172-203). The case was tried before United States District Judge Merhige in Richmond, Virginia, on July 24, 25 and 26, 1973 (I App. 308-II App. 717).

**Judgment**

On April 13, 1974, the district court handed down its findings of fact (Jt. Pet. 15a-37a), conclusions of law (Jt. Pet. 37a-38a) and order (Jt. Pet. 46a) determining that GE had violated Title VII as alleged by plaintiffs and enjoining GE from continuing its policy of discriminating against females by failing to pay weekly disability benefits for absences from work due to pregnancy-related disabilities in the same manner as



afforded male employees for disabilities (Jt. Pet. 46a). The district court provided in its order that monetary judgments would be entered in favor of those members of the class affected in such amounts as the court ultimately concludes is proper (Jt. Pet. 46a).

## STATEMENT OF THE FACTS

The district court based its decision on two grounds: first the legal ground that the exclusion by an employer from coverage under an all inclusive temporary disability benefit plan of pregnancy-related disabilities constitutes discrimination because of sex in violation of Title VII (Jt. Pet. 28a-29a) and second, the factual ground that GE's exclusion was motivated by a discriminatory attitude towards its female employees (Jt. Pet. 32a). The court of appeals sustained the judgment on the first ground without mention of the second (Supp. Br. Jt. Pet. 9a-11a). This Court need not reach the first ground in this case if it wishes to accept and dispose of this case on the unchallenged finding of discriminatory motivation. Most of the facts recited below relate to the second ground and are intended to show that the district court's finding of discriminatory motivation was dispositive of the case.

GE has relied heavily in its brief to this Court on the cost of making such payments and the practice of other employers relating to the payment of disability benefits for pregnancy-related disabilities. Both the district court (Jt. Pet. 30a-31a) and the court of appeals held that cost was legally irrelevant to the issue to be decided here (Supp. Br. Jt. Pet. 10a-11a, fn. 23). We agree with this holding. Although we believe it is clear that cost to GE or other employers and general industrial practice are not relevant to a determination of whether GE has violated Title VII we have included these issues.

**GE's Weekly Sickness and Accident Benefit Plan**

It is stipulated that at all times here material "GE has provided and does now provide non-occupational sickness and accident benefit payments to all of its employees * * * in an amount equal to 60 percent of an employee's normal straight time weekly earnings up to a maximum benefit of $150 for each week he or she is totally disabled as a result of a non-occupational accident or sickness for a period up to and including 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related cause, excepting therefrom absences due to pregnancy or resulting childbirth or to complications in connection therewith" (I App. 173).

The fixing at 26 weeks of the maximum period for which temporary disability benefits may be received reflects the fact (III App. 879) that after 26 weeks social security disability benefits are available under Section 223 of the federal Social Security Act (42 USC 423) for disabilities which are expected to last not less than 12 months. GE has Long Term Disability Plans under which employees after exhausting their 26 weeks of temporary disability benefits receive long term disability benefits supplementary to their social security disability benefits to age 65 (III App. 1073-1080). The Long Term Disability Plans likewise exclude pregnancy-related disabilities (III App. 1076). As the district court found (Jt. Pet. 4a, fn. 1) the legal and factual issues raised by the pregnancy exclusion of the long term disability programs are the same as those raised by the exclusion in the temporary disability program. None of the plaintiffs had claims under the Long Term Disability Plans. This brief will not treat with the



Long Term Disability Plan separately as everything applicable to the short term plan, so far as here relevant, also aplies to the long term plan.

The terms and conditions governing the payment of temporary disability benefits from 1970 to date are set forth in the General Electric Insurance Plan with Comprehensive Medical Expense Benefits, as amended January 26, 1970 (ERB-32 D (I App. 173, III App. 1060-1072). Although entitled an insurance plan it was stipulated that no insurance is involved (I App. 175-176).

The language which excludes pregnancy-related disabilities reads as follows (III App. 1066):

> "Benefits under Weekly Sickness and Accident Insurance will not be payable for any absence due to pregnancy or resulting childbirth or to complications in connection therewith."

**Termination of coverage for non-pregnancy related disabilities during maternity leave**

In addition to excluding pregnancy disabilities from coverage, the Plan also provides that weekly sickness and accident benefit coverage for all disabilities, whether or not related to pregnancy, terminates when an employee shall "cease active work because of * * * pregnancy" (II App. 635, III App. 1069). This is the provision on which GE relied in denying the Furch claim for a pulmonary embolism admittedly unrelated to pregnancy (see pp. 32-35 *infra*). The termination of coverage when an employee ceases active work because of pregnancy is to be contrasted with the continuance of such coverage for 31 days in cases of personal leave,

lay off or strikes (II App. 611-614, 635-637, III App. 881-883, 1070-1071).

As a result of this provision GE admittedly does not pay sickness and accident benefits to females on leave because of pregnancy, even for accidents or illness completely unrelated to pregnancy, although a male on a leave of absence has coverage for 31 days. On cross examination by counsel for plaintiffs, Thomas F. Hilbert, Jr., GE's Labor Relations Counsel, testified (II App. 611-612):

> "Q. Under the insurance plan, if you would look at page 33 of plaintiffs' exhibit 6, the provision there in the next to last full paragraph on the page provides that sickness and accident benefits will be discontinued on the date you cease active work because of total disability or pregnancy. This provision means that if a woman has an automobile accident two days after she goes on pregnancy leave she does not get sickness and accident [benefits], is that correct?
>
> "A. That's right.
>
> "Q. Turning to the next page, on page 34, under the heading of 'Layoff and Leave of Absence,' looking at the last sentence in that large full paragraph just below the middle of the page, it says that sickness and accident benefits will not be payable for any period of disability which begins more than 32 days after layoff or leave of absence occurs?
>
> "A. That's right.
>
> "Q. This means that anyone who is on leave of absence that has an automobile accident after two days * * * does get sickness and accident benefits?
>
> "A. That's right."



The following colloquy between the district judge and Hilbert establishes the flagrantly sex discriminatory effect of this provision (II App. 636):

> "The Court: * * * What happens when a male gets a leave of absence? He goes off without pay?
>
> "The Witness: Yes, sir.
>
> "The Court: But for a certain period of time he is covered under the policy so that if he becomes ill he gets benefits, is that correct?
>
> "The Witness: Yes, sir. Well, yes, if he becomes ill within 31 days, right.
>
> "The Court: Now, if a female asks for a leave of absence because of pregnancy, she doesn't get it; is that correct? She is told she can't have it?
>
> "The Witness: Well, she is permitted to be absent and notation is formally 'absence-pregnancy'[2] some word like that. Sometimes it may even say, 'leave of absence.'
>
> "The Court: So she is not covered for any benefits she would have if she were not pregnant and just took a leave of absence?
>
> "The Witness: Yes, that is correct."

**Coverage of every disability of a male**

GE has paid and has an established practice of paying weekly sickness and accident benefits for periods during which a male employee had been absent because of voluntary medical procedures or self-inflicted injuries, including absences for alcoholism, following a pro-

[2] The "GE Health Bulletin re pregnacy leave" issued by the Company to all its plants under date of November 4, 1971 provided that an absence for pregnancy was to be carried on Company records as "Illness-Pregnancy" (II App. 638-639, 722, 724-725, 727-728). Most plants followed this practice (I App. 263, 264, 277, II App. 718-719).

gram for cure of alcoholism, drug addiction, following a program for cure of drug addiction, veneral disease, emphysema, sclerosis of the liver, lung cancer, injury incurred on the picket line, injury incurred in an auto accident, even where it results from the employee's negligence, injury incurred in sports activity, injury incurred in a fight, even where the employee instigated the fight, injury incurred in attempted suicide, sterilization, elective surgery unrelated to pregnancy, elective plastic surgery and following a program of psychiatric treatment (I App. 187, 213-215, 228, 242-243, II App. 613-614, 649). In the category of elective plastic surgery, GE pays sickness and accident benefits for hair transplants (II App. 607-608). Not only did GE admit that a disability related to pregnancy is the only expressly excluded disability (II App. 583) but GE was unable to point to a single cause which created any disabling condition requiring absence by a male which had the effect of excluding that absence from payment by GE of sickness and accident benefits (I App. 228, 261).

#### GE Disability Benefit Program Not Insured

Although GE uses the terminology of insurance in describing its weekly sickness and accident benefits program and utilizes the Metropolitan Life Insurance Company to process claims, GE has not in fact insured its programs, but rather pays claims thereunder directly (I App. 175-176, 211, 218-219, 241). Instead of paying premiums to Metropolitan, GE makes advance deposits and then receives a refund of excess deposits if claims come to less than deposits (e.g., IV App. 1100), or adds to the deposits if the claims exceed the deposits. This type of arrangement is becoming increasingly frequent. The insurance company provides no insurance but provides only administrative services for which it charges a small fee. GE pays all claims completely out of GE funds. GE has not funded the plan nor does it use any actuarial estimates in its day-to-day income maintenance for its employees.



By making direct payments, instead of insuring the risk, GE has complete control and avoids any problem of malingering or claim abuse. GE regularly exercises its right to require employees who claim to be ill to be examined by a physician designated by the Company. If it paid claims for pregnancy-related disabilities, its right to have the employee involved examined by its physician before paying claims would not be affected.

As GE's Labor Relations Counsel Thomas F. Hilbert, Jr., admitted on cross examination, if GE for any reason fails to pay a claim, the employee has no recourse to arbitration and, in order to collect, the union will either have to file a law suit or call a strike (II App. 633-634).

#### Purpose of GE's Employee Benefits Program

The booklet which GE distributes to employees to explain its "Insurance Plan" begins with these words (III App. 1062):

> "This Plan is designed to help you and your dependents meet the threats to security that are brought about by loss of wages through death or disability and the medical expenses which occur when you or one of your dependents have a sickness or accident."

Helping male employees "meet the threats to security" to themselves and their dependents has been

deemed by GE as essential to assure that male employees work to full productive capacity and to attract and retain high caliber male employees. These explanations, not only for GE's weekly sickness and accident benefit program, but for its entire fringe benefit system appear repeatedly in speeches of its officers (III App. 954-972, 981-994), annual reports to its stockholders (III App. 968-979) and studies of GE practices.[3]

Among the many benefits available to a GE employee the following are relevant to the purposes of the disability program:

Supplemental workman's compensation benefits are paid by the same weekly sickness and accident benefit plan and by the same long-term disability plan as are here involved to maintain income during a job-related sickness or accident (I App. 173-174, III App. 1063, 1066, 1073). Income maintenance is not limited to absences due to disabling conditions but includes income maintenance for every instance where a male employee is absent from work and during his absence receives less than his pay, as for instance the provision of a "military pay differential," in addition to a "military duty allowance" whenever an employee is absent attending annual encampment of or training duty in the Armed Forces, State or National Guards or U.S. Reserves or is called out to perform temporary emergency duty or enlists or is drafted into the Armed Forces (I App. 268, III App. 872, 974, 975, 979, III App. 1051-1052, IV App. 1342).

[3] Since the close of the trial in this case a new book has been published describing studies made of GE recognition of the need of the worker "for security for himself and his family". Ronald G. Greenwood, Management Decentralization: A Study of General Electric Philosophy (Lexington Books, 1974), p. 84.



Full hospital and other medical expenses are provided for all voluntary as well as involuntary conditions not only for employees and their dependents but also for pensioners and their dependents (I App. 174-175, III App. 1060-1077, 1084-1091). Income is maintained during unemployment, retirement and certain military duties by plans known respectively as supplemental unemployment insurance (Exhibit B to Pre-Trial Stipulation, pp. 72-77, not printed), pension (I App. 178, III 1080A-1083) and military pay differential (I App. 268, III App. 879, 974, 975, 979, 1051-1052, IV App. 1342).

GE's basic thesis throughout the years has been that expressed by Gerald Swope, then president of GE, in testimony before a Committee of the United States Senate in 1931, as follows (III App. 983):

> "We think, of course, that security and peace of mind on the part of the workman is really a very large contributing factor to his doing good work.
>
> We think that a man whose mind is distracted * * * is not going to do as effective work as one whose mind is free from such worries."

In his famous Swope Plan, which convinced industry to fight governmental social security such as prevailed in Europe by duplicating its benefits in private fringe benefit plans, Swope expressed his increased productivity theme (III App. 989):

> "The foregoing plan tends * * * to remove fear from his (the worker's) mind, allowing him to devote himself wholeheartedly to his task."

In a nationwide radio address, given in 1931, under government auspices, Swope stated (III App. 981):

> "For many years the General Electric Co. has been making constant endeavors, each one a step in a comprehensive program, for removing fear

of the future from the mind of the worker in the shops; that is, *his* constant fear of not being able to provide for and take care of *his* responsibilities, first to *his parents* or, if he has taken on further responsibilities, to *his wife* and *children.*" (Emphasis supplied.)

The annual reports over the years have reiterated the above theme and described the disability benefits plan initiated in 1925 as part of the program (III App. 968, 969, 970-971, 977-979).

GE's weekly sickness and accident benefits have an even more direct effect on productivity. Donna Allen Fringe Benefits: Wages or Social Obligation? Rev. ed, 1969, Cornell Uni., pp. 23, 31, 34, 35 (IV App. 1202, 1205-1206) lists the following as the purposes which have generally been expressed by employers as the basis for their adoption and maintenance of sickness and accident benefit systems (IV App. 1202, 1205-1206):

"Sick leave plans * * * restore or * * * rest an employee for greater productivity in the succeeding work period.

* * *

"Sick leave has the obvious social purpose * * * of enabling the worker to take proper care of himself without the financial loss to his family which otherwise occurs when illness disables the breadwinner.

* * *

"Sick leave or health and welfare plans, sometimes covering dependents, pertain to off-the-job illnesses.

* * *

"The employer incurs the cost to increase productivity. * * * He is particularly interested in them precisely because of their social effects. The employee who can stay home and take care of his cold because he has a sick leave plan returns to work with more energy and without having exposed his fellow workers in the meantime."



The plans were described as "cementing a loyalty" of employees to GE (III App. 956), reducing turnover (III App. 964, 989), and helping "TO ATTRACT, DEVELOP AND RETAIN HIGH CALIBER EMPLOYEES" (III App. 977, 978).

GE concedes the employee benefit plans are part of the compensation which it pays its employees, as it repeatedly states in its annual reports. For instance, the 1956 Annual Report, under the heading "Continuing progress in employee compensation" states (III App. 976):

"Compensation at General Electric is interpreted broadly to include not only monetary returns but also the value of benefit programs."

**All Costs of Procreation Covered for Male Employees**

In order to assure the productivity of male employees, the possibility that worry over the costs of having babies might impair the male employees' ability to concentrate and function to the highest capacity, has led GE to pay in full all hospital and medical costs (III App. 1063). This has recently been extended to cover deliveries for female employees but they still are not put on the same level as males with respect to procreation. Male employees have full economic security so they need not worry about the possibility of being unable to meet all the economic vicissitudes. In procreation female employees suffer the loss of income which never happens to a male in connection with either procreation or any other activity, voluntary or involuntary.

The terminology "sickness and accident" is used in the insurance plan as the classification under which delivery is covered. The plan limits coverage to "loss of wages through death or disability and the medical

expenses which occur when you or one of your dependents have a sickness or accident" (III App. 1062). Maternity expenses are included in the medical expenses covered in this plan, thus accepting delivery as a sickness or accident for the purposes of the hospital and medicare provisions of the plan.

With respect to GE's basic thesis that pregnancy is not regarded by the insurance industry as an insurable risk because "pregnancy is voluntary and subject to planning" (GE Br. pp. 6-9, 18, 22, 23, 24, 26, 55-59), the maternity expenses for the delivery of babies for its female employees and for dependent wives of male employees involve exactly the same risk. GE's actuary after explaining on direct examination that insurance requires "a defined event, a clear-cut hazard that is capricious in its impact beyond the control of the insured" (II App. 526), which pregnancy was not, On cross-examination Jackson admitted with respect to whether pregnancy is voluntary or not, that the maternity expenses of wives of male employees stand on no different basis than the weekly sickness and accident benefits for female employees disabled by childbirth or a complication of pregnancy (II App. 547).[4]

[4] The prevalence of insurance covering pregnancy-related risks is evident from the fact that "[a]mong mothers of legitimate live births during 1964-1966 there was an annual average of 59 percent of mothers who had insurance to pay the physician bills for office visits or home calls during pregnancy, the physician bills for delivery of the baby, or the bills for hospital care at the time of delivery." U.S. Dept. of HEW, National Center for Health Statistics, Series 22, No. 12, Health Insurance Coverage for Maternity Care: Legitimate Live Births U.S. 1964-1966 (GPO 197), p. 5 in evidence as Plffs' Exh. 99, IV App. 1332-1333). Also according to GE's Exh. 13, 60 percent of the female employees in the United States who are covered by short term disability insurance have coverage for maternity with an average maximum duration of six weeks (II App. 738).



During 1971, GE paid 20,588 claims from male employees for maternity expenses for dependent wives (I App. 237). During the collective bargaining negotiations in 1960, GE asserted that it had 25,000 pregnancies per year including all pregnancies of wives of male employees as well as pregnancies of female employees (I App. 188, IV App. 1033).

### Claims of Individual Plaintiffs

Six of the individual named plaintiffs, illustrating the various types of situations which have arisen, and the variety of ways GE has responded, testified with respect to the circumstances of their going on leave when disabled by childbirth or a complication of pregnancy, their return to work, and their efforts to collect temporary disability benefits. The substance of their testimony is as follows:

#### Plaintiff Erma Thomas—the typical childbirth absence

The facts respecting plaintiff Erma Fay Thomas conform, except for interference by GE, to the pattern of working up to delivery and return to work within a few weeks thereafter, which all medical witnesses, both those presented by GE and those called by the plaintiffs, testified would be typical of 95% of the pregnancies, the 90% that have no complications and the more than 5% which have complications which are not disabling (see pp. 42-43 *infra*).

The plaintiff Thomas is a black woman employed at GE's Tyler, Texas plant as a tube fabricator who became pregnant in the latter part of July or August 1971 (II App. 414-415). Upon the confirmation of her pregnancy by her personal physician, he had advised her that she could continue working until she went to

the hospital to have her baby as long as no complication developed (II App. 416-417).

As required by a plant rule which was prevalent at all GE plants (II App. 724) she obtained and delivered to the local plant nurse a statement from her personal physician that she was six weeks pregnant and had his approval to work throughout pregnancy (II App. 415-416). Nevertheless, in accordance with rules then in effect at the Tyler, Texas plant, which were similar to rules theretofore in effect in all GE plants (I App. 221, III App. 869, 1012, 1013, 1019) GE notified Thomas that she would be required to terminate work on February 18, 1972, that being the end of her sixth month of pregnancy (I App. 180, II App. 415-417, III App. 1014). As she needed the income and saw no reason to stop working, Thomas then enlisted the services of the union which sent GE a letter dated February 15, 1972 reading in pertinent part as follows (I App. 180, 417, III App. 1015-1016):

> "The International Union of Electrical, Radio and Machine Workers and IUE Local 782 consider your company policy requiring female employees to leave work three (3) months before expected delivery during pregnancy is illegal under Title VII of the Civil Rights Act of 1964.
>
> "Several decisions on this subject have been rendered by the Equal Employment Opportunity Commission and by the courts. For your information we cite, *Cohen* v. *Chesterfield County School Board,* 3 FEP Cases 526 (USDCEDVa. May 17, 1971); *Middletown Board of Education,* 56 LA 830 (April 26, 1971); *Schattman* v. *Texas Employment Commission,* 3 EPD ¶ 8146 (USDCWD Tex. March 4, 1971)."
>
> "Erma F. Thomas has been notified by Employee and Community Relations that she cannot work after February 18, 1972. * * *



> "We request that Mrs. Thomas be notified that she may continue active employment at the Tyler General Electric Plant until her personal physician declares her unable to work. We further request any and all others similarly situated now or in the future be allowed their legal right to continue active employment until declared disabled from work by the physician in charge of the case(s)."

GE by letter dated February 16, 1972 replied as follows (I App. 180, III App. 1017):

> "The Tyler plant practice regarding removal of pregnant employees from payroll at the end of a specific number of months of pregnancy had previously been modified to consider the removal based on the individual's ability to perform the specific duties of her regular job, efficiency and personal medical safety.
>
> "This modification apparently was not incorporated into the dispensary procedure when Erma Thomas was informed of her removal date. Accordingly, she will be permitted to continue working based on the above criteria, including her personal and Company physician's evaluations."

Thomas worked a full shift, 7:00 a.m. to 3:30 p.m., on Friday, April 14, 1972 (II App. 417-418). She went to the hospital at 10:00 p.m. and her baby was born a few hours later, early on April 15, 1972 (II App. 418).[5]

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[5] GE's records showed both that Thomas worked the full daytime shift on Friday April 14, 1972 and that her baby was born the same day, and GE testified on so stipulating (I App. 189). Thomas testified she went to the hospital about 10 p.m. on Friday April 14 and that the baby was born the next day (II App. 417-418). The claims for disability benefits filed by Thomas, which was attached to the pre-trial stipulation as an Exhibit WW (I App. 181), showed that her doctor reported a "spontaneous delivery" on April 15 (Exhibit WW not printed).

She remained in the hospital for three days (II App. 418).

Her personal physician cleared her for return to work four weeks after her baby was born and gave her a certificate so stating for her to take to GE (II App. 418). Thomas reported back to GE for work four weeks after the date of the baby's birth and gave the nurse in GE's dispensary the certificate from her personal physician, Dr. Kenneth Orten, clearing her for work (II App. 418). The nurse took the certificate, but after making a call to ascertain if she could permit Erma Faye Thomas to return to work, informed her that she could not go to work but had to wait until she had her six weeks checkup by her personal physician (II App. 418). Accordingly, Thomas did not return to work until May 30, 1972, six weeks after her baby's birth (I App. 189, II App. 418).

Thomas filed a claim with GE on May 2, 1972 for weekly sickness and accident benefits for the period beginning with the date she went into the hospital, April 14, 1972 (Exhibit WW to Pre-Trial Stipulation, I App. 181-182, II App. 419). The claim was filed on the printed form for "Statement of Claim for Weekly Sickness and Accident Benefits," Form FN 688A, which is used throughout all plants of GE (III App. 1095-1098). The claim was filled out on the front side by Thomas and on the reverse side by her doctor and signed by both of them. Both she and her doctor showed her period of disability as beginning on April 14, 1972. Her doctor specified as the dates between which "The patient has been continuously disabled (unable to work) as from April 14, 1972 through May 15, 1972.



He showed her as in the hospital from April 15, 1972 to April 18, 1972 (*id.*).

GE denied the claim for sickness and accident benefits (I App. 182, II App. 419-420). The sole ground stated for the denial was that the General Electric Insurance Plan provides that benefits under weekly sickness and accident insurance will not be payable for any absence due to pregnancy, resulting childbirth or complications in connection therewith (I App. 181-182).

If Thomas had been permitted to return to work four weeks after her baby was born, which was the date she reported back to work with her doctor's certificate clearing her for work (I App. 418), she would have been absent only 28 calendar days and lost only 20 days of work, counting her first day of absence from the next scheduled work day, namely, Monday, April 17, 1972.[6] Weekly sickness and accident benefits are

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[6] This length of disability following childbirth is not shorter than is to be expected of most women. See *Turner* v. *Department of Employment Security*, 44 U.S.L.W. 3298, 3299, 11 FEP Cases 721, 722 (1975) where this Court held a presumption of disability for six weeks after childbirth unconstitutional as violating due process because "It cannot be doubted that a substantial number of women are fully capable of • • • resuming employment shortly after childbirth." Both GE's witness Dr. Wilbanks (II App. 687) and the plaintiffs' witness Dr. Hellegers (II App. 466-467) testified that most women by two weeks after childbirth are back doing all the same work as pre-pregnancy. Medical witnesses in other litigation have fixed the period of post childbirth disability as follows: ***Hanson*** v. ***Hutt***, 83 Wn. 2d 195, 517 P.2d 599 (1973) (5 days to 4 weeks); ***Cedar Rapids School District*** v. ***Parr***, 6 FEP Cases 101, 102 (Iowa District Court Linn County 1973) (3 to 4

paid on a calendar day basis beginning, when hospitalized, on the first day of hospitalization (I App. 184). At the time Thomas left work to have her baby, her straight time weekly earnings as paid by GE were $121.20 (I App. 189). Her weekly sickness and accident benefits at 60% of such weekly earnings (I App. 173, III App. 1063) would have been at the rate of $72.72 per week, or $10.30 per day. The manner in which damages are to be computed has not been determined by the court below. Applying the principle that mandatory leave when a woman is able to work violates Title VII, Thomas would be entitled to have her damages figured at the 60% rate for the 30 days she was disabled (beginning the count on Saturday, April 15, her first full day in the hospital and ending the count with Sunday, May 14, the day preceeding the first day of work, Monday, May 15, for which she was available) and at the 100% rate for the additional two weeks of pay she lost because GE refused to allow her to return. If GE had permitted Thomas to return to work when she reported back and had paid her the same benefits as are paid any other disabled employee, the total disability benefits would have been 30 times $10.30 which comes to $309.00. The claim of the average male em-

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weeks). The plaintiffs in cases decided have often had even shorter periods of absence due to childbirth. *Hutchison* v. *Lake Oswego School District*, 374 F. Supp. 1056, 8 FEP Cases 276 (DCD Ore. 1974), aff'd re Title VII issues of liability, 11 FEP Cases 161 (9th Cir. 1975), petition for certiorari pending, No. 75-568 (15 work days); *Leonard* v. *Bd. of Ed. of Eau Claire, Wisconsin*, 2 CCH-FPG 5210 (Wis. Dept. Industry Labor and Human Relations) (10 days); *Liss* v. *School District of City of Ladue*, 396 F. Supp. 1035, 11 FEP Cases 156 (DCED No. 1975) (22 work days); *Danielson* v. *Bd. of Higher Education*, 358 F. Supp. *22, 24*, 4 FEP Cases 885, 4 EPD ¶ 7773 (SDNY 1972) (12 work days).



ployee of GE for disability benefits in 1970 was was 48 days, in 1971, for 47 days (I App. 198-199), these being the only years for which GE supplied data (I App. 294-296). For his 48 days absent in 1970, the average male received total temporary disability benefits from GE of $592.23, and for his 47 days in 1971 he received $623.95 (I App. 227, 260).

**Plaintiff Sherrie O'Steen—"economic disaster" from unpaid maternity leave** [7]

The plaintiff Sherrie O'Steen began to work on June 1, 1971 for GE at its Portsmouth, Virginia plant, whose employees are not represented by the IUE or any other union (II App. 443, 448). When she reported for work GE gave her an employee handbook which stated that "Pregnant employees will be required to terminate active work at the end of the sixth month of pregnancy" (II App. 444-445). At no time during her employment with GE was she ever told that this was not still the policy of the company (II App. 445).

She accidentally became pregnant during 1972 (II App. 443-444, 449). O'Steen had no money and no source of income except her wages, and she had a two-year-old daughter to support so she asked her foreman to let her continue to work past her sixth month (App. 445-446). GE placed O'Steen on unpaid leave because of pregnancy on October 15, 1972, which was the end of her seventh month (II App. 444).

At the time she was placed on pregnancy leave, O'Steen was separated from her husband (II App. 448-449). She applied for Welfare Aid but prior to re-

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[7] This characterization appears in the findings of the district court (Jt. Pet. 29a).

ceiving her first welfare check she was unable to pay electricity and oil bills (II App. 446-448). Her electricity was turned off in November (II App. 446-448). Since she used electricity for cooking and refrigeration and oil for heat, she was left for about a month and a half in rural Virginia during November and December of 1972 without any light or heat, refrigeration or cooking facilities (II App. 446-448). This was the condition under which O'Steen lived while awaiting delivery and to which she would return from the hospital with a newborn infant (II App. 446-449).[8]

Before GE placed her on mandatory unpaid leave and while she was receiving pay from GE, she and her little girl were eating three balanced meals a day, of meat and vegetables, with milk for herself and her two year old daughter (II App. 447-448). When O'Steen was placed on unpaid leave by GE, she and her two year old daughter had only cold sandwiches to eat and water to drink except that about two times weekly they walked to a neighbor's house a mile away in order to get an occasional hot meal (II App. 448). As the time

[8] Another instance of denial of temporary disability benefits because of pregnancy forcing a pregnant employee to resort to welfare appeared in testimony in *Williams* v. *Stromberg Carlson Corp. Co.*, New York State Division of Human Rights Case No. CSF-27270-72. The need of many pregnant women for welfare came to the attention of this Court in the litigation over whether an unborn fetus is a dependent person within the statute for Aid to Families with Dependent Children (AFDC), 42 USC 601, *es. seq.*, in *Burns* v. *Alcala*, 420 U.S. 575 (March 18, 1975). See also *Shapiro* v. *Thompson* 394 U.S. 618, 623 (1969); *Doe* v. *Bolton*, 410 U.S. 179, 186 (1973). There were 44,022 unborn children recipient of benefits under AFDC in 1973, all paid in the seventeen states, Guam and the District of Columbia, which were the only jurisdictions making benefits available for unborn fetuses. DHEW Publications, No. SRS 74-03164, Findings of the 1973 AFDC Study, Part I, Demographic and Program Characteristics, NCSS Report AFDC-1, June 1974, Table 21, p. 42.



for the birth of her expected baby approached O'Steen became so upset and distressed by her lack of income that her nervous state threatened the loss of her expected baby and required medication and shots from her doctor (II App. 448).[9]

Her baby was born November 21, 1972 (II App. 449). It was not until in December that she received her first welfare check and was able to get her light, heat, cooking and refrigeration facilities restored (II App. 446-447).

When she went on pregnancy leave, she was told by a member of GE's personnel staff that she could return when the baby was six weeks old (II App. 444). Her doctor cleared her for return to work at six weeks and she returned to work for GE on January 1, 1973 (II App. 444, 449).

O'Steen was paid $2.65 per hour or $106.00 per week. Her weekly sickness and accident benefits, at 60 per cent of such weekly earnings would have been at the rate of $9.09 per day, $63.60 per week (II App. 446). Since O'Steen, unlike Thomas, did not have the benefit of a union to advise her that if she was not disabled, she had the right to work until her child was born and to return as soon as medically certified as able, O'Steen did not obtain medical certification as to whether she

[9] Judged by GE's touted "aim" of its disability plan to increase productivity by giving its employees "peace and security of mind by provision for the uncertainty of life" (III App. 969, see also pp. 17-21, *infra*), there could scarcely be any greater fear of the future than a woman hoping for a healthy normal baby someday but fearful that during those last critical weeks before the baby's birth she might have a protein deficiency that would produce a deficient offspring. See Dr. Hellegers' testimony as to the incidence of low IQ, cerebral palsy and other central nervous system disorders as the result of diet deficiency at the end of gestation (II App. 473-475, 486-487, IV App. 1322-1331).

could work until childbirth or as to whether she could have returned earlier than six weeks after childbirth. Hence, there is no evidence in the record as to how much of her absence was due to enforced mandatory leave when she was able to work. It may be that in assessing damages the district court will give her full back pay for a portion of her absence. If she had been disabled the entire period from October 15, 1972 to January 1, 1973, her sickness and accident benefits would have been computed by deducting the first eight days of her absence from work as is required when not in the hospital during those days (I App. 184, III App. 1065). Thus computed O'Steen was entitled to 77 benefit days at the rate of $9.09 per day, or a total of $636.36.

**Plaintiff Emma Furch—nonpregnancy disability while on pregnancy leave**

The plaintiff Emma Furch was another black employee who began to work for GE at its Tyler, Texas plant on October 13, 1966 (I App. 183, 189, II App. 420). She became pregnant in 1971 with an expected delivery date of July 6, 1972 (App. 420-421). She worked continuously until April 5, 1972, when during her fifth month a miscarriage threatened (I App. 183, 189, II App. 421). She was hospitalized April 7, went home on April 11 under doctor's orders to stay on complete bed rest, was hospitalized again on the 14th and on the 17th miscarried (I App. 183, 189, II App. 421-422). She stayed in the hospital until April 17, and then went home to convalesce (II App. 421-422). On April 21, 1972 she was again hospitalized for pulmonary embolism, a blood clot in the lung, unrelated to her pregnancy or miscarriage (I App. 183, II App. 421-423, III App. 1056-1057). She remained in the hospital until



April 29 and remained at home recuperating thereafter until she was cleared by her doctor for return to work and did return to work on June 6, 1972 (I App. 189, II App. 422, III App. 1056-1057).

Furch did not file any claim for weekly sickness and accident benefits for the period of her absence which was due to complications of pregnancy or miscarriage, but filed solely for the period of absence due to the pulmonary embolism (I App. 183, II App. 422-23, III App. 1056-1058).

She stated she was first "disabled by this sickness" April 21, 1972, that she was hospitalized as a bed patient in Mother Francis Hospital on April 21, 1972 and ending on April 29, 1972 (I App. 183, III App. 1056). On the reverse side of the claim form her doctor certified that her disability was not due to pregnancy, that she had been hospitalized on April 21, 1972 until April 29, 1972, but she was "continuously disabled (unable to work) from 4/21/72 through 6/5/72" (I App. 183, III App. 1057).

Plaintiff Furch filed the foregoing claim with GE on June 1, 1972 (II App. 422-423). On June 6, 1972, GE returned her claim to her with an explanatory letter reading as follows (I App. 183, II App. 422-23, III App. 1059):

Furch did not file any claim for weekly sickness and accident benefits for the period of her absence which was due to complications of pregnancy or miscarriage, but filed solely for the period of absence due to the pulmonary embolism (I App. 183, II App. 422-23, III App. 1056-1058). On the front side of her claim she stated she was first "disabled by this sickness" April 21, 1972, that she was hospitalized as a bed patient in

Mother Francis Hospital beginning at 6:00 p.m. on April 21, 1972 and ending at 7:00 p.m. on April 29, 1972 (I App. 183, III App. 1056). On the reverse side of the claim form her doctor certified that her disability was not due to pregnancy, that she had been hospitalized on April 21, 1972 until April 29, 1972, but she was "continuously disabled (unable to work) from 4/21/72 through 6/5/72" (I App. 183, III App. 1057).

Plaintiff Furch filed the foregoing claim with GE on June 1, 1972 (II App. 422-423). On June 6, 1972, GE returned her claim to her with an explanatory letter reading as follows (I App. 183, II App. 422-23, III App. 1059):

> "We are returning your claim for weekly sickness and accident benefits since such benefits have been discontinued in accordance with the provisions of the General Electric Insurance Plan.
>
> "The Plan provides that 'Weekly Sickness and Accident Insurance will be discontinued on the date you cease active work because of total disability or pregnancy, except that if you are entitled to Weekly Benefits for a disability existing on such date of cessation, Weekly Sickness and Accident Insurance will be continued until the expiration of the maximum period for which such benefits are payable for such disability in accordance with the provisions of the Plan. Such insurance may be reinstated only upon your return to active work'."

GE has refused to pay any weekly sickness and accident benefits for any of the absences resulting from any of these two different disabilities (I App. 183, II App. 423).

Furch at the time of her absence was paid $148.28 per week straight time (I App. 189) which would make her



daily benefit $12.71. She was absent 44 days (I App. 189) for which she is entitled to benefits, which makes her claim in the amount of $559.24.

**Plaintiff Mary Williams—disabled by a complication of pregnancy**

The Plaintiff, Mary Williams, suffered from complications of pregnancy which persisted from the sixth week of pregnancy until delivery and disabled her from work most of her pregnancy. All medical witnesses agreed that only a small percentage of pregnancies had any complications which would disable an employee from work (see p. 42, *infra*).

The plaintiff Mary Williams became an employee of GE at its Salem, Virginia plant on October 26, 1970, assembling plastics, and has continued to be employed on that job at all times since (I App. 189, II App. 424, 426-27). She became pregnant the latter part of June 1971 (II App. 425). She was hospitalized on August 4, 1971 after she experienced cramps and bleeding (II App. 425-426, 428). She was in the hospital five days. She remained at home several days after leaving the hospital and returned to work after a total absence of 11 days (II App. 425). She continued to work until September 13, 1971, when she again had cramps and bleeding (I App. 189, II App. 425-426, 428). Her personal physician advised her to stop work and to stay home in bed or on the couch until delivery (II App. 425-426). She followed his advice, remaining in her home in bed or on the couch and not leaving the house for any purpose until she went to the hospital and delivered her baby on February 22, 1972 (I App. 189, II App. 425-426, 428).

Four weeks after her baby was born, Williams phoned GE and asked to be allowed to return to work

(II App. 426). She was told that her foreman could use her and she returned to work on March 25, 1972 (I App. 189, II App. 426-428).

**Plaintiffs Barbara Hall and Doris Wiley—Mandatory unpaid maternity leave both before and after childbirth**

Plaintiffs Barbara Hall and Doris Wiley began work at the GE Salem, Virginia plant respectively on April 4 and April 15, 1966 (I App. 189, II App. 429, 432). Each of them received through the mails a GE employee Handbook which contained the following (I App. 179-180, II App. 429, 433, III App. 1013):

> "It is the policy of the Department that pregnant employees will be required to terminate active work at the end of the sixth month of pregnancy. The employee may terminate active work any time before the sixth month if she so elects.
>
> "Unless there are verified medical complications, an employee desiring to return to work must report back not later than eight weeks after termination of pregnancy."

Hall and Wiley each became pregnant in 1971 (I App. 189, II App. 429, 433). Hall discussed with her doctor how long she could work (II App. 430). He advised her that as long as she felt good she could continue to work (II App. 430, 431). Neither Wiley nor Hall had any complications and neither was advised by her doctor to discontinue work (II App. 430-431, 434). Nevertheless, GE required each of them to go on unpaid leave at the end of her sixth month of pregnancy (II App. 430, 433-34). Each was in the hospital five days and cleared by her doctor for return to work after each had her six weeks post partum check (I App. 189,



II App. 433-34). Each immediately applied to GE to be allowed to come back to work (II App. 431-432, 434). GE however, told each that she could not come back until eight weeks after the child's birth (II App. 431-432, 434). At all times during her employment with GE, Wiley had worked as an engraver, which was a sit-down job not involving any lifting or any strenuous work (II App. 434-435). Neither was allowed to and did not return to work until eight weeks after her baby was born (II App. 189, II App. 431-432, 434-435).

Each Hall and Wiley duly filed claims, certified by her respective doctor, for weekly sickness and accident benefits for the period of her absence as above described, which claims were denied solely on the ground that pregnancy absences were not covered (I App. 180-182, II App. 430-431).

**GE Treats Pregnancy as Illness for All Other Purposes**

Over the years of its bargaining for employees, the Union has gradually obtained, step by step, greater rights for women disabled by pregnancy so that at the time this suit was filed it believed that the only exception was with respect to the payment of temporary disability benefits. The 1970-1973 GE-IUE National Agreement states (Article VIII, Sec. 1(e), p. 30) that "'Illness' shall include pregnancy" (I App. 172, IV App. 1107).

The "GE Health Bulletin re pregnancy leave," issued 11/5/71 (II App. 722-725), which GE distributes to all its plants as a "headquarter statement" (II App. 638-639) provides that "The pregnant employee may elect to voluntarily discontinue working and have her status designated as 'Illness-Pregnancy' which is treated the same as an absence due to illness

for continuity of service" (II App. 724). Employee handbooks at various locations contain the following statement (I App. 267, 272, III App. 872):

> "An absence for pregnancy is treated as an absence for illness, except that no weekly sickness and accident payment is made".

The above mentioned GE Health Bulletin contains a description of the effect of pregnancy on the "capacity to work" (II App. 723) which is completely at odds with the testimony of GE's only medical witness in the case that a normal pregnancy in no way incapacitated a female employee from working up until delivery (II App. 682-684). Although GE's Labor Relations Counsel, Hilbert, took a contrary view (II App. 604), he admitted, on cross examination, that he had no basis for this view except his own conjecture (II App. 643-644). GE's witness, Actuary Jackson knew of no studies showing Workman's Compensation claims because of injuries due to pregnancy (II App. 564). Prentice Hall, in its survey of employers with respect to pregnancy policies, reported that not a single employer had ever heard of a workman's compensation case based on a claim arising from a pregnant woman (IV App. 1137).

Plaintiffs do not seek pay for any woman who voluntarily absents herself from work when not incapacitated. No claim for disability can properly be made by any employee for a period when he or she is not in fact disabled from working. Although GE has elected to designate all employees who go on voluntary leave during pregnancy as on leave for illness, to the extent that the employee is not disabled she should be treated the same as any other employee on voluntary leave. Only



if the employee became disabled within the first 31 days, would she be entitled to collect disability benefits and then, of course, only for the period she was disabled from working. There is a great deal of "semantic confuson" because "maternity leave has been a broad term to encompass not only leave for childbirth but in some contexts for the total period of pregnancy, and subsequent leave for child care." (IV App. 1161). The plaintiffs only seek disability pay for the period of "child bearing leave", meaning thereby leave when delivery requires their absence from work from the onset of labor through the period of convalescence from childbirth, plus any period of actual disability arising from a complication of pregnancy or childbirth. If a woman desires to stay at home while she is pregnant but able to work she should apply for unpaid personal leave. If she wishes to stay home and take care of the child after she has become physically qualified to work again she should apply for personal unpaid leave. The latter leave is sometimes called "child rearing leave". The EEOC guidelines respecting temporary disability pay clearly apply only to the period of childbirth leave. As to other leave, it must similarly be afforded a female on the same basis as comparable types of leave are furnished to a male employee without either advantage or disadvantage because of pregnancy or child rearing (IV App. 1151, 1155-1167, 1168-1170).

GE's historic Company position that pregnancy is an illness (pp. 37-38 *supra*) is contrary to the position of GE in this lawsuit (GE Br. 10-11, 24-25, 62-63, 66, 67-68) and contrary to the position of its only medical witness, Dr. Wilbanks (II App. 679, 681-688, 693, 697-709). All of GE's cost figures, besides being held legally irrelevant by the courts below (Jt. Pet. 31a, Supp.

Br. Jt. Pet. 10a-11a fn. 23) were also discredited because they reflected GE's view that an employee was ill throughout pregnancy (Jt. Pet. 22a). ~~Supp. Br. Jt. Pet. 10a-11a fn. 23).~~

### Mandatory Unpaid Leave for Pregnancy

GE has repeatedly issued employee handbooks to its employees containing statements that a pregnant employee must go on unpaid leave at the end of her sixth month of pregnancy (I App. 179-180, 221, 277, III App. 869, 1012-1013, 1019) or at some plants, at the end of her seventh month of pregnancy (I App. 269, III App. 1020-1022). GE has enforced its mandatory unpaid leave policy and grievances alleging improper insistence on mandatory leave have been rejected by GE (I App. 181, III App. 1020-1021). Although at the time that this suit was filed the Union had been assured by GE that employees could work until delivery if their personal physician so certified and the Union assumed that GE was conforming to this assurance (I App. 20), it appeared during the preparation for trial in this case that GE had not taken any effective steps to put this policy into effect (II App. 639-640). As late as January 15, 1973, the GE publication to employees at its Murfreesboro plant carried a front page notice that employees were required to quit work at the end of their sixth month (I App. 181, II App. 639, III App. 1019). It was stipulated that the employees at the Salem, Virginia plant had never been notified that the six months termination date appearing in their employee handbook was no longer in effect (I App. 179-180, 211, 221, III App. 1013).

One of the plaintiffs in this case, Erma Thomas and another employee at the Tyler Texas plant (I App.



180), were each notified February in 1972 she had to stop work at the end of her sixth month and it was only due to intervention of the union that they were permitted to continue work (see pp. 24-25, *infra*).

In instances of an employee who due to non-pregnancy related conditions is partially disabled so that he cannot perform his usual duties but is still physically able to perform other work in the plant, GE temporarily assigns such employees to suitable work (I App. 187-188). In the many handbooks and bulletins issued by GE on the subject of leave for pregnant employees there is no suggestion that GE was willing to apply its temporary assignment practices to pregnant employees.

### Medical Testimony

All three obstetricians who testified, GE's medical expert, Dr. George Wilbanks (II App. 670-679), and the plaintiffs' two medical experts, Dr. Andre Hellegers (II App. 452-456) and Dr. David Forrest (I App. 312-315), as well as Dr. Robert Barter, whose testimony in another case GE included in an exhibit in the instant case (III App. 779-790), were agreed that more than 90 percent of the pregnant women workers continued good health throughout pregnancy and could continue to work at their accustomed jobs until they went to the hospital to deliver their babies (I App. 315-316, 320-322, II App. 459-464, 489-499, 682-685, 708-709, III App. 781-782, 783-790, IV App. 1292-1293, 1297-1308). They likewise agreed that many women are fully recovered from childbirth within two or three weeks, and, with rare exceptions, all were fully recovered by six weeks (I App. 329-330, 349-351, 357-358, II App. 465-468, 500-501, 686-688).

**Complications of pregnancy**

With respect to the various complications of pregnancy which disable the pregnant women from working, the evidence establishes that they are from a medical point of view the same as other disabling conditions and have no characteristics peculiar to pregnancy which would justify denying sickness and accident benefits for the period of the disability (I App. 334-336, II App. 470-472, 485-486).

The testimony placed at not more than 10 per cent the number of women who have complications during pregnancy, aside from the 10 per cent who spontaneously miscarry during the first trimester (I App. 344-345, 355-356, II App. 461-462, 463-464, 492-493, 498). Miscarriage during the first trimester is usually a one or two day affair (II App. 463-464). If the miscarriage necessitates hospitalization she is generally in and out the same day (II App. 492-493).

Of the less than 10 per cent of the women who do have complications, only about half or 5 per cent of all pregnancies have major complications which might disable the woman from working. Dr. Forrest testified that only 1 per cent to 2 per cent of the patients which he delivered had major complications, meaning thereby complications which would disable a woman from working (I App. 323, 344-345).

Dr. Hellegers believed that fewer than 10 per cent of women had complications, but made a high guess of 10 per cent who had major complications (II App. 494-495). These 10 per cent Dr. Hellegers divided into two categories (II App. 461-462):

> "There would then be a certain group of women who would be disabled by virtue of two groups of conditions * * * the one would be that group of conditions I alluded to before where the rapid weight gain of pregnancy brought out an underlying disease which was there in the non-pregnant state, like, diabetes, and that might or might not cause disability depending on how well it was under control very much in the same way as a man gaining weight rapidly might suddenly decompensate in diabetes. * * * Then there would be a second set of disabling conditions of the fetus and placenta, which is obviously what differentiates from the non-pregnant state. And the two most classical ones of those would be one, the condition in which the placenta lies below the infant and consequently episodes of bleeding might occur in pregnancy. And the second major one would be the one in which a part of the placenta would be detached from the lining of the uterus, so-called eruptial placenta or premature separation of the placenta."



Dr. Hellegers testified that of the 10 per cent of pregnant women who have complications about half, or 5 percent of all pregnant women come within the classification of complications caused solely by weight gain and the other 5 per cent in the classification of complications caused by the presence of the fetus (I App. 494-495, 498-499). He expanded further on the conditions effected by weight gain and testified that from a medical point of view these complications were no different from a weight gain in men (II App. 457, 461-462, 468, 476, 495-499). GE's medical expert agreed (II App. 715). Some conditions in either a pregnant female or a male which are aggravated by a weight gain are: diabetes, thyroid, hypertension and heart disease (I App. 331-332, 336-337, II App. 461, 468, 471-472, 495-498). The complete lack of any rational basis for distinguishing between males and fe-

males in such situations was made manifest in the following colloquy between the district court and GE Labor Relations Counsel Hilbert (II 606-607):

> "The Court: * * * Mr. Hilbert, let me ask you if under your policy a woman is being treated simultaneously for her pregnant condition and hypertension, for example, a latent situation which came about as a result of or at least came to the forefront as a result of this rapid gain in weight that the doctors have been talking about, does she get disability?
>
> "The Witness: No, sir.
>
> "The Court: Why not?
>
> The Witness: Well, because in effect I guess the short answer is because the language of the plan excludes any disability resulting from pregnancy.
>
> "The Court: But supposing it didn't result from pregnancy, it was there all the time, or a condition was there that wasn't noticeable, wasn't known?
>
> "The Witness: Well, under the language of the plan it is our contention, and we have applied it to it this way, in that situation the benefits are not payable.
>
> "The Court: How about the chap that goes off on a gourmet holiday and comes back with a rapid weight gain and starts being treated for hypertension. Does he get disability?
>
> "The Witness: If he is under the care of a physician who certifies that he is sick and disabled, he has suffered total disability, inability to work because of sickness, then we will pay."

The problem presented by the placenta is usually manifested by bleeding (I App. 320, 324, 345-346, 351-



353, II App. 461-462, 471-472, 476-477). Medically, the problem of a lot of blood coming from a ruptured uterus is no different than a lot of blood coming from a ruptured ulcer in a male (II App. 472).

Ectopic pregnancies always require surgical procedures which parallel surgical procedures for other abdominal operations such as an appendectomy (II App. 464, 465, 468-469). Likewise, Caesarean operations are not medically different than a gall bladder operation or an appendectomy (I App. 330-331, 332-333, II App. 468-469, 501-503). The similarities cover both the type of surgical procedures followed, the period of recuperation and the disabling of the employee from work (I App. 332, II App. 468-469, 501-503).

**Normal delivery**

The women who give birth are all bed patients in the hospital whereas a large proportion of the males who draw sickness and accident benefits are never hospitalized. The undisputed medical testimony is, to quote Dr. Forrest, "I would say that 100 per cent of these patients go to the hospital. Even if they delivered in a rescue squad, they still go to the delivery table and are examined and kept there for three or four days" (II App. 364, cf. I App. 326-327, II App. 511, 681).

The role which hospitalization serves in GE's sickness and accident program is evident from the fact that sickness and accident pay becomes immediately due on the first day of hospitalization whereas sickness and accident pay is not due until the eighth day away from work if no hospitalization occurs (III App. 1065).

Delivery involves not merely hospitalization as such. There is routinely a surgical procedure known as episiotomy, with accompanying anesthesia, in which skin tissue and muscle tissue are cut, and the repair of the incision with stitches which usually accompany surgery (I App. 326-328, 357-358, II App. 364-365, 513-516). Dr. Forrest described an episiotomy as follows (I App. 326-327):

> "An episiotomy is that incision which is made between the posterior opening of the vagina and the rectum. And this incision releases the muscular—muscles and fibers, tissue, and allows a larger opening so that when the baby's head is delivered there is—it makes it easier for the baby's head to be delivered. * * *
>
> "In most instances, particularly with the first baby, if you don't make it nature will make it for you and a tear is much harder to repair than an incision."

The consequences which might ensue if instead of an episiotomy a woman had a tear which was not repaired, were described by Dr. Hellegers as follows (II App. 515-516):

> "The most severe form might be formation of a fissure which would be an opening or tract between the vagina and the peritoneal, and a lesser—a relaxation of perineum, possibly loss of sphincter control in the rectum, or worse—well, not worse but alternatively, uneven healing of the two edges of the wound so that one is constantly sitting on a knob with the pain and discomfort of constantly sitting on a knob."

In performing the episiotomy and in repairing tears from childbirth, the same surgical instruments are used, the same anesthesia and the same "cat gut" or other absorbable sutures to sew up incisions, as are used in other operations or in providing remedial measures in accidents (I App. 327-328, 357-358, II App. 364-365, 514-516).



All women who deliver are disabled during labor and delivery (II App. 461, 514). Labor and childbirth is not such a normal process that a woman can go through it herself unaided by medical assistance (II App. 512-515). Usually delivery is followed by a three or four day stay in the hospital (II App. 364, IV App. 1275).

**For benefit purposes no rational differences between disabilities**

In response to a hypothetical question listing the purposes of temporary disability pay as the employer's belief it increased productivity in the manner described above (pp. 17-20, *supra*) both Dr. Forrest (I App. 334-336) and Dr. Hellegers (II App. 470-471, 485-486) testified that paying sickness and accident benefits to females disabled by childbirth or a complication of pregnancy was as relevant to these purposes as payment of sickness and accident benefits for other disability causes.

On direct examination GE Labor Relations Counsel Hilbert testified that GE's primary concern was "production" and theorized about the reduced production which might result from the presence of a woman well advanced in pregnancy in a group of employees paid on the basis of a group incentive system (II App. 603-605). While on cross examination he admitted that he had never heard of such a situation arising and that his direct testimony was based simply on "my impression of life in the GE Company" and not on any "specifics" (II App. 642-644) his reasoning makes it clear

that the same purposes as motivate payment of sickness and accident benefits in all the situations in which it is paid are equally applicable to a woman whose physical ability to work is affected by a disability caused by pregnancy.

**Potential Pregnancy Discriminatory Factor in Low Female Wage Rates**

Prior to the enactment of Title VII GE made no pretense but what it paid women less than men for the same work. Typical of GE's attitude is the following answer given during collective bargaining negotiations by Mr. Willis, GE Employee Benefits Manager (II App. 645), when IUE President Jim Carey pointed out that wages in the steel industry were higher (III App. 1034, 1037):

> "[T]hey don't have women; therefore, our average wage is lower."

The War Labor Board in a decision issued in 1945, *General Electric Co.,* 28 War Lab. Rep. 666 quoted a GE job evaluation manual which expressly provided that women were to be paid one-third less than men for the same work. This manual reads as follows (III App. 995, 1002):

> "In evaluating the characteristics of a job, the point value allowed each characteristic should be in proportion to its importance on that job.
>
> "Thus, all jobs receive proper consideration, one to another on each characteristic, and the sum total of the characteristic values of each job, after adding the base content, will be in correct relationship to each other, and the rates so determined will be equitable and just.
>
> 'The total points, including the base points thus assigned, are then to be multiplied by the value per point which is suitable to the status of the job.



> "The value per point for day work performance is to be set to establish average day rates with a maximum permissible day rate of 5 per cent above, while the value per point for incentive performance is to be 15 per cent higher than for day work. *For female operators, the value shall be two-thirds of the value for adult male workers.*" (Emphasis supplied)

The War Labor Board decision contains a table listing many plants here involved, and shows at these plants "a heavy concentration" of women in "jobs carrying rates substantially below those of the male common labor rate" (III App. 1003).[10] The Board

[10] The following table was part of the War Labor Board decision (28 War Lab. Bd. 666, 681), is in evidence here as part of Exhibit T to Pre-Trial Stipulation of Facts (I App. 179) and should have been printed at III App. 1003 but was omitted:

*General Electric* •

| Location | Range of Women 's Rates Min. † | Max. | Male Common Labor Rate | Rate at Which Largest No. of Women are Concentrated (Modal Rate) | Differential Between Male Common Labor & Modal Rate of Women | % of Women Employees at Modal Rate |
|---|---|---|---|---|---|---|
| Taunton | $.62 | $.74 | $.71 | $.68 | $.03 | 87 |
| Pittsfield (Chem.) | .68 | .92 | .80 | .74 | .06 | 48 |
| Pittsfield Works | .65 | .92 | .80 | .71 | .09 | 42 |
| Lynn | .62 | .80 | .80 | .74 | .06 | 23 |
| Ontario | .65 | .71 | .77 | .65 | .12 | 54 |
| Lowell | .68 | .84 | | .68 | | 48 |
| Ft. Wayne | .68 | .92 | .84 | .71 | .13 | 50 |
| Bridgeport | .62 | .74 | .80 | .65 | .15 | 75 |
| Schenectady | .62 | .84 | .80 | .71 | .09 | 43 |

• Sample plants selected by the company on the basis of volume of production and number of women employees.

† Lowest rate at which women actually employed. In some cases, the starting rate was lower but no women employees at the starting rate.

found (Plaintiffs Exhibit 16, p. 683, Pre-Trial Stipulation Par. 22, Exhibit I):

> "All but a small fraction of the women's jobs are rated substantially below male common labor despite the fact than many, if not most, of these jobs clearly involve more skill, mental aptitude, and responsibility than the male common labor jobs."

The Board concluded (III App. 1004):

> "On the basis of the entire record, we conclude that the union has established the existence in the plants of both companies [GE and Westinghouse] of substantial differentials between rates for women's jobs and men's jobs which cannot be justified on the basis of comparative job content."

In the years since 1945 increases in wage rates given across the board (III App. 1034-1035) have brought up the hourly rates of both male and female employees but have not significantly changed the relationship of wage rates paid to women as compared with those paid to men. 43.6 per cent of the females represented by the plaintiff International Union as of December 1972 had earnings below the male common labor rate, as compared with 6 per cent of the males having such earnings.[11] In 1970 and 1971, women employed by GE had straight time hourly wage rates less than 75 per cent of the hourly wage rate for males.[12]

[11] It is stipulated that on each page of Exhibit L to the Pre-Trial Stipulation "The heavy black horizontal line across the page with an hourly earnings figure entered in long hand above the line indicates the common labor or equivalent rate at the plant designated" (I App. 177-178, III App. 883-953).

[12] GE's Answers to Plaintiffs' Interrogatories 72-75 show that the average weekly sickness and accident benefit claim paid by GE in 1971 to males was $92.89, to females $69.79; in 1970, to males $86.31, to females $64.26, plus or minus a possible correction not in excess of 2% (I App. 227-228, 260). Since the benefit was at the rate of 60% of straight time earnings but not in excess of $150.00 per week (III App. 1062) the hourly rates of males including 2% correction added were, 1970, at least $3.89; 1971, $3.95. The comparable figure for females for 1970, $2.73; 1971, $2.96. This would mean that the annual rate based on straight time earnings of males in 1970 was $7,628.92; 1971, $8,210.80: of females 1970, $5,704.92, 1971 $6,168.76. In answering Interrogatories 72-75 GE stated "In this connection we note the attached fact sheet, dated December 1971, prepared by the Women's Bureau, U.S. Dept. of Labor, shows that in the years 1965-1971 women's median earnings have been approximately 60 percent of men's earnings" (I App. 260). GE Labor Relations Counsel Hilbert testified that the 1973 to date projection of GE annual rates of pay, including overtime, is $10,000 for males, $7,750 for females and, excluding overtime, $9,200 for males, $7,200 for females (II App. 608-609).



The print out of the hourly straight-time earnings as of December 1972 of males as compared with females for all employees at each of the GE plants represented by the IUE (I App. 177-178, III App. 883-953) shows the continuance to date of the pattern found by the War Labor Board of females concentrated heavily in the lowest paid brackets and virtually absent in the higher pay brackets (I App. 177-178, III App. 883-953).

Analysis of GE's justification to the War Labor Board for its payment of lower wages to females discloses that the lower wages represent a discounting based on various allegedly greater costs in employing females, one of which was the cost of paying temporary disability benefits to women absent for childbirth or a complication of pregnancy. GE relied upon the community practice in the areas where it had plants as justifying its paying females low rates (III App. 1004-1007). Among the cases cited by the War Labor Board (Plaintiffs' Exhibit 16, pp. 675-676) is *United Screw and Bolt Company,* 17 War Lab. Rep. 232, 235 (1944) where the Board rejected the costs incident to child bearing as justifying a lower wage for females.

Throughout the years prior to the enactment of the Equal Pay Act (29 USC 206(d)) employers generally

attempted to justify lower wages for females on the basis of the allegedly higher cost to the employer of employing females, one of which higher costs was the cost of sickness and accident benefits during maternity leave. See the following testimony of W. Boyd Owen, Vice President of Personnel of Owens-Illinois Glass Co.: [13]

> "*[T]he cost of providing disability income benefits fore female employees is reported to be approximately 150 percent of the cost of providing the same benefits for male employees when maternity benefits are excluded or 200 percent when maternity benefits are included,* * * * For a typical package plan of medical care benefits, however, the female cost is reportedly about 130 percent of the male cost. This does not include a plan that allows benefits for pregnancy. Since the typical group plans does include benefits for pregnancy, a ratio of 165 percent or even 170 percent would be appropriate." (Emphasis supplied)

The Owens-Illinois Company has filed a brief here as *amicus curiae* in support of GE's position in which the same arguments are addressed to this Court (pp. 3-4, fn. 3, 4) as were unsuccessfully addressed to Congress in 1963.

An exhibit offered by GE shows that in 1972 sixty percent of the women nationwide who are covered by temporary disability benefit plans receive 6 weeks coverage for pregnancy-related absences (II App. 738).

GE is a competitor in the glass industry. Two of the unions representing employees of GE engaged in the glass industry, are primarily unions of glass workers (I App. 134, 140).

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[13] Hearings on S. 882 & S. 910 Before the Subcom. on Labor of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess. April 3, 1963, p. 142.



We have attached hereto as Appendix A a list of some of the major employers who provide sickness and accident benefits for maternity absences, indicating the number of weeks provided (see pp. 1a-3a *infra*). A comparison of the list with a list of the competitors of GE (II App. 622-623, 625-627) (see list of unions with whom GE bargains) and the variety of plants operated (I App. 133-142) shows that many of GE's competitors pay benefits for pregnancy disability for six or eight weeks.[14] GE Labor Relations Counsel Hilbert in his testimony pointed out that the IUE in bargaining for disability benefits for pregnancy-related disabilities had in 1955 relied upon the payment of six weeks benefits by GM (II App. 585, 622-623, 625-627). Minutes of negotiations in 1966 show reliance by IUE on the provision of disability benefits for maternity absences by a large number of employers (III App. 879).

In addition to the above quoted testimony of Mr. Owens, other witnesses during hearings on the bill which became the Equal Pay Act, similarly emphasized that the lower wages which women were paid, were due to costs to the employer incident in part to the childbearing of the female employee.[15]

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[14] GE over the years has stated that it considers itself "the most diversified company in the American economy," being actively engaged in 18 of the 21 basic industry classifications used by the Department of Commerce. Testimony of Virgil Day, formerly Vice President of GE, *Matter of General Electric Co.*, 150 NLRB 192 (1964), enf'd 418 F.2d 736 (2nd Cir. 1969) cert. denied 397 U.S. 965 (1970), at Tr. 6047. This is confirmed by the list of unions with which GE bargains which is in the record here (I App. 133-142).

[15] Statements of James Fagan on behalf of the Council of State Chambers of Commerce, Hearings on H.R. 3861 and related bills before the Subcommittee on Labor of the House Com. on Education and Labor, 88th Cong., 1st Sess., pp. 192, 194; John G. Wayman, pp. 137, 146-147; Arnold G. Becker, Supervisor, Labor Relations, Hazel-Atlas Glass Division, Continental Can Co., Inc., p. 250, 252; William Miller, Vice President, Stewart-Warner Corp., Chicago,

While we believe that much of this employer testimony as to the cost of providing such disability benefits for pregnancy-related disabilities is vastly exaggerated, the fact that Congress rejected the argument establishes that it intended to correct this discrimination, notwithstanding that wage rates were also to be equalized.

**Refusal to Hire Pregnant Applicants for Employment**

In the [redacted] "GE Health Bulletin re pregnancy leave" issued 11/5/71 (II App. 722-725) which constitutes a "headquarters statement" of policy (II App. 638-639), all personnel of GE have been advised not to hire any pregnant applicants for employment (II App. 723).

**Reason for Exclusion Asserted by GE During Bargaining**

The Union proposed to GE during contract negotiations in 1955, 1963, 1966, 1969, 1972 and 1973 the deletion from the temporary disability benefit plan of the exclusion of pregnancy-related disabilities (I App. 154, 176, II App. 584, IV App. 1102-1104). Beginning in 1955 the Union repeatedly called GE's attention to the fact that General Motors and other competitors had six weeks of disability benefits for preg-

Ill., on behalf of the Chamber of Commerce of the United States, p. 155, 158 and 164; Jerry N. Markham, Director, Industrial Relations of Thatcher Glass Mfg. Co., Inc., p. 241, 243. During hearings on S.882 and S.910 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess. (1963), the issue was raised by spokesmen noted above before the House, plus also Geraldine L. Gross, on behalf of the Council of State Chambers of Commerce, p. 129, 131, and others. Supporters of the bill also discussed the issue. For example, during Senate Hearings Dorothy Haener, International Representative, Women's Dept., UAW, on behalf of Caroline Davis, Director, p. 151, 152 and 155. In the House, Sonia Pressman, Attorney, ACLU, p. 211, 214 and Elizabeth S. Johnson, American Assn. of University Women, Washington, D.C., p. 253, resumed at 265, 272.



nancy disabilities (II App. 584-585, 622, III App. 879). During the 1973 negotiations the Union proposed affording employees disabled by pregnancy, childbirth or complications thereof the same disability benefits as any disabled employee (I App. 144-154). The proposal submitted to GE read (I App. 154):

> "The elimination of all provisions in the national agreement or local supplements which single pregnancy out for special treatment. As long as pregnant employees are able to work they should be treated exactly the same as other able bodied employees. To the extent that an employee is disabled by pregnancy, childbirth or complications arising therefrom, the rights to leave, return to work, accumulation of service credits and sickness and accident benefits should be the same as for any disabled employee."

This suit was then pending and the matter was left for resolution by this suit, with GE agreeing to indemnify the Union against any liability by reason of the exclusion arising under the 1970-1973 and the 1973-1976 agreements (IV App. 1346).

During the 1966 negotiations GE rejected the Union's proposal on the ground that the majority of pregnant females did not return to work following delivery (III App. 879). Although the plaintiffs requested by way of interrogatories the number of females returning during the period 1967-1972 (I App. 205, Interrogatory 11), GE supplied figures for only 1970 and 1971. Contrary to the assertion of GE, its data showed that 60 percent of the women were returning (I App. 253, 257-258) whereupon GE changed its ground of rejection, contending that absences based on childbirth or a complication of pregnancy did not involve "a disability as such" (III App. 881).

**GE Disclaimer of Cost Considerations During Bargaining**

GE's position in every round of negotiations held with IUE, including the 1969 round of negotiations which produced the 1970-1973 agreement in effect when this suit was instituted, was that GE negotiated only "level of benefits, not costs" (II App. 645-647, III App. 1028, 1031, 1033, 1048-1049).

GE Counsel Hilbert testified that in negotiations, GE had repeatedly told the union that GE bargains level of benefits, not costs (II App. 645-647). The following colloquy was quoted by the Second Circuit in *NLRB* v. *GE,* 418 F.2d 736, 750 (2d Cir. 1969), cert. denied 357 U.S. 965 (1970) (III App. 1033):

> Swire [Union]: We are asking for an improvement in maternity. * * *
>
> Willis [Company]: * * * Maternity is the most expensive item.
>
> Swire [Union]: What does it cost * * * ?
>
> Willis [Company]: We talk level of benefits, not costs.

The minutes of negotiating meetings shows that both in 1966 and in 1969, the Company reiterated its refusal to reveal or discuss costs (III App. 1026-1028, 1036, 1037, 1041, 1043, 1044, 1048, 1049). GE expressly disclaimed any problem of "ability to pay" (III App. 1048) and insisted that it bargained only with "what is the appropriate thing to do" (III App. 1036). It admitted that, as the union demonstrated, many other companies paid disability benefits for pregnancy-related disabilities, but insisted that GE had "better uses for the money in [its] overall plan," pointing to medical coverage for pensioners as an area in which GE was ahead of other companies (II App. 585, 622, 646, III App. 879, 880-882, 1036).



**Cost to GE**

GE did not offer any evidence, nor submit even an estimate, as to the cost to it of paying sickness and accident benefits to employees who were absent from work due to childbirth. Rather GE offered a vague estimate as to the cost nationwide to all employers in the aggregate (II App. 536-539, 541-559, 561-563, 737-738, III App. 846-849). The data submitted by other employers is irrelevant because it assumes that the entire period of absence is due to disability. Before giving such data any realistic meaning, it is essential to separate the period of actual disability to the employee for which benefits would be paid, and the period of leave of absence to permit the employee to take care of the newborn child for which benefits would not be paid (see pp. 38-39, *supra*). The plaintiff objected to all evidence offered by GE as to costs (I App. 304-305, II App. 451-452, 591-592). The district court expressed a strong doubt as to the relevance of the evidence but admitted it to make a complete record (I App. 446, 451). The court of appeals did not consider it (Supp. Br. Jt. Pet. 10a-11a (fn.23)).

In their interrogatories the plaintiffs requested complete statistical data for each of the years 1967-1972 including among other requested data the amount of time lost from work by males as compared with females, the time lost by females due to pregnancy, the number of men who received disability benefits because of alcoholism, drugs, fighting, lung cancer and hernias, and amount of such claims paid, and the amount for hospital, medical, and prescription drugs by sex, including and excluding dependents, the same data respecting claims for maternity services, showing whether payment was for employee or for spouse of employee and the total annual cost to GE of all fringe benefits for all employees by sex and average

cost per employee by sex. GE refused to furnish most of the data requested, objecting that "the information is irrelevant and does not appear reasonably calculated to lead to the discovery of admissable evidence" (I App. 294-296). Since GE had not pleaded business necessity nor made any other cost contention in its answer and since, even if it had, the burden of proof would have been on GE, the plaintiffs did not move to compel compliance. Having refused to supply data which would have given a complete picture of the cost, on the basis of sex, GE cannot now rely upon the cost of a single item, pregnancy-related disabilities, which comprises a relatively small portion of the insurance program.

*Cost of average male claim exceeds cost of average female claim.*

The only comparative male/female data which GE provided was with respect to disability benefit claims and showed a 26% higher cost per average male claim than per female claim in 1970 and a 22% higher cost per male claim in 1971. GE's answers to interrogatories showed that the average days of absence covered by a disability claim were 48 days per male as compared with 52 days per female in 1970 and 47 days per male as compared with 52 days per female in 1971 (I App. 244). The average amount paid per male disability claim was $592.23 (plus or minus 2%) as compared with $477.51 (plus or minus 2%) per female in 1970 and $623.95 (plus or minus 2%) per male as compared with $518.71 (plus or minus 2%) per female in 1971 (I App. 227-228, 260.) [16]

[16] GE's assertion (Br. p. 6, fn. 5) that its average cost per insured employee in 1970 was $82.57 per female and $45.76 per male and in 1971 was $112.91 per female and $62.08 per male was calculated in a sex biased manner not permissible under Title VII. The assertion rests on the premise that although the average days absence covered by female claims is substantially the same as the average day's absence covered by a male claim, it costs GE more per female because more females were absent. This is burdening each female by judging her by placing her in the classification female, rather than judging her as an individual. See the excellent analysis of the sex discrimination inherent in disadvantaging an employee because of the characteristics of members of her sex based on averages, in Note: Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109-1172-1176 (March 1971).



*Average pregnancy-related disability claim compared with average male claim*

Because GE imposed mandatory leave, usually for three months prior to expected delivery date and for two months after childbirth (see pp. 24-25, 36-37, 40-41, *supra*) past experience at GE affords no basis for determining the length of actual disability which can be expected if mandatory leave is abolished and disability benefits are paid.

The explanation for the great variability in duration of absences prior to the date of delivery upon which GE relies in making its assumptions as to the costliness of covering pregnancy-related disabilities (see GE Br. p. 9, fn. 10) is to be found primarily in the inaccuracy of present practices of fixing the expected delivery date. Only 4.1 percent of the babies arrive on the expected date and a larger percentage arrive this date than any other date. The following table which appears in Eastman, Williams Obstetrics (11th ed.), p. 216, Table 8-1, shows the spread of arrivals of full term babies:

| | |
|---|---|
| Delivered on expected due date | 4.1 % |
| Delivered 1-5 days early | 18.5 % |
| Delivered 6-10 days early | 13.1 % |
| Delivered 11-20 days early | 15.7 % |
| Delivered 21-30 days early | 4.5 % |
| Delivered 31 days or over early | 1.6 % |

| | |
|---|---|
| Delivered 1-5 days late | 16.6 % |
| Delivered 6-10 days late | 12.2 % |
| Delivered 11-20 days late | 9.9 % |
| Delivered 21-30 days late | 2.9 % |
| Delivered 31 days and over late | 0.9 % |

If the employees are permitted to work until actual delivery, as occurred in the case of plaintiff Thomas (pp. 25-26, *supra*), this variability in length of pre-delivery absences is eliminated.[17] Taking the periods of six to eight weeks which the district court found was the period of time pregnancy without complications would normally be disabling (Jt. Pet. 20a) and disregarding the two to three percent of pregnancies which may involve disabling complications, the incurred costs would be minimal especially when considered in the context of the total amounts which GE spends on employee benefit plans. GE refused to supply the total cost of all fringe benefits for the period 1967 to 1972. The record therefore fails to show the very small proportion of labor costs which disability benefits ~~contribute~~ constitute. The plaintiffs did introduce in evidence an exhibit containing the figures as to the amount expended by GE in its "insurance" plans in 1972, showing a payment of more than $200,000,000 (IV App. 1099-1101).

Taken in this context it is possible to make a fair estimate of what the additional cost might be if the disability period averages six weeks or eight weeks. (Jt. Pet. 20a). GE admitted that the average weekly sickness and accident benefits paid to females in 1970

[17] See grievance of Betty Snyder, Tell City, Indiana where GE recomputed the expected delivery date placing it two months earlier than her doctor and imposing unpaid mandatory leave on the basis of GE's calculation of the due date (III App. 1020-1022).



was $64.26, in 1971, $69.79, subject to a possible correction plus or minus of not in excess of 2% (I App. 227-228, 260).[18] Figured at these benefit rates, the average weekly benefit claim of a female for six weeks disablement by childbirth and delivery in 1970 would have cost GE $325.20, for eight weeks, $418.94. In 1971 the benefit cost for six weeks would have been $418.74, for eight weeks, $558.32.

While the findings of the district judge are to the effect that about 2 to 3 percent (or half of the 5 percent who have complications) would be disabled (J. T. Pet. 20a), the period of disability would vary. The effects of averaging the disability claims for such longer periods of disability would probably still leave the cost to GE of the average claim for pregnancy-related disabilities lower than the cost of the average male disability claim, or at least only slightly larger.

In 1971, the latest year for which data is available, GE employees had 2,781 pregnancies (I App. 253). If figured on eight and six weeks duration, the total cost for females would have been $1,583,641 and $1,157,308, respectively. Given the total sickness and accident payments to both males and females (I App. 197-200), the increase in total cost of the sickness and accident program for both male and female, figured at 8 and 6 weeks duration, for 1971 the increase would have been 6% and 4%, respectively.

[18] GE's actuary Jackson testified that all of his calculations were based on a weekly benefit of $90, which figure had been supplied by GE (II App. 558). His testimony shows that he failed to consider the fact that females because of their lower rates of pay get benefits of a lower dollar value than males (II App. 569).

**Nationwide Cost Estimates**

The estimates of the cost to all employers of covering pregnancy disabilities which GE introduced in evidence over the objection of plaintiffs (I App. 304-305, II App. 451-452, 591-592), are based on the following inaccurate assumptions:

1. It is conjectural whether all employers who have disability programs would be required by the EEOC guidelines to pay disability benefits for pregnancy-related disabilities. The EEOC guidelines test the existence of discrimination by looking to the terms and conditions upon which benefits are paid to males. Only to the extent that absences for pregnancy-related disability judged by the standards used for male claims, would be payable except for sex-linked characteristics, would Title VII require the payment of claims. Whether all employers having disability plans apply standards which would make failure to pay pregnancy-related disability claims violative of Title VII is unknown.

2. Each of GE's actuaries assumed women would be absent for childbirth for periods two to three times longer than the six to eight weeks which the district court found would be the normal period of disability (Jt. Pet. 20a). Jackson's figures assumed all women would be absent for 13 weeks when this was the maximum period covered, for 23 weeks under 26 week plans, [redacted] 30 weeks under 52 week plans (II App. 554). Bailie made three calculations, assuming all women would be absent either 20 weeks, 25 weeks or 30 weeks (see GE Br. pp. 8-9, fn. 9).

3. The assumed weekly benefit failed to give effect to the fact that most benefits are paid on the basis of



a percentage of wage rates as in the instant case (III App. 1060-1065), or are otherwise graduated according to wage rate (II App. 568) and that women's rates of pay nationwide are only 60% of those of males (I App. 260, 278-279). Under cross examination, GE's actuary Jackson admitted he did not give effect to this fact in making his calculations (II App. 557-558, 569).

**Findings of Fact of the District Court**

The district court entered extensive findings of fact (Jt. Pet. 2a-28a). The findings which are relevant to the issues before this Court are as follows:

1. All females employed by GE are equally victims of GE's refusal to pay weekly sickness and accident benefits when a woman is absent because of a pregnancy-related disability (Jt. Pet. 4a, I App. 130).

2. GE's "discriminatory attitude" towards its female employees was a "motivating factor" in its policy of not paying weekly sickness and accident benefits to women absent because of a pregnancy-related disability (Jt. Pet. 32a).

3. GE's exclusion of pregnancy-related disabilities from its disability program is neither "neutral on its face" nor "in its intent" (Jt. Pet. 30a).

4. GE has imposed varying periods of unpaid involuntary leave on pregnant employees such as mandatory leave for three months before childbirth and six weeks thereafter, thus making pregnant women the "only" employees "who have been required to cease work regardless of their desire and physical ability to work" and "to remain off their job for an arbitrary period after the birth of their child" (Jt. Pet. 36a-37a).

5. GE chose to establish a benefit program and "deliberately to preclude benefits to employees who became pregnant" (Jt. Pet. 30a-31a).

6. There is no issue of increased costs because the discrimination arises out of the manner in which the money paid is distributed, not in the failure to provide a larger amount for distribution (Jt. Pet. 31a).

7. The actuarial value of the coverage now provided by GE is not equalized between men and women (Jt. Pet. 31a-32a).

8. The provision of disability benefits for female employees with pregnancy-related disabilities within an otherwise all inclusive disability program cannot reasonably be considered more favored treatment for male employees (Jt. Pet. 32a).

9. Ten percent of pregnancies terminate by miscarriage during the first trimester which results in disabling the woman for work but in most cases for only a few days (Jt. Pet. 17a).

10. Ninety percent of pregnant women who do not miscarry during the first trimester have no complications and there is no medical reason for an employer not allowing a woman to work to the day before delivery or for limiting her activities prior to delivery (Jt. Pet. 18a-19a).

11. Half of the complications of pregnancy, suffered by five percent of the pregnant women, arise from stimulation, usually by a weight gain, of a preexisting disease, such as hypertension and diabetes, receive the same medical treatment as if not pregnant, and are diseases which may be disabling (Jt. Pet. 18a-19a).



12. Half of the complications of pregnancy, suffered by five percent of pregnant women, are due to the physiology of pregnancy, require special medical procedures used only for pregnant women, result in hospitalization in about half the instances, are diseases and may prove disabling (Jt. Pet. 18a-20a).

13. A pregnancy without complications is normally disabling for a period of 6 to 8 weeks, which time includes the period from labor and delivery or slightly before, through several weeks of recuperation (Jt. Pet. 20a).

14. "[T]here is no rational distinction to be drawn between pregnancy-related disabilities and a disability arising from any other cause" which is relevant "to the purpose of the Company program" (Jt. Pet. 37a).

15. GE's refusal to pay disability benefits in cases of pregnancy-related disabilities constitutes "disparate treatment of persons, otherwise similarly situated on the basis of a particular condition, the pecularity of which is both irrelevant to the purpose of the company program and inelectably 'sex-linked'." (Jt. Pet. 37a).

16. The voluntary nature of pregnancy does not afford a rational basis for excluding females absent from work due to a pregnancy-related disability because GE follows the policy of providing disability benefits to male employees for all disabilities, including cosmetic surgery and disabilities arising from attempted suicides (Jt. Pet. 28a).

17. The application by GE of the exclusions on the basis of voluntarism to pregnancy-related disabilities, when exclusion because of voluntarism is not applied to any other disability, constitutes sex discrimination (Jt. Pet. 37a).

18. "[T]he pregnant women would not, *per se,* be inclined to malinger more than other persons" (Jt. Pet. 23a).

19. No disabilities which affect only males, e.g. vasectomy, or have a higher incidence among males, e.g. heart attacks or hair transplants, are excluded (Jt. Pet. 32a).

20. GE, by refusing to pay disability benefits to women absent because of a pregnancy-related disability penalizes women simply for being women, thereby discriminating against them because of sex. (Jt. Pet. 29a-30a)

21. GE has not established that its refusal to pay disability benefits for pregnancy-related disabilities was justified by business necessity (Jt. Pet. 31a).

22. The evidence GE offered as to costs was of too speculative a nature to be probative of actual future costs (Jt. Pet. 25a).

23. "An industrial policy which does not account" for whatever greater cost is required to protect women against loss of income during absences related to their peculiar biological nature when men are protected in every instance, "fails in providing such sexual equality as is within its power to produce" (Jt. Pet. 32a-33a).

**Conclusions of Law of the District Court**

The district court entered extensive conclusions of law. (Jt. Pet. 27a-38a). Those which are here relevant are as follows:

1. Section 1604.10(b) of the EEOC's Guideline on Discrimination Because of Sex is valid and in accord



with the intent of Congress as expressed in Title VII and its legislative history. (Jt. Pet. 28a).

2. The decision of EEOC issued on charges filed by plaintiff Martha Gilbert, et al, that GE's exclusion of pregnancy-related disabilities from its temporary disability income maintenance plan violated Title VII is entitled to deference by the court. (Jt. Pet. 27a-28a).

3. For an employer voluntarily to establish a disability benefit program applicable to every possible disability except those suffered by women from their participation in a joint male-female procreative experience constitutes discrimination because of sex within the meaning of Title VII (Jt. Pet. 29a-31a).

4. The failure to "exclude from coverage any disability because it was voluntarily incurred other than disabilities arising from childbirth or other pregnancy-related conditions" constitutes "sex discrimination" in violation of Title VII (Jt. Pet. 37a).

5. "An industrial policy which does not account for" "women's biologically more burdensome place in the scheme of human existence" "fails in providing such sexual equality as is within its power to produce" and thereby violates Title VII (Jt. Pet. 32a-33a).

6. The burden of proof is on GE to overcome the prima facie violation of Title VII established by the evidence and GE has not met this burden of proof. (Jt. Pet. 28a).

7. Because GE's refusal to pay disability benefits in cases of pregnancy-related disabilities is neither neutral on its face nor in its intent, business necessity is not available as a defense (Jt. Pet. 30a).

The majority of the court of appeals (Circuit Judges Haynsworth and Russell) held that the EEOC's guidelines respecting pregnancy-related disabilities "are merely expressive of what is the obvious meaning and purpose of the Act" (Supp. Br. Jt. Pet. p. 5a fn. 12). The court quoted from one of GE's annual reports stating that compensation at GE includes the value of benefit programs and noted that "[i]t would seem necessarily to follow, therefore, that any limitations or restrictions on disability benefits imposed by the defendant under its program of employee benefits which may be found to be sex-based would represent a discrimination in the 'compensation, terms, conditions, or privileges of employment' within the proscription of the Act" (Supp. Br. Jt. App. 3a-4a).

The court held that the denial of disability benefits for pregnancy-related disabilities constituted discrimination because of sex within the meaning of Title VII. The court's reasoning was explicated as follows (Supp. Br. Jt. Pet. 4a):

> "Pregnancy is a condition unique to women and a basic characteristic of their sex. A disability program which, while granting disability benefits generally, denies such benefits expressly for disability arising out of pregnancy, a disability possible only among women, is manifestly one which can result in a less comprehensive program of employee compensation and benefits for women employee than for men employees; and would do so on the basis of sex. '[W]omen, to be treated without discrimination [under the Act], must be permitted to be women,' and this means a right to be 'women' without being burdened by any discrimination in employment benefits, whether in wages



> or in fringe benefits, on account of characteristics peculiar to their sex." (footnote omitted)

With respect to GE's contention that disabilities arising from pregnancy do not constitute a sickness within its disability plan because pregnancy is "voluntary," the court looked to the industrial practice of applying to pregnancy disabilities in the employment context the provisions applicable to any nonoccupational sickness. The court stated (Supp. Br. Jt. Pet. 6a):

> "[T]he rule generally followed in labor arbitration cases is to equate pregnancy disability and sickness and to find an employee entitled to the same disability benefits in pregnancy confinement as in the case of any other disability under an employee sickness benefit program." (citing cases)

This Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) was read as inapplicable to Title VII. The court below stated (Supp. Br. Jt. App. 9a):

> "In essence, its [*Gelduldig*] holding was simply that a legislative classification incorporating a pregnancy-childbirth classification was "rationally supportable" in a social welfare program under the Fourteenth Amendment and that it did not amount to an 'invidious discrimination' under the Equal Protection Clause."

The issue under Title VII, the court of appeals stated, "is not whether the exclusion of pregnancy benefits under a social welfare program is "rationally supportable" or "invidious, but whether Title VII, the Congressional statute, in language and intent, prohibits such exclusion." (Supp. Br. Jt. Pet. 9a)." The Congressional intent to exclude any rationality test in

the construction and application of the prohibition on sex discrimination in Title VII was held evident in the face of the statute. The court below stated (Supp. Br. Jt. Pet. 10a):

> "Title VII, however, authorizes no such 'rationality' test in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in conditions of employment. It is not concerned with whether the discrimination is 'invidious' or not. It outlaws all sex discrimination in the conditions of employment. It authorizes but a single exception, to this statutory command of non-discrimination and that is a narrow one which, to be upheld, requires a finding that it is 'necessary to the safe and efficient operation of the business.'" (footnotes omitted)

The court of appeals rejected GE's construction of *Geduldig* as a holding by this Court that discrimination because of pregnancy was not discrimination because of sex. The court of appeals stated (Supp. Br. Jt. Pet. 9a):

> "[T]he opinion in *Aiello* did not declare that the distinction in disability benefit rights in that case between males and females, a distinction which excluded pregnancy-related disabilities, was not discriminatory. In fact, the language of the Court indicates rather clearly that the Court considered the differentiation discriminatory."

The court of appeals found it "unnecessary to consider" GE's evidence relating to cost because GE had expressly disclaimed in the court of appeals that this evidence was relevant in any respect except as one of the "business considerations" which "shows the absence of pretextual motivation under the *Geduldig, supra,* rationale" (Supp. Br. Jt. Pet. 10a-11a, fn. 23, quoting from page 12 of GE's Reply Brief in the court of appeals).[19] The court below, having determined that nothing in *Geduldig* mandated the imposition of its rationality test on Title VII, did "not consider *Geduldig* in point here" (Supp. Br. Jt. Pet. 11a, fn. 23). Hence, the only basis upon which GE relied in urging cost was eliminated from the case and the cost evidence was irrelevant (Supp. Br. Jt. Pet. 11a, fn. 23).



The court of appeals also stated two additional reasons for rejecting GE's cost contentions. The second reason stated was that the court read the legislative history of Title VII as establishing the Con-

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[19] The language which the court of appeals quoted appears in the following context in Reply Brief for General Electric Company, filed in the court below, pp. 11-12:

> "Appellees assert (Br. 79-83) that GE has failed to plead and prove a business necessity defense under Section 703(e) of Title VII (42 U.S.C. § 2000e-2(a). Clearly GE did not plead such a defense. But the point is—and this appellees apparently do not comprehend—GE has not sought to establish a business necessity defense under Section 703(e). *GE's primary position is, and always has been, that the exclusion of pregnancy related disabilities from coverage under GE's sickness and accident insurance does not constitute sex discrimination. Consequently, there is no need for a secondary defense under Section 703(e).*
>
> "To be sure, GE has also sought to demonstrate that its position with respect to the pregnancy exclusion is a reasonable one, based on, among other factors, what it has referred to as 'business considerations'. That business considerations constitute one of the reasons for GE's adoption of the pregnancy exclusion is, of course, a very material factor in the case. But it is material, not because of a Section 703(e) reason, but rather because it shows the absence of pretextual motivation under the *Geduldig, supra,* rationale." (emphasis supplied and footnotes omitted)

gressional intent that cost considerations related to the supposed greater cost of female employees were not a defense. The court of appeals stated (Supp. Br. Pt. Pet. 11a, fn. 23):

> "[T]hese same 'business considerations' were marshalled in opposition to the enactment of the Equal Rights Law one year before the enactment of Title VII and were discarded by the Congress. * * * Since the two Acts (i.e., the Equal Pay Law and Title VII as directed at sex discrimination) had a similar purpose, Congress no more regarded 'business considerations,' that is claimed greater absenteeism by women employees, etc., as a basis for escape from the prohibition of Title VII than it did for the Equal Pay Law."

The third reason stated was the doubt of the court "[a]s to whether there is any basis in fact for those claims of 'business considerations', see *Bartlett,* [*Pregnancy and the Constitution: The Uniqueness Trap,* 62 Cal. L. Rev. 1532] at pp. 1558-9." (Supp. Br. Jt. Pet. 11a, fn. 23).

The court affirmed the judgment below (Supp. Br. Jt. Pet. 11a).

## SUMMARY OF ARGUMENT

Employer practices with respect to the employment of women during pregnancy have been one of the major causes of transciency of women in the market place, with accompanying long periods of unemployment, low wages and undesirable jobs. The EEOC in its first annual report to Congress listed as a major problem in sex discrimination the protection of job rights of a woman during pregnancy. Since that date numerous decisions have been issued by EEOC and state FEP agencies, the principles of which have been now been



codified in Guidelines on Discrimination Because of Sex, and applied by at least ~~29~~ 24 state FEP agencies.

I. The unchallenged finding of fact of the district court, that GE's refusal to pay sickness and accident benefits was motivated by a discriminatory attitude towards its female employees, ~~and was not based upon its concern for cost,~~ affords basis for affirmance here without reaching the issue of the validity of the EEOC guideline. In *Geduldig* v. *Aiello,* 417 US 484, 494 (1975) this Court impliedly held that even in the constitutional law context, invidious discrimination with respect to pregnancy violates the equal protection clause. The finding of discriminatory motivation here establishes a violation of Title VII.

GE's exclusion of pregnancy-related disability from its otherwise all inclusive employee benefits program rested on irrational grounds and was part of a pattern of discrimination against its female employees because of their sex, including the failure at the time the program was started in 1925 to cover women in the disability program because they were expected to get married, have families and leave GE. GE officials in public statements stressed that the objective of its disability program was to provide security for its male employees who had the responsibility of taking care of their families during periods of disability.

The low wages received by present female employees trace back to a GE job evaluation manual which directed that wages for females be placed at 2/3 of the rate for men for the same number of job evaluation points. In War Labor Board hearings during the 1940's GE justified the discounting of one third because of the extra costs of employing women. At that time many employers paid disability benefits for pregnancy-re-

lated disabilities usually limited to six weeks duration and justified their low female wages as in part due to the cost of disability benefits for maternity. Today the majority of women covered by disability plans have coverage for pregnancy-related disabilities. In some cases the employers so paying are competitors of GE.

The pattern of concern for the welfare of families only of male employees during periods of disability, GE's coverage of "voluntary" and self-inflicted disabilities and other disabilities which apply only to one sex, and its practice of blatant wage rate discrimination show that GE's decision not to pay disability benefits for pregnancy-related disabilities constitutes invidious discrimination.

II. Findings of the courts below on the basis of extensive medical evidence that there was no rational basis for distinguishing between disabilities for which males received benefits and pregnancy-related disabilities likewise render *Geduldig* inapplicable. GE's contention that it is contrary to insurance practice to insure pregnancy-related risks is belied by the fact that 60 percent of women covered by disability benefit plans have coverage for an average of six weeks for pregnancy-related disabilities. GE's actuary stated that the factor of pregnancy as within the control of the insured was the insurance principle which required the exclusion. He admitted a pregnancy was as equally within the control of the insured in respect to insurance for hospital and medical coverage for pregnancy.

III. The EEOC Guidelines on Discrimination Because of Sex constitute a valid determination that in the employment context, disabilities arising from childbirth and complications of pregnancy are comparable with



various other disabilities and the failure to treat them as such, constitutes invidious discrimination. The guideline provision on disability benefits is but one of many different provisions of the guidelines which enunciate a consistent pattern of requiring that a pregnant employee who is not disabled be treated the same as any physically able nonpregnant employee and when she is disabled, that she be treated as any other disabled employee. The involuntary loss of job incident to pregnancy, whether caused by an employer's inadequate leave policy or the need to find another job because of economic need before the expiration of an unduly long enforced leave, is a major factor in women's low wages, and long periods of unemployment.

IV. Congressional intent that discrimination because of pregnancy constitutes discrimination because of sex is clear. The version of the Equal Pay proposal contained in the Martin bill and the Findley amendment to the Equal Pay Act, was rejected by the same Congress which enacted Title VII. Supporters of the Martin bill in committee and the Findley amendment on the floor of Congress proceeded on the assumption that payment of maternity benefits involved the factor of sex because the bill that became the Equal Pay Act had in all its versions allowed unequal pay to the extent that it could be justified by a factor "other than sex." Because they regarded maternity benefits as involving the factor of sex, those Congressmen who believed it would be favoritism to women to pay them both equal pay and disability benefits recognized the need for a specific exception which would authorize an inequality based on a payment attributable to ascertainable and specific added costs resulting from the employment of the other sex.

The debate on the Equal Rights Amendment likewise supports the view that Congress regarded discrimination because of pregnancy as discrimination because of sex.

Further evidence of Congressional intent in support of the EEOC guideline is found in express Congressional adoption and approval of coverage of pregnancy disabilities under the Railroad disability system continuously from 1946 to date, approval of the Civil Service Commission regulations requiring governmental agencies to permit use by government employees of sick leave for child bearing leave, acquiescence in coverage of pregnancy disabilities under the Social Security Disability Benefits, Congressional approval of the new HEW Regulations under Title IX which include a provision substantially the same as the EEOC Guidelines respecting temporary disability benefits and acquiescence over the years in the EEOC's Guidelines.

Congress, by its clarifying amendment to Title VII, defining nondiscrimination because of religion as requiring a reasonable accommodation manifested its intent that the requirement of nondiscrimination is not met by identical treatment but rather requires accommodation to different needs. The district court in the instant case construed the nondiscrimination commitment of Title VII as requiring the same disability benefits for females as for males even if the cost were greater. This Court in *Lau* v. *Nichols*, 414 U.S. 563 (1974), construed Congressional intent in its use of the term "discriminate" in another section of the same statute now before the Court, namely, Title VI of the Civil Rights Act of 1964. In *Lau*, this Court held that identical treatment of Chinese speaking children with English speaking violated the ban on discrimination



because equality could only be achieved by accommodation.

V. GE's cost argument is not properly before this Court. GE did not plead cost as a defense, but nevertheless urged cost was relevant as a "business consideration". Both courts below held that as a matter of law cost was not relevant. The court of appeals properly relied upon the rejection by Congress of the same "business consideration", defense to sex discrimination when it enacted the Equal Pay Act. In addition the district court properly held that GE's evidence as to cost was too vague and speculative. Only limited data for two years was provided by GE.

GE offered no evidence as to what its cost would be if it were to pay disability benefits for pregnancy-related disabilities. GE instead assumes that disability benefits for females cost more than for males even without coverage of pregnancy. GE's contention as to cost ignores the fact that although the average days per employee for which benefits were paid was almost the same, the average male received a much larger sum of money each year than the average female. GE's method of figuring costs would burden each female with the attributes of her sex. Relative to the number of females, more females than males had claims. To deny women pregnancy disability coverage because more females than males have disability claims is discriminatory. The record does not indicate whether the incidence of female disability was greater or less than men who work at the same grade as the women. But it is the basic principle of non-discrimination that no female be penalized because of the characteristics of other females. GE's method of figuring costs violates Title VII.

Cost is not a defense. Congress realized it would cost employers to rectify discrimination.

VI. The district court improperly admitted in evidence GE Exhibit 12 which consisted of unsigned and unidentified copies of two letters. The alleged writer, Charles Duncan, testified he ceased to be General Counsel of EEOC on or before October 31, 1966. The two letters were dated respectively November 10 and 15, 1966. Duncan had never seen the letters and knew nothing about them. They were inadmissible.

VII. The holding of the district court that it would not consider even as background evidence, GE's pre 1965 discrimination because of sex, was error. Under decisions of this and other courts it is established that in Title VII cases such background evidence should be considered.

## ARGUMENT

### Introduction

Most, if not all, distinctions in treatment, for purposes of employment, between men and women are based upon either actual or supposed differences arising from women's child-bearing capacity. After all, it is the fact that women bear children and men do not, which creates the classification of the human species into male and female. The whole range of employer practices[20] differentiating between male and female and all the so-called female state "protective"[21] leg-

[20] E.g., *United Screw and Bolt Co.*, 17 War Lab. Rep. 232, 235 (1944) where an employer after determining by established job evaluation methods the point value of jobs without regard to the sex of the employee had placed a lower wage rate on the job when performed by a female because her potential for absences for childbirth allegedly made her services of less value to the employer.

[21] *Muller* v. *Oregon*, 208 U.S. 412, 421 (1908) sustaining the constitutionality of an Oregon statute forbidding employment of females for more than ten hours per day, in which one of the reasons for limiting her to ten hours was described by this Court as "her maternal functions."



islation have historically been justified on grounds leading directly or indirectly to either the potential or actual child-bearing function of women. GE's practice, revealed by the War Labor Board in 1945, of paying women only two thirds of the rates paid males for jobs having an equal job evaluation, a practice which is still reflected in the payment of 43.63 per cent of the females represented by IEU at less than the male common labor rate (I App. 171-172, III App. 883-953), was based on GE's view that women were worth less than males as employees partly because of their childbearing role (III App. 1002-1005).

Throughout industry practices based on singling out pregnancy for special treatment have deprived females of their seniority rights and left them with a junior status when applying for a job or promotion. Even the one-tenth of all females who remain single and have a longer work life on the average than male employees, 45 years for females as against 43 for males,[22] have been denied training for, and promotions to, higher paying jobs on the employer assumption that they would not remain in the labor market as permanent employees.[23]

The discrimination against women as workers which followed the combined concern for her as a future

[22] U.S. Department of Labor, Women's Bureau Bulletin No. 294, 1969 Handbook on Women Workers, Government Printing Office 1969, p. 7.

[23] See *Cheatwood* v. *South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754, 759-760, 2 FEP Cases 33.36 (M.D. Ala. 1969) arising under Title VII holding possible pregnancy of some women no basis for denying job to all women; ***Boyce* v. *Safeway Stores***, 351 F. Supp. 402, 403, 5 FEP Cases 285, 286 (D.C. D.C. 1972), dicta to the same effect; *Nat'l Bk. of Sioux City*, 460 F.2d 57, 62 (8th Cir. 1972), female employees excluded from management training because someday they might get married and have a family.

mother, with the accompanying employer ability to discount the value of her services because of her alleged transiency in the labor force, brought such a host of ills as to generate the federal and state equal pay and equal employment opportunity laws.

In Congress during the eighteen years which elapsed between the War Labor Board and the enactment in 1963 of the Equal Pay Act (29 USC 206), representatives of industry made a sustained but unsuccessful effort to include in the Equal Pay Act an express provision which would allow employers to discount "equal pay" by the amount of the allegedly extra costs of employing women, including the cost of disability benefits during absences for childbirth and other pregnancy-related disabilities. Several of the names which appear on the covers of amici briefs here testified as witnesses before Congressional committees in support of this exception to equal pay, using there the same argument based on the allegedly greater cost of employing women, and that paying both equal pay and disability benefits for pregnancy-related disabilities would constitute favoritism to women (see pp. 126-127, *infra*). They were in the proper forum where they so testified. They are not in the proper forum when they ask this Court to overrule the Congressional intent manifested by its rejection of their position that paying both equal pay and disability benefits would be unequal.

In the years following the enactment in 1963 of the federal equal pay act and in 1964 of the Civil Rights Act, women's earnings as compared with males dropped as low as 57.8 percent in 1967 (I App. 279) and brought careful study by governmental committees ramifications of sex discrimination with respect to both causes and effects.



The 1970 Report of the President's Task Force on Women's Rights and Responsibilities entitled "A Matter of Simple Justice," U.S. Government Printing Office 1970, p. 18, referring to 1968 statistics, stated:

> "Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round fulltime is $7,396, of Negro men $4,777, of white women $4,279, of Negro women $3,194. Women with some college education both white and Negro, earn less than Negro men with 8 years of education.
>
> "Women head 1,723,000 impoverished families, Negro males head 820,000. One-quarter of all families headed by white women are in poverty. More than half of all headed by Negro women are in poverty. Less than a quarter of those headed by Negro males are in poverty. Seven percent of those headed by white males are in poverty." (footnotes omitted)

To update the figures above, in 1972 the median income for white men working year round full time was $10,918, of Negro men $7,373, of white women $6,172, of Negro women $5,280. U.S. Department of Commerce, Current Population Reports, Consumer Income, Series P-60, No. 87, June 1973. Women headed 2,100,000 impoverished families. U.S. Department of Labor, Employment Standards, Women's Bureau, Facts About Women Heads of Households and Heads of Families, April 1973 p. 8.

A large number of the charges filed in 1965 and 1966 with EEOC [24] and the state FEP [25] agencies al-

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[24] See EEOC First Annual Report for Fiscal Year 1965-1966, p. 40.

[25] In *Kupczyk* v. *Westinghouse Electric Corp.*, the New York State Division of Human Rights, Case No. CSF 15206-67 (March 3, 1969), EPG Par. 26,000B.37 held that the discharge of an employee for pregnancy and subsequent refusal to reemploy her constituted

leged employer discrimination based on potential pregnancy, [26] past pregnancy,[27] present pregnancy [28] or visible pregnancy.[29]

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discrimination in employment because of sex in violation of the New York State Human Relations Act, Section 296, Art. 15, N.Y. Executive Law, Ch. 119.

[26] E.g. charges of pre-employment inquiries by employers of female employees as to their "family planning". *Wetzel* v. *Liberty Mutual Ins. Co.*, 372 F. Supp. 1146, 1157, 7 FEP Cases 34, 43 (W D Pa 1974), aff'd 511 F.2d 199 (3rd Cir. 1975) pending here No. 74-1245.

[27] See EEOC Decision No. 71-413, CCH-EEOC Dec. Par. 6204, November 5, 1970, holding that failure of an employer to recognize employee's date of original hire as her seniority date, and the employer's insistence that her seniority date was her date of re-employment following an absence for childbirth, constituted unlawful discrimination because of sex in violation of Title VII. The EEOC required restoration of her original date of hire as her seniority date. The Prentice Hall Survey of Maternity Leave Practices of over 1,000 employers conducted in 1965 shortly after Title VII took effect, showed that in many companies if a woman wanted to return to work after the birth of her baby, she was considered a "new hire" with no seniority rights. Prentice-Hall, Personnel Management-Policies and Practices, Report Bulletin 25, Vol. XIX, June 6, 1972, p. 457.

[28] E.g., *Mann* v. *Allis Chalmers Mfg. Co.*, Norwood, Ohio, EEOC Case No. TCLO 1015, EEOC Decision No. YCL 1246, February 24, 1971 holding that failure to grant a personal leave of absence for two weeks following the date of childbirth which was requested by her personal physician on her behalf as necessary for recuperation from childbirth constituted unlawful sex discrimination where a male employee had been granted approximately 13 months of leave of absence in order to undergo a series of back operations. IUE supported Mann's position in her court suit, *Mann* v. *Allis Chalmers Mfg. Co.*, U.S.D.C.S.D. Ohio W.D. Civil Action No. 8115, which was settled by stipulation of all the parties, after she was reinstated, her original seniority date restored and a sum of money paid in settlement of the back pay claim.

[29] ~~Cerro~~ Cerra v. *East Stroudsburg Area School Dist.*, employer contention that not being visibly pregnant is a bona fide occupational classification for teaching. Banks have questioned whether visibly pregnant tellers should be continued behind the teller's window, tansferred to a non-customer contact job or sent home. → 299 A.2d 277, 5 FEP Cases 485 (Pa Sup. Ct. 1973) where court rejected the



The key role of employer practices with respect to employment of pregnant women was the subject of study and report in 1968 by the Citizens Advisory Council on the Status of Women, appointed by President Johnson. That Council "recommended the establishment of a Federal Temporary Disability Insurance System that would provide for compensation for loss of income for all employees who lost time because of temporary disabilities, including pregnancy." (II App. 373). The presently constituted Citizens Advisory Council on the Status of Women appointed, by President Nixon held hearings in which "the Council heard witnesses from an insurance company, from the Civil Service Commission from the Equal Employment Opportunity Commission, from the Office of Federal Contract Compliance, and the Labor Department" (II App. 373). Research was conducted into practices in foreign countries and in this country (II App. 373, IV App. 1151-1169). In 1970 the Council issued a "Statement of Principles" on "Job-Related Maternity Benefits," which in relevant part reads as follows (II App. 373, IV App. 1148-1151):

> "Childbirth and complications of pregnancy are, for all *job-related purposes,* temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, union or fraternal society. Any policies or practices of an employer or union, written or unwritten, applied to instances of temporary disability other than pregnancy should be applied to incapacity due to pregnancy or childbirth, including policies or practices relating to leave of absence, restoration or recall to duty and seniority.
>
> "No additional or different benefits or restrictions should be applied to disability because of

pregnancy or childbirth, and no pregnant woman employee should be in a better position in relation to job-related practices or benefits than an employee similarly situated suffering from other disability." (Emphasis in original)

Thereafter the EEOC filed a complaint with the Federal Communications Commission charging AT&T with discrimination because of sex in various respects, including failure to pay the same disability benefits when disabilities arose from normal childbirth as are paid for all male disabilities. AT&T pays disability benefits in case of abortions or complications arising prior to an employee's going on leave (III App. 769-770, 775). During preparation for this case the EEOC consulted Dr. Andre E. Hellegers and utilized his services as an expert witness in proceedings instituted by EEOC before the Federal Communications Commission. A copy of the testimony of Dr. Hellegers before the Federal Communications Commission along with other portions of the record before the FCC were included in exhibits of each GE and the plaintiffs in his case (III App. 761-835, IV App. 1292-1308). Before testifying, Dr. Hellegers had cooperated with EEOC in preparing key words to be placed in the Medlars Computor retrieval system at the National Institute of Health for the purpose of locating and studying all the medical literature relevant to the issue. Thereafter the EEOC and 16 state fair employment practice commissions issued guidelines in conformity with the recommendation of the Citizen's Advisory Council above quoted (pp. 4a-8a, *infra*). In two states, Connecticut and Montana, the legislature enacted legislation incorporating the principles of the EEOC guidelines that a disability from pregnancy constitutes a temporary disability for all job-related purposes (see pp. 9a-10a,



*infra*). Five other states follow the EEOC guidelines (pp. 8a-9a, *infra*). A list of these 24 states is printed as Appendix B, pp. 4a-10a, *infra*. The State of Washington Human Rights Commission held hearings and made the following findings in connection with its adoption of guidelines identical in this respect with the EEOC guidelines. The State of Washington findings are as follows (IV App. 1320):[30]

"WAC 162-30-020. MATERNITY. (1) Findings and Purposes. Childbearing is an expectable incident in the life of a woman. Practices such as terminating pregnant women from employment and not hiring young women for responsible jobs because they may become pregnant and have to be terminated have contributed substantially to present conditions of lack of job opportunity for women, limitation of women to low-paying clerical jobs, and lack of opportunity for women to advance to levels of employment enjoyed by men of equal ability. It is the objective of the law against discrimination in employment because of sex, Chapter 49.60 RCW, to equalize employment opportunity for men and women. This regulation defines how that law applied to childbearing by women workers."

As we shall show hereafter, the EEOC guidelines on pregnancy-related disabilities are in accord with the language of Title VII and its legislative intent. Both courts below agreed that the guidelines were valid and in accord with legislative intent (Jt. Pet. 28a, Supp. Br. Jt. Pet. 5a, fn. 12), but also held that irrespective of the guidelines the record here established a violation of Title VII by GE (Jt. Pet. 28a, 37a, Supp. Br. Jt. Pet. 5a fn. 12, 10a-11a).

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[30] Washington State Human Rights Commission, New Employment Regulations, Maternity Leave Policy, adopted 6-22-72, effective 7-26-72, FEP 451:1248.

## I

### The Unchallenged Finding of the District Court That GE's Exclusion of Pregnancy-Related Disabilities Was Motivated by a Discriminatory Attitude Towards Women Fully Sustains the Determination of the Courts Below That GE Violated Title VII.

The district court found that GE's "discriminatory attitude * * * was in fact a motivating factor" in its exclusion of pregnancy-related disabilities from its sickness and accident benefit plan (Jt. Pet. 32a). The court found that the exclusion was neither "neutral on its face" nor "in its intent" (Jt. Pet. 30a). The discriminatory practices were found to have "been deliberate and intentional" (Jt. Pet. 38a). The "concern" of GE "in reference to pregnancy risks, coupled with the apparent lack of concern regarding the balancing of other sex-linked disabilities" was found to buttress the findings of other discriminatory conduct (Jt. Pet. 32a). Similarly GE was found to have shown sex bias by applying a voluntarism exclusion to all pregnancy-related disabilities where no voluntarism test was applied to any male disability (Jt. Pet. 28a-29a, 37a). Where a male employee is partially disabled GE assigns him temporarily to another job (Jt. Pet. 14a). But a female employee who is pregnant has been required to go on unpaid leave even when she is fully able to perform all the duties of the job. The court found that "of all the employees it is only pregnant women who have been required to cease work regardless of their desire and physical ability to work and only they have been required to remain off their job for an arbitrary period after the birth of their child" (Jt. Pet. 36a-37a).

The court of appeals based its decision on the broader ground, namely that Congress intended to outlaw all sex discrimination in employment irrespective of



whether the particular instance of sex discrimination can be viewed as having a rational basis and irrespective of whether it was discriminatorily motivated (Supp. Br. Jt. Pet. 4a, 9a). The finding of the district court that GE's exclusion of pregnancy was discriminatorily motivated (Jt. Pet. 32a), being unchallenged, would have furnished the court of appeals with an alternate basis for its decision. Likewise here, these unchallenged findings warrant affirmance without necessarily considering or deciding the broader ground upon which the court of appeals based its decision.

When GE "pioneered in the field of social benefits for employees," to use the words of its Annual Report for 1969 (III App. 975), it did not intend to leave out the female half of the population. The explanations of founders of GE's employee benefit plan state their thesis that productivity is increased if an employee does not need to live in "constant fear of not being able to provide for and take care of his responsibilities, first to his parents, or if he has taken on further responsibilities, to his wife and children" (III App. 981). GE intended that its "social benefits" reach females but only as dependents of male employees, that is, as mothers, wives and daughters. The literature issued by GE to describe the cradle-to-grave private social security system it was establishing emphasizes the need for wives of employees to feel secure if the employee is to be in a state of mind where he could devote himself wholeheartedly to his job (III App. 970, 981).

In 1926 when GE put into operation a new life insurance and disability benefit plan it did not at first offer the plan to female employees because "women did not recognize the responsibilities of life, for they prob-

ably were hoping to get married soon and leave the company" (III App. 958, 962, 968). Obviously GE assumed females would never be breadwinners and that men, parents and children would never be dependents of a ~~male~~ female. While the mandatory leave rules at most plants required that pregnant employees leave work at the end of six months, the handbooks and bulletins encouraged the pregnant female to leave as soon as she became pregnant (I App. 263, 264). Employees are told that they "may leave because of pregnancy at any time from the start of pregnancy" (I App. 269) and significantly the handbooks state that "some leave in the second or third month" (I App. 277).

The tables in evidence setting forth the distribution of males and females over a graduated pay scale contain that same concentration of females in the lower pay brackets and absence of females in the higher pay brackets (I App. 177-178, III App. 883-853) which courts have regularly found to establish a prima facie case of violation of Title VII in cases involving discrimination because of race. E.g. *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1380-1384 (4th Cir. 1971), cert. denied 409 U.S. 982 (1972); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801 (4th Cir. 1971), cert. dismissed 404 U.S. 1006, 1007 (1971); *U.S.* v. *Dillon Supply Co.*, 429 F.2d 800, 804 (4th Cir. 1970); *Rowe* v. *GM*, 457 F.2d 348, 350 (5th Cir. 1972); *U.S.* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 458-459 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972).

The present day GE wage scale with payment to females of less than 75% of the wage rates paid males (see pp. 50-51, *supra*) is the direct continuation of GE's job manual instruction that for equal work females shall be paid two thirds as much as males (III App. 1002). This lower wage rate reflected various factors



which allegedly made women more costly to employ, including, among others, the payment of disability benefits covering absences for maternity (see pp. 51-53, *supra*). To the extent that GE has based the wage rates it paid women on rates paid by other companies, where the rates of a substantial number of companies were low, in part, because they, in addition, paid temporary disability benefits for pregnancy-related disabilities, GE is trying in effect to have its cake and eat it too. GE's continuance of these wage rates which were already discounted to reflect the costs of disability benefits for maternity, but at the same time refusing to pay disability benefits for absences due to pregnancy-related disabilities, constitutes the most flagrant discrimination because of sex.

Indeed, the practices of GE and of other employers of terminating women for pregnancy or placing them on leave for long periods of time, as the district court found GE did (Jt. Pet. 36a-37a) create the transient character of women as employees and contribute to the statistics of high absenteeism and turnover, which the War Labor Board noted as among the factors upon which GE relied to justify its claim women were not as desirable employees and therefore were properly paid lower wages (III App. 1004-1007).

The prevalent practice of paying 6 weeks of maternity benefits has been used as an excuse for the payment of lower wages to females than to males for equal work. During the hearings on the Equal Pay Act (see pp. 121-126 *infra*) employers explained that one of the reasons they paid lower wages to females was the need to deduct the cost of various items resulting from the maternity function of females, which in the typical insurance plan included disability benefits during disabilities arising from pregnancy (see pp. 125-127 *infra*).

GE explained to the War Labor Board that its payment of lower wage rates to females represented merely GE's practice of basing its pay rates on local community practices (III App. 1007-1009). See also *GE* v. *NLRB,* 414 F.2d 918, 921 (4th Cir. 1969), cert. denied 396 U.S. 1005; *GE* v. *NLRB,* 466 F.2d 1177 (6th Cir. 1972), enfg. 184 NLRB 407 (1970), as supplemented by 188 NLRB 919 (1971, Rome, Ga.), 188 NLRB 911 (Dover, Ohio), 188 NLRB 920 (Seattle, Wash.), 192 NLRB 68 (Fitchburg, Mass.); GE, *Battery Prod.* v. *NLRB,* 400 F.2d 713, 724-726 (5th Cir. 1968, Jacksonville, Fla.), all cases describing GE's practice of taking a survey of local wage rates for the purpose of determining the rate it should pay.

For GE to pay the same low wages as other employers in the community who paid low wages discounted to reflect various allegedly additional costs of employing females, including the cost to these other employers of providing disability coverage during maternity, but for GE not to grant such coverage, was a double discrimination against GE's female employees solely because of their sex.

The deliberate discrimination against females by the pregnancy exclusion is further supported by the fact that the grounds on which GE over the years has explained to the Union its denial of disability benefits where the woman was absent because of pregnancy-related disability have been inconsistent, illogical and not founded in fact. During the 1966 bargaining with IUE the proposal for benefits for pregnancy-related disabilities was rejected by GE solely because of the alleged failure of "most" of the females to return to work following childbirth (III App. 879).

The record does not show whether it was true in 1966 or not that most women at GE did not return to work following childbirth. Plaintiffs in their Interrogatories 11, 12, 13 and 14 (I App. 205-207) requested information as to the number returning in the years 1967 to date. GE instead of answering as to the years 1967-1969 stated that it would be too burdensome to retrieve data for those years (I App. 234-236). The figures supplied by GE for 1970 and 1971 show that in those years a majority were returning (I App. 239, 256-257).



The evidence is subject to the inference that an even larger number of females return to work following childbirth, miscarriage or abortion than the figures supplied by GE seem to indicate. GE never answered Plaintiff's Fourth Interrogatories 63-66, but stated that it was in the process of collecting data which would be supplied shortly, but was in fact never supplied (I App. 258). Plaintiffs in their Interrogatories 63-66 had asked if the figures supplied by GE in its Supplemental Answer and Revised Answer to Interrogatory 12 as to the number of females not returning included any females presently working for GE or who had worked for GE at any time subsequent to the childbirth, miscarriage or abortion, and if so, how many (I App. 224-225). By failing to supply the figures the fair inference is that there were a substantial number of such females. That an inference favorable to the plaintiffs may be drawn from such failure to supply requested information, see Wigmore, *A Treatise on Evidence,* 3d ed. (1940), Sec. 285, p. 162; *International Union, UAW* v. *NLRB,* 459 F.2d 1329, 1335-1338 (D.C. Cir. 1972).

The district court, in commenting on the contention made at the trial that the failure of 40% of the females to return makes disability benefits for them a form of termination pay benefits, stated (Jt. Pet. 24a):

> "The termination pay problem exists with *all* workers who do not return to work following sickness and accident." (emphasis the court's)

Not only is it stipulated that GE has paid weekly sickness and accident benefits to employees who did not thereafter return to work (I App. 184) but it is accepted industrial practice that such benefits are due even though the employee does not return to work for the employer upon recovery from his disability. See *Malester Operating Corp. & Cavannaugh's Enterprise Inc.*, 20 LA 534 (Sidney Sugarman, Arbitrator, 1953).

Moreover, GE has a 40 percent turnover rate for all employees (I App. 294). Thus even if 40% do not return from pregnancy, this is only the same number as would quit if not pregnant.

In the 1969-1970 negotiations with IUE there was no longer any contention made by GE that a majority did not return to work. The position of GE during the 1969-1970 negotiations was again stated by GE Employee Benefits Manager Willis, and in the minutes recorded by GE there appears the following (III App. 881-882):

> "There is a six weeks accident and disability benefit request for pregnancy. We don't believe it's a disability as such and it should not be included."

The IUE Minutes for the same date summarize the statement of GE Employe Benefits Manager Willis on this subject as follows (III App. 882):

> *"S&A—52 weeks 2/3 pay*
>
> Company position is 50% is the proper level of benefits. This is pretty well standard. SUB plan pays 72%
>
> * * *
>
> *"Six Weeks for pregnancy*
>
> we don't feel any obligation to pay for pregnancy as it is a long planning type situation."



Many of the disabilities for which GE pays sickness and accident benefits to males involve similar long planning types of situations, e.g., surgery for cataracts, tonsils, hemorrhoids, adenoids, cosmetic improvement and prostate disease. And, of course, all maternity costs which the company pays are equally as long planning types of situations as any pregnancy-related disabilities of female employees.

Similarly, with respect to GE's contention urged at the trial that the alleged voluntariness of pregnancy distinguished benefits for pregnancy-related disabilities, the district court below found there were a million abortions in the United States annually, as compared with about 4.2 million pregnancies, indicating that a substantial number of pregnancies are not voluntary (Jt. Pet. 15a-16a). For religious, medical, social and other reasons, undetermined numbers of accidental pregnancies do not result in abortions (II App. 477-483).

The district court also found that GE paid for all voluntarily incurred disabilities of male employees, thereby making this attempt at distinction inherently discriminatory (Jt. Pet. 37a).

GE's reliance on the alleged voluntariness of pregnancy points up the discrimination against females, especially when it is recalled that all pregnancies of wives of male employees, which are equally as voluntary, are paid for in full (see pp. 21-23 *supra*). Likewise, all voluntary disabilities of males such as hair transplants, nose jobs, repair of trick football knees result in GE's payment of temporary disability benefits (see pp. 15-16 *supra*).

In no instance does the coverage of a male employee end by reason of his absence from work whether on strike, lay off, vacation, personal leave (see pp.

13-15

*supra*). In no instance is any disability cause considered grounds for failure to pay a male sickness and accident benefits.

At the trial GE also listed, as an additional reason to support its position, that men would demand benefits for absence taken for child care if women received S & A benefits (III App. 400). The district court picked this out as a particularly spurious contention, when after listing all the above grounds asserted by GE, the district court stated (Jt. Pet. 24a):

> "Several of the aforementioned assertions are factually erroneous. For example, under the s and a plan men could not demand child care absence benefits without proving their work absence resulted from medical disability."

One of the purposes of GE's fringe benefit plan, including its disability benefits plan, was to attract and retain high caliber employees (see pp. 17-21 *supra*). The exclusion of pregnancy-related disabilities shows GE did not have the same desire to attract and retain female employees. This inference is confirmed by the fact that as of December 1972, 43.7% of its female employees in plants represented by IUE were paid less than the common labor grade (see pp. 49-51 *supra*). Likewise, the record shows that GE copied into its private employee benefits plans the whole cradle-to-grave program of social security prevalent in Europe, old age pensions, supplementary workman's compensation, medical and hospital coverage, leaving out only one item present in the social security systems of other nations, namely income maintenance during absence due to childbirth or other pregnancy-related disability.

Copies of all GE presently effective employee benefit plans are exhibits in this case. Employees who still remain disabled when they exhaust benefits under the temporary disability program here involved (III App. 1060-1072), are then entitled to benefits under a long term disability program for both hourly and salaried employees which continues weekly benefit payments for employees who are not recovered when the 26 weeks of sickness and accident benefits under the temporary disability plan are exhausted. The long term disability program is coordinated with the federal Social Security Act which provides benefits for disabilities which exceed 26 weeks and is in effect a supplementary long term disability benefit (III App. 1073-1077). As the district court noted the long term disability benefit program has the same discriminatory exclusion of pregnancy-related disabilities as the temporary program (Jt. Pet. 4a, fn. 1). GE maintains a comprehensive medical expense plan for not only all present employees and their dependents, but also pensioners and their dependents (I App. 174-175, III 1060-1077, 1084-1091). Supplemental workmen's compensation benefits are paid in the event of a job-related sickness or accident (III App. 1066, Plaintiffs Exhibit 6, p. 4, not printed). Supplemental unemployment benefits are paid in the event of a lay off (Plaintiffs' Exhibit 5, pp. 72-77, Stip. ¶ 3, Exh. B, pp. 72-77, not printed). A military pay differential in the nature of a supplemental military pay benefit is paid in the event of service in the Armed Forces, State or National Guard or United States Reserves by way of attending annual encampment, training duty or temporary emergency duty (I App. 268, III App. 872, 974, 975, 979, 1051, IV App. 1342). Retirement income is provided under the Pension Plan (I App. 174, III App. 1080-1082). Thus in all the exigencies of life except disabilities arising from childbirth, miscarriage or complications of pregnancy, GE maintains the income of anyone unable to work.

In adopting these plans GE expressed the view that private industry should establish employee benefit programs and oppose social security programs administered by government, (III 984-985, 987-988, 991-992). Through its adoption of its fringe benefits program, and persuading American industry to do likewise, GE achieved five objectives: (1) Industry retained control of fringe benefit funds; the "money * * * did not lie in the tax revenue columns of the federal budget but in the profit columns of the companies" (IV App. 1200); (2) "Using their profits from the increasing productivity for their own employees was, of course, more advantageous to them than paying it in taxes for social benefits that would go to workers in other industries, particularly those in low-productivity industries or even to the unemployed, with perhaps very few of their own relatively high-paid workers receiving any of the benefits directly." (IV App. 1200, fn. 2); (3) Averted adoption of legislation for a national health plan, national temporary disability, and old age benefits by providing them for their own employees (IV App. 1197, 1200); (4) Because plans provided for no vesting for a sizable portion of the program, employees could not change employers if conditions became unsatisfactory (IV App. 1206); and (5) Industry retained control over the payment of benefits, as indicated here by the unavailability of arbitration if a claim for benefits is denied (II App. 633-634, IV App. 1196).[31] See Donna Allen, Fringe Benefits: Wages or Social Obligation, Rev. ed. (1969, Cornell University, pp. xiii, xiv, xv, 3-6, pp. 30-36).

[31] That exclusion of claims for fringe benefits from arbitration is the usual practice. See *New England Telephone and Telegraph Co.*, 62 LA 216 (1973).



GE's strong opposition to a national social security system has for all practical purposes prevailed.[32] GE's private social security system provides for its employees the kind of social security provided by the government in all industrial nations, except that GE does not cover the risk of loss of income by pregnancy and childbirth which is an integral part of the social security system of all the European countries, both Western and Eastern, and many other countries as well (IV App. 1209-1213). The provision for income maintenance during disability arising from childbirth and pregnancy is covered in 68 nations as part of the temporary disability program (IV App. 1213). For GE to parallel all the other social security programs prevalent in industrialized nations, but omit the one peculiar to its female employees demonstrates that such action is sexually motivated.

Upon the foregoing facts, the district court properly found that GE's "discriminatory attitude" towards women "was in fact a motivating factor" in its denial of sickness and accident benefits to women absent because of pregnancy-related disability (Jt. App. 32a). The district court also found that GE's policy was neither neutral on its face nor in its intent (Jt. App. 30a). GE has not challenged either of these findings. These findings remove the instant case from *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). There this Court impliedly held that even in the constitutional framework "a showing that distinctions involving pregnancy are

[32] See Charles I. Schottland, *The Social Security Program in the United States* (Appleton-Century-Crofts, 1963), pp. 150-151, explaining the absence of a comprehensive program of health insurance in the United States as due to the establishment by employers of their own private plans and the opposition of employer associations, insurance companies and the medical profession.

mere pretexts designed to effect an invidious discrimination" would establish denial of equal protection (417 U.S. at 496-497).

The record here contains abundant support for the determination of the district court that GE's failure to pay weekly sickness and accident benefits to women absent because of pregnancy-related disabilities was a pretext for discrimination against females. Indeed, there is a vindictiveness about GE's cancellation of all coverage under its sickness and accident program so that when a woman is absent because of a pregnancy-related disability she cannot recover even if injured in an auto accident, or as here in the case of plaintiff Furch (see pp. 32-34, *supra*), hospitalized for a pulmonary embolism, admittedly unrelated to pregnancy. which occurred 16 days after she stopped working because of a miscarriage. Thevindictiveness towards females of the cancellation of coverage is brought into sharp focus when it is remembered that coverage continues for employees on strike so they draw benefits while disabled or injured in the picket lines, even if otherwise they would not be working any way because of strike or similarly while on lay off or personal leave (see 13-14, *supra*). Indeed, as the lengths to which GE has gone in order to justify their discriminatory attitude towards women unfolds, it becomes increasingly clear that rather than encouraging their female employees to return to their jobs promptly upon recovery from childbirth, they have done everything within their power to encourage them to stay home with their babies and thus not burden the company with problems connected with child rearing at some future date (see pp. 40-41, ~~37~~ 44, *supra*). GE's fringe benefit package thus is aimed at attracting and retaining only those employees whose lives are not burdened with the



absences necessitated by child bearing (see pp. 17-21, *supra*), and when their female employees seek the right to function as females and incur pregnancy-related disabilities, the company's interest in them as employees ceases.

The following survey on maternity leave conducted by Prentice-Hall illustrates the continuing pattern of females to return to their employment following childbirth when such return to work is facilitated by the employer's extending to them the benefits enjoyed by male employees (Personnel Management-Policies and Practices, Report Bulletin 25, Volume XIX, June 6, 1972, at p. 463 (IV App. 1135):

> "MOST OF THE WOMEN WHO TAKE MATERNITY LEAVE COME BACK TO WORK.
>
> "We asked survey respondents to tell us what proportion of their employees who were pregnant in 1971 quit their jobs and what proportion took a leave. * * * [H]alf the plants, one-third of the office firms * * * said that 75% or more of the employees who were pregnant elected to take a leave. (In many of these cases, 100% of the employees took a leave). * * * [M]ore than half reported a perfect score on 'returns'—that is, all the employees who elected [to take] a leave actually returned to work as scheduled."

A fair inference from the record is that GE realized that by paying sickness and accident benefits for pregnancy-related disabilities it could no longer insist pregnant women leave the plant at the end of their sixth month or seventh month of pregnancy (see pp. 40-41 *supra*) and remain away for at least eight weeks after delivery (see p. 36--38, *supra*). Once the period of absence of pregnant women was reduced to the average of 6 or 8 weeks, the fact that the female has long periods

of absence would no longer serve as one of the bases for paying females lower wages or refuse them promotions. We submit that the cost which GE seeks to avoid by its efforts to overturn the judgment below is not the relatively small amount involved in the payment of such benefits to its female employes, but rather the loss of one of the props in the discriminatory wage system which is so profitable to GE.

As the district court found (I App. 121, 129-130), all 100,000 female employees of GE have "a stake in the outcome of this litigation" and are "equally" affected by the pregnancy exclusion.[33] All women hired into GE suffer from the carry over of GE's wage pol-

[33] The latest medical knowledge has confirmed the correctness of "Lord Coke's view that the law seeth no impossibility of issue" regardless of age. This Court stated that "[t]he presumption generally has been held to be conclusive when the element of age alone is involved." *United States* v. *Provident Trust Co.*, 291 U.S. 272, 283 (1934). See Anno: Modern status of presumption against possibility of issue extinct, 98 ALR 2d 1285; Taylor, Alfred S. Medical Jurisprudence, 5th Am. ed. 1961 (Blanchard, Philadelphia) p. 512. Dr. Lawrence R. Wharton, Professor of Gynecology and Obstetrics, Johns Hopkins, Normal Pregnancy with Living Children Past the Age of Fifty, American Journal of Obstetrics and Gynecology, vol 90, pages 672-677, November 1964, states (at p. 672):

> "On the basis of the present study, however, it may be said that it is impossible to fix a definite upper limit to human fertility and that dogmatic assertions in the literature probably would not have been made if present information had been available."

In a later work, he reports confirmed incidents of women bearing normal children as long as 15 years after menopause. Lawrence R. Wharton, The Ovarian Hormone: Safety of the Pill; Babies after Fifty (Chas. Thomas, Springfield, Ill., 1967) at p. 290. He reported that even without estrogen therapy and as a result of improved socio-economic conditions the age of menopause is continually getting later. id. at pp. 13-14. Dr. Hellegers adverted to this development in his testimony in this case (II App. [illegible]). And with estrogen it is reported that the menopause can be postponed indefinitely. [illegible], at p. 53.

Wharton, The Ovarian Hormone,



icy of paying two-thirds as much for the same labor performed by females as when performed by males. Each female who is hired by GE at the sex discriminatory rates of pay given females and at the same time denied the right to temporary disability benefits if absent because of a pregnancy-related disability is being doubly penalized by GE's pregnancy policies. This constitutes, as the district court held, discrimination in employment rights because of sex in violation of Title VII.

## II

**The Unchallenged Finding That There Is No Rational Distinction Relative to the Purposes of the GE's Temporary Disability Benefit Plan, Between the Disabilities for Which It Pays Benefits and Pregnancy-Related Disabilities, Sustains the Determination of the District Court That GE Violated Title VII.**

The district court found (Jt. Pet. 37a):

> "There is no rational distinction to be drawn between pregnancy related disabilities and a disability arising from any other cause."

The court of appeals agreed and pointed out that the "rule generally followed in labor arbitration cases is to equate pregnancy disability and sickness and to find an employee entitled to the same disability benefits in pregnancy confinement as in the case of any other disability under an employee sickness benefit program," citing cases. (Supp. Br. Jt. Pet. 6a).

All of the reported unreversed decisions under Title VII which considered the issue have held that a disability due to childbirth or a complication of pregnancy is for employment purposes indistinguishable from any other disability. *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F.2d 199 (3rd Cir. 1975) granted on cert. No. 74-1245); *Hutchison* v. *Lake Oswego School District,*

519 F.2d 961, 11 FEP Cases 161 (9th Cir. 1975), petition for cert. pending, No. 75-568; *Holthaus* v. *Compton & Sons Inc.*, 514 F.2d 681, 10 FEP Cases 601 (8th Cir.); *Farkas* v. *South Western School District*, 506 F.2d 1400 (6th Cir. 1974); *Satty* v. *Nashville Gas Co.*, 11 FEP Cases 1 (6th Cir. 1975); *Polston* v. *Metropolitan Life Ins. Co.*, 11 FEP Cases 380 (WD. DCKy 1975); *Liss* v. *School District of Ladue*, 11 FEP Cases 156 (USDCED Mo., 1975); *Sale* v. *Waverly-Shell Rock Bd. of Ed.*, 9 FEP Cases 138 (DC ND Ia 1975); *Vineyard* v. *Hollister School District*, 64 FRD 580, 8 FEP Cases 21 (USDCND Oh ED 1973; *Dessenberg* v. *American Metal Forming Co.*, 8 FEP Cases 290 (USDCND Oh ED 1973). The Second Circuit in *Communications Workers* v. *ATCT*, 513 F.2d 1024 (2d Cir. 1975), pet. for cert. pending, No. 74-1601, held *Geduldig* inapplicable and did not rule on the issue directly, reversing and remanding where the lower court had dismissed on the basis of *Geduldig*. We read *Newmon* v. *Delta Airlines*, 374 F. Supp. 238 (D.C. Ga. 1973) as ruling only on a claim for benefits for absence while pregnant, without disability. Twenty-four state FEP Agencies have either adopted guidelines, decisions, or follow the policy based on findings that disabilities caused by childbirth or a complication of pregnancy are for all job related purposes the same as disabilities caused by other disabilities. See Appendices B-Q pp. 4a-71a, 73a-74a, *infra*.

The arbitration awards are particularly instructive as to the industrial context in which this case arises. In the earliest reported arbitration case in which a woman sought sickness and accident benefit for a period of absence necessitated by normal childbirth, Judge Nathan Cayton, retired Chief Judge of the Dis-



trict of Columbia Court of Appeals, upheld the grievance and awarded the sickness and accident benefits. *Washington Publishers Assn.*, 39 LA 159 (1962). He stated (at 160):

> The contract section neither includes nor excludes maternity conditions. But it is fair to say that *the section was written into the contract in order to assure a continuing income for employees unable to work because of physical disability. The section speaks of "sickness benefits" and "absence due to illness" and there is no reason in logic or fairness to hold that there must necessarily be a showing of a disease or malady which was morbid in nature, or which undermined the employee's constitution.*
>
> In support of its contention that pregnancy is merely a "normal biological function" the Association cites a New York Decision. *Sullivan* v. *National Casualty Co.*, 128 N.Y. Supp. 2d 717. I am satisfied it is more accurate to say that pregnancy is a physiological condition, involving substantial changes in various organs of the mother's body.
>
> We may properly take "judicial notice" that in these times and in this community (as in most others), it is usual—and generally considered imperative—that a pregnant woman is attended by a physician before, during, and after confinement, and that almost all babies are delivered in hospitals. Similarly, there is no need to resort to technical or scientific sources in order to be aware that labor and confinement result in some amount of trauma and debilitation. Such was the situation here, as shown by the physician's report and the testimony of Mrs. N— herself. In everyday language, she went to the hospital to have a baby; she was attended by a doctor; leaving the hospital in three days. She went through a process of healing and convalescence; and after an absence of

six weeks [34] she was able to go back to work. She had no infection or other complication and it is not claimed that she was gravely ill. On the other hand, *what she suffered was clearly much more than a mere trifling or passing indisposition; it was a substantial impairment of her strength and her body functions, which made it impossible for her to perform her usual work.* It would be unrealistic to hold that she was not entitled to the sickness benefits above described. (emphasis supplied)

For other arbitration awards of sick pay for absences due to childbirth see *Thornapple-Kellogg School District,* 60 LA 549 (M. David Keefe, Arbitrator, 1973); *Clio Education Assn.,* 61 LA 37 (James R. McCormick, Arbitrator, 1973); *Corporation of Burough of York*, 57 LA 758 (Howard D. Brown, Arbitrator, 1971).

In other contexts, Arbitrators have been holding for two decades that absences of female employees because of a disability arising from childbirth or a complication of pregnancy must be treated the same as an absence for any physical disability. See *National Lead Co.,* 18 LA 528, 531 (Arthur Lesser, Jr., Arbitrator, 1952) holding that the same rules for leave of absence as are applied for other temporary disabilities must be applied in the case of disability due to childbirth and indicating the arbitrator believes that any other rule would discriminate because of sex; *Republic Steel Corp.,* 37 LA 367 (Joseph Stashower, Arbitrator, 1961) holding that continuity of service credit must be granted for a period of leave for childbirth as this came within the clause providing that continuity of

[34] Benefits began after the seventh day of "absence due to illness", and the employer does not contend that the five week claim was excessive.



service would not be broken by illness; *American Machine & Foundry Co.,* 38 LA 1085, 1088 (Wayne T. Geissinger, Arbitrator, 1962) where employees absent for illness do not forfeit vacation, women absent on maternity leave are also entitled to vacation.

From the foregoing it is apparent that the term sickness is generally accepted in the industrial world as embracing the condition of a woman disabled by childbirth or a complication of pregnancy. The fact that here GE has written into its insurance plan an exclusion for pregnancy and pregnancy-related disabilities indicates it felt an exception was necessary. Throughout the insurance field, the assumption that disabilities from childbirth and pregnancy come within the term sickness or illness is so widespread that exceptions are always stated in express language where it is desired to exclude pregnancy related disabilities.

*This case, therefore, does not involve a neutral policy which is discriminatory because of a disparate effect. Rather the sex discrimination here is explicit and overt.* Because disabilities from childbirth and pregnancy were within the language of the GE sickness and accident plan, GE insisted on an express exclusion. The exclusion singled out a sex related characteristic for special and different treatment.

In the industrial context and by the purposes served by GE's payment of weekly sickness and accident benefits, a claim for benefits due to childbirth or a pregnancy disability is equally as deserving as any claim based on other disability. A female who is not feeling well and comes to work and remains at work lowers her productivity and in some cases the productivity of those around her (see 20, 47-48, *supra*). She needs the same incentive of income maintenance to go

home and stay home until fully recovered. That it may be a pregnancy-related physical condition which causes her to feel sick is not relevant to GE's purpose of promoting productivity.

Now that pregnant females have a right to return to work, the ability to attract and retain high caliber employees which is served by the assurance of income maintenance through every contingency that may befall a male employee (see pp. 18-21, *supra*) is equally served by assuring female employees the same full coverage.

The medical testimony that pregnancy per se does not disable until the time of delivery but only complications, all of which the medical profession classifies as a disease and half of which are medically no different than the ill effects of weight gain on a male suffering from hypertension, diabetes or thyroid (pp. 42- 45, *supra*), makes irrational the exclusion of such disabilities. The similarity of the hospitalization, anesthesia, episiotomy and other incidents of modern delivery to other conditions covered (pp. 45-46, *supra*) demonstrates the irrationality of the exclusion.

## III

**The EEOC Guidelines on Discrimination Because of Sex Constitute a Valid Determination That in the Employment Context, and Having Regard to the Purposes for Which Employers Pay Temporary Disability Benefits, the Refusal of An Employer To Pay the Same Benefits During Absences Necessitated by Childbirth as Are Paid During Absences Because of Other Disabilities, Constitutes Invidious Discrimination Because of Sex.**

From the start of operations EEOC held that Title VII protected pregnant women from the imposition of irrational employer practices relating to maternity.



The EEOC First Annual Report to Congress for Fiscal Year 1965-1966, p. 40 states:

> "The prohibition against sex discrimination is especially difficult to apply with respect to the female employees who become pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely. The Commission decided that to carry out the Congressional policy of providing truly equal employment opportunities, including career opportunities for women, policies would have to be devised which afforded female employees reasonable job protection during periods of pregnancy."

Between 1966 when the above statement was issued and April 1972 when its guidelines on pregnancy were issued (pp. 4-6, *supra*), EEOC processed numerous cases involving ~~erroneous~~ various aspects of pregnancy discrimination in the employment context (see footnotes 27, 28, 29, p. ~~81~~ 83, *supra*, ~~112~~ 113, *infra*) and participated with other government agencies in hearings to consider the subject of maternity benefits (II App. 373, IV App. 1160-1167). fn 38, p.

During 1971 EEOC made a careful study of the medical issues involved in employment of women before and after childbirth. It consulted Dr. Robert Henry Barter, professor of gynecology at The George Washington University School of Medicine (II App. 780-789) and Dr. Andre E. Hellegers, professor of obstetrics-gynecology at Georgetown University, and utilized their services as expert witnesses

in proceedings instituted by EEOC before the Federal Communications Commission against AT&T (IV App. 1294-1308). Before so testifying, Dr. Hellegers had cooperated with EEOC in preparing key words to be placed in the Medlars Computer retrieval system at the National Institute of Health for the purpose of locating and studying all the medical literature relevant to ths issue.[35]

The medical literature retrieved by the Medlars Computer was uniformly to the effect that pregnancy per se without complications does not disable an employee from continuing to perform the same job as she was accustomed to performing when she became pregnant. Not only is it medically established that there is no deterioration in a pregnant woman's mental and physical capacity by reason of pregnancy, but several recent studies indicate it is in fact enhanced. Studies of comparative exercise efficiency of pregnant and non-pregnant women showed that pregnant women between the 24th and 35th weeks of pregnancy have a greater exercise efficiency than non-pregnant women or women during the earlier months of pregnancy.

Joseph Seitchik, Body Composition and Energy Expenditure During Rest and Work in Pregnancy, American Journal of Obstetrics and Gynecology, Vol. 57, page 701, March 1, 1967 describes an exercise study of 195 women, divided between 133 pregnant women, 34 non-pregnant women and 28 postpartum women.

[35] Information furnished to counsel for the IUE by David Copus, Attorney, EEOC, who worked with Dr. Hellegers in arranging for the project at NIH.



He used a stationary bicycle ergometer.[36] His conclusions were stated as follows (at p. 709):

> Our pregnant women did not pay a greater price for the performance of this specific quantity of work. They appear to be at least as efficient as non-pregnant women, and are most efficient between 24 and 35 weeks. In retrospect, this result is not surprising. The period of maximum exercise efficiency occurs during that time when the cardiac output and blood volume are reaching their maxima. Pregnancy produces no alterations in the ability to ventilate. Therefore, the cardiovascular and respiratory set of the pregnant woman should not produce any limitation of exercise tolerance.

In a comment accompanying the publication of the article, Dr. Edward C. Hughes of Syracuse states (at p. 710):

> The interesting finding that pregnant women are more efficient in carrying work loads during the twenty-fourth to thirty-fifth weeks of pregnancy brings up several possible explanations. It is possible that between the twenty-fourth and thirty-fifth weeks of pregnancy the body activity is at its maximum efficiency. Cerain physiological events seem to point in this direction.

[36] Of interest in this connection, as showing that these tests do not represent mere medical experiments removed from real life, is the story carried in the *Washington Star-News* October 31, 1973, p. A-1, bottom of the page, entitled "Bikes Whip Autos in Downtown Race" which reported a race sponsored by the Washington Area Bicyclists Assoc., The Metropolitan Coalition for Clean Air and the Emergency Committee on Transportation Crisis. Of ten bicycles racing autos from suburban to downtown Washington during morning rush hour traffic, nine bicycles won the race, the tenth bicycle tied, and one of the winning bicyclists was a woman six months' pregnant who outraced her husband, driving the car, by four minutes.

1. Cardiac output begins to rise at about the tenth week, reaches a peak action between the twenty-fifth and thirtieth weeks, and gradually declines to near normal at term. The maximum reported values average between 30 and 40 percent above the non-pregnant level, the increased output probably being due to increased cardiac volume.

2. The blood volume reaches 20 to 30 percent above the normal from the twenty-fifth to thirty-fourth week of pregnancy with increments in both the plasma volume and red cell mass. This is followed by a decline during the last 4 to 6 weeks of pregnancy although the term values still are definitely higher than the normal. The hypothesis that placental function with increased hormone-steriod production may have an effect upon these activities, affecting cardiac output and the general metabolic activity, has been proposed by others.

Michael Bruser, *Sporting Activities During Pregnancy, Journal of Obstetrics and Gynecology,* Vol. 32, p. 72 (Nov. 1968), summarizes his conclusions respecting this study as follows:

A recent report of certain exercise tests done in 34 non-pregnant, 133 pregnant, and 28 recently pregnant women offered the following conclusions:

1. Pregnancy produces no alteration in the ability to ventilate.

2. The period of maximum exercise efficiency occurs during the time when cardiac output and blood volume reach their maximums.

3. Measurements of exercise efficiency show that pregnant women are as efficient as non-pregnant women (except that women who were 24-35 weeks' pregnant were even more efficient).



4. There should be no limitation of exercise on any presently identifiable physiologic grounds until very late in pregnancy, when many of the physiological alterations of pregnancy, such as cardiac output, revert to non-pregnant levels.

The above cited article on sporting activities contains numerous interesting facts respecting the placement of pregnant women in Olympic sporting events, including the fact that of 25 female Soviet Olympic champions of the XVI Olympiad in Milbourne, ten were pregnant (at p. 723). Bruser also states that (at p. 722):

In 1961, a report from a German sports school stated that the physicians there had learned to allow all sports during pregnancy except those accompanied by "bumping and compression." They also stated that the athlete has a better labor—i.e., easier and with fewer complications.

Another study confirmed the increased cardiac output in pregnancy but found that "the hyperkinetic state of pregnancy . . . is sustained up to the time of delivery." C. A. Guzman and R. Cajean, *Cardiorespiratory Response to Exercise During Pregnancy, American Journal of Obstetrics and Gynecology,* October 15, 1970, pp. 620, 605.

The illogical character of employer insistence on mandatory leave applicable to the last half rather than the first half of pregnancy is commented upon in William J. Dignam, *Work Limitations of the Pregnant Employee, Journal of Occupational Medicine,* Vol. IV, 1962, p. 423 at p. 424:

Many institutions have an arbitrary policy with respect to how long pregnant women may work, but I doubt that these policies are logical from a

medical point of view. In general a women is no less efficient, and perhaps more so, in late pregnancy than in early pregnancy.

The EEOC thus had before it all the best available medical data when it issued its Guidelines on Discrimination Because of Sex, 29 CFR 1604.10, April 2, 1972, pp. 4-6, *supra.*

The guidelines group under five different legal categories, each the subject of a different section or subsection, the different types of discrimination in employment because of pregnancy. As to each of these legal categories, by examining the annual reports of the EEOC and its decisions, it is possible to trace the cases and different solutions which EEOC tried before deciding to embody in these guidelines a culmination of the experience which EEOC has gained in its processing of cases during the preceding seven years.

First, under the heading of "Sex as a bona fide occupational qualification," all state laws regulating work during pregnancy are declared superseded by Title VII.[37] Section 1604 2(b)(1) p. 4, *supra.*

Second, under the heading of "Fringe benefits," it is declared unlawful discrimination for an employer to pay the hospital and doctor bills incurred by wives of male employees in connection with pregnancy and childbirth but refuse to pay such bills when female employees have babies (Sect. 1604.9). This codified earlier decisions by EEOC finding reasonable cause to believe that the employer violated Title VII by failing to extend to its female employees maternity-

[37] Several states have now repealed their statutes limiting women from working during specified periods before and after childbirth. Conn. S.B. 62, L. 1972, effective April 17, 1972, Mo. Stat. 442, repealed 1973 (3 weeks before and 3 after childbirth repealed).



insurance coverage provided for wives of male employees. E.g., EEOC Decision No. 70495, 2 FEP Cases 499 (January 29, 1970). That a substantial number of employers followed this practice see Prentice-Hall Survey: Maternity Leave Policies Due for a Change, Report Bulletin 25, June 6, 1972, p. 459.

Third, under the heading "Employment policies relating to pregnancy and childbirth," it is declared that a policy of not hiring pregnant employees is prima facie violation of Title VII. Section 1604.10(a).

Fourth, under the same heading, it is provided that adequate leave must be provided to employees disabled by pregnancy or childbirth so that women do not lose their jobs by being absent because so disabled, even if there is no similar leave policy for other disabling conditions, if the absence of such leave has a disparate sex effect and is not justified by business necessity. This provision codifies earlier EEOC holdings that an employee could not be discharged because of an absence occasioned by childbirth or a pregnancy-related disability but rather had to be given leave whether or not leave was provided for any other illness.[38] It is noted that, in taking this position, the EEOC recognized that the apparent sexually neutral policy of granting no leaves or only very short leaves has a disparate effect on female employees, in much

[38] See for example EEOC Decision No. 70-360, CCH-EEOC Decisions ¶ 6084 (December 16, 1970), where the charging party claimed that the employer discriminated against her because of race in refusing her maternity leave thus treating her as a quit when she was absent because of childbirth. The employer refuted the race discrimination charge by showing he had likewise denied maternity leave to Caucasion employees. The finding that the employer violated Title VII, quoted a November 15, 1966 opinion letter as follows: "The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a

the same way as a variety of facially neutral policies have been held to violate Title VII because in operation they reduced employment opportunities for racial or religious minorities. Closely analogous are employer practices with respect to Saturday work which have a disparate effect on those who observe their Sabbath on Saturday. The failure of the employer to make a reasonable accommodation violates Title VII. *Riley* v. *Bendix Corp.*, 464 F.2d 1113, 1116-1117 (5th Cir. 1972); *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972). Also analogous is the testing and high school diploma requirements which had a discriminatory effect on blacks and were therefore held by the Supreme Court in *Griggs* to be discriminatory within the meaning of Title VII."[39]

Fifth, all policies and practices with respect to leave, seniority, pensions, and health or temporary disability insurance must be applicable to absences occasioned by childbirth or other pregnancy-related disability on the same basis as to absences occasioned by other temporary disabilities (Sec. 1604.10). This codified the principles stated by the EEOC in a great vari-

temporary disability unique to the female sex . . . Accordingly, we believe that to provide substantial equality of employment opportunity . . . there must be some special recognition for absences due to pregnancy, . . . for this reason, . . . a leave of absence should be granted for pregnancy whether or not it is granted for illness." In EEOC Dec. No. 71-308, CCH-EEOC Dec. ¶ 6170 (September 17, 1970) the EEOC stated that to refuse leaves for maternity "has a foreseeable adverse effect upon the terms and conditions of female employment, without any equivalent effect upon males." The EEOC's position is that even though males are never given such sick leave, as a man may lead the full life of a male and never miss work because of sickness, the absence of leave for disability has a disparate effect on females as they cannot lead the full life of a female without missing work because of childbirth.

[39] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).



ety of situations in which the failure to accord an employee absent because disabled by pregnancy or childbirth the same rights to accrue seniority, vacation pay and hospital, medical and disability benefits on the same basis as if the absence were for any other illness or accident was discriminatory within the meaning of Title VII. EEOC Decision No. 71-413, 3 FEP Cases 233, CCH-EEOC Dec. ¶ 6204 (November 5, 1970) restoration of seniority lost prior to enactment of Title VII. EEOC Dec. No. 71-1474, 3 FEP Cases 588, CCH-EEOC Dec. ¶ 6221 (March 19, 1971) sickness and accident benefits.

The EEOC guidelines are directed at the widespread practices of employers respecting pregnancy which have kept women at the bottom of the seniority lists and in the lowest paid jobs. In enacting the Equal Employment Opportunity Act of 1972, Congress pointed out that in the years since the enactment of the Equal Pay Act, 29 USC 206(d), in 1963 and Title VII, 42 USC 2000e, in 1964, the median wage or salary income of fulltime year 'round female workers has fallen from 60% to 58.5% of that of comparabe males.[40] The female worker has on the average a slightly higher number of years of education than the male,[41] with the work

[40] H. Rep. No. 92-238, 82nd Cong., 2d Sess., reprinted U.S. Cong. and Adm. News 1972, 2137, 2140 states: "Recent statistics released from the U.S. Dept. of Labor indicate that there exists a profound economic discrimination against women workers. Ten years ago, women made 60.8% of the average salaries made by men in the same year; in 1968 women's earnings still only represented 58.2% of the salaries made by men in that year. Similarly, in that same year, 60% of women, but only 20% of men earned less than $5,000. At the other end of the scale, only 3% of women, but 28% of men had earnings of $10,000 or more."

[41] U.S. Dept. of Labor, Women's Bureau, Bull. No. 294, 1969, Handbook on Women Workers, p. 178.

life of the single female 45 years as compared with 43 years for the male,[42] and a work life of 25 years on the average for all females.[43]

Employer practices in terminating the employment of women upon pregnancy have been one of the major causes of the transiency of women in industry and it is this transiency upon which employers have historically justified the payment of lower wages to female employees.[44]

Congress in its enactment of the 1972 amendments to Title VII also expressed its intent that the discriminatory practices with which it was concerned often manifested themselves in the form of patterns or systems of practices whose discriminatory character was to be detected by the expertise of the EEOC. Thus Congress stated (H. Rep. No. 92-238, 92nd Cong., 2d Sess., U.S. Cong. & Adm. News at 2144):

> "Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs.
>
> * * * The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. Particularly to the untrained

[42] Id., p. 7.

[43] U.S. Dept. of Labor, Women's Bureau, The Myth and the Reality, May 1974 (revised) p. 2.

[44] *General Electric Co.*, 28 War Lab. Rep. 666, 680-681, 685-686 (1945); *United Screw and Bolt Co.*, 17 War Lab. Rep. 232, 235 (1944); Hearings on H.R. 3861, 88th Cong., 1st Sess., Before the Special Subcommittee on Labor, 88th Cong., 1st Sess., pp. 139, 194, 243, 252, 258-259; Hearings on S. 882 and S. 910, 80th Cong., 1st Sess., Before the Senate Subcommittee on Labor of the Committee on Labor (Public Welfare) 88th Cong., 1st Sess., April 3, 1963, p. 142, 145; 100 Cong. Rec. 9205.



> observer, their discriminatory nature may not appear obvious at first glance. * * *
>
> "It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful."

The guidelines represent a recognition by EEOC that employers have a wide variety of policies disfavoring women on the basis of pregnancy, that these policies are interrelated, and that they are part of a general pattern of discrimination based on sex. Obviously, an employer's bar to workers with the potential to become pregnant will serve to eliminate the vast majority of women from the workforce.[45] Similarly, if women are terminated whenever they become pregnant, they not only lose the job but also lose the opportunity to gain seniority and access to higher paying jobs in the future. Since many, if not most, female employees will become pregnant during their career, such a termination policy, as EEOC found, is sex discrimination in violation of Title VII.

The exclusion of pregnancy-related disabilities from disability programs is a similar means of sex discrimination. When one reviews the purposes of employers' disability plans, the invidiousness of the discrimination becomes apparent.

[45] In holding that South Central Bell Telephone had discriminated against the plaintiff because of her sex in refusing to consider her bid for the position of commercial representative the court stated (*Cheatwood* v. *South Central Bell Telephone & Telegraph Co.*, 303 F.Supp. 754, 759-760, 2 FEP Cases 33, 36 (M.D.Ala. 1969)): "Title VII surely means that all women cannot be excluded from consideration because some of them may become pregnant." To the same effect see *Boyce* v. *Safeway Stores*, 351 F.Supp. 402, 5 FEP Cases 285, 286 (D.C. 1972); *Hodgson* v. *Security Natl. Bk. of Sioux City*, 460 F.2d 57, 62 (8th Cir. 1972).

The most obvious purpose of a sickness and accident plan is to provide employees with insurance against financial problems during periods when they are disabled from working. That is the time when the loss of salary can be especially devastating, because disabled employees often incur increased expenses. They face heavy medical bills that may not be fully covered by health insurance, and payments for personal services they can no longer perform for themselves.[46]

Moreover, plans such as GE's which condition the receipt of benefits on a physician's certification of disability, encourage employees to receive medical attention as soon as possible. Thus, a second purpose of sickness and accident plans is to minimize the severity of an employee's disability. A third is to foster higher employee morale, better worker-management relations and increased productivity.[47] This relationship between employees' well-being and employers' self-interest was recognized by Congress.[48] Employer spokesmen have

[46] Congress recognized this purpose in the 1946 Amendments to the Railroad Unemployment Insurance Act, 45 U.S.C. 351(k)(2), which extended unemployment insurance payments to railroad workers who were unemployed because of disabilities. Officials of GE invoked the same purpose when they referred to the company's sickness and accident plan as a way of insuring employees "against the vicissitudes of life." J. Hammond, *Men and Volts, The Story of General Electric*, 383 (1941), III App. 954.

[47] National Industrial Conference Board, *Preparing for Collective Bargaining*, Studies in Personnel Policy, No. 172, 128 (1959).

[48] The railroad workers' disability insurance was viewed as an aid in maintaining an employment relationship that would encourage employees' return to the employer upon recovery. Lester P. Schoene, representing the Committee of the Railway Labor Executives Association, Hearings on H.R. 1362 Before the House Committee on Interstate and Foreign Commerce, 79th Congress, 1st Sess. (Jan. 31, 1945) at 1112.



repeatedly explained that these programs increase productivity because employees given insurance against sickness and accidents no longer have to worry about the future and hence are better workers, and more loyal to their employers.[49] GE's workers would be encouraged to remain with the company, and thus to reap the benefits of seniority and access to better jobs (see pp. 17-21, *supra*).

A fourth is to discourage an employer from sending an employee home or refusing to let the employee return to work when the employer might be of the view that the employee was not in the physical condition for top capacity production. If it costs the employer a substantial portion of the employee's usual wages to keep the worker at home, the employer will find less arduous work in the plant for the even partially disabled worker rather than have him or her at home drawing partial pay and producing nothing.

There can be no question that these purposes are as applicable to women workers who became disabled by pregnancy as they are to workers disabled by any other condition. When employers such as GE exclude a disability which many women employees will incur, while including every other type of disability possible, from cosmetic surgery to attempted suicide, they are not only denying women a benefit available to men, but are affirmatively and emphatically discouraging women from remaining with the company, thereby also reducing their access to seniority and advancement.

[49] The Prentice-Hall Survey of Maternity Leave Policies, Report Bulletin 25, vol. XIX, June 6, 1972, at p. 463 shows a high rate of return where employers have leave policies applicable to employees absent on account of childbirth; see p. 113, *supra*.

## IV

**Congress Intended To Prohibit an Employer from Discriminating in Employment Against Females by Failing To Pay Them Disability Benefits During Absences Due To Childbirth or Complications of Pregnancy When the Employer Pays Males Disability Benefits for All Disabling Conditions.**

Both the district court (Jt. Pet. 28a) and the court of appeals (Supp. Br. Jt. Pet. 10a-11a, fn. 23) relied upon the legislative history of Title VII. The district court was satisfied that (Jt. App. 28a):

> "[T]he EEOC's construction, as enunciated in the guideline, is in accord with the will of Congress as expressed in the Act and its legislative history."

The court of appeals pointed out that the "business consideration" which GE relied upon to construe the discrimination concept as consistent with its failure to pay disability benefits, had been rejected by Congress when it adopted the Equal Pay Act, 29 USC 206(d). The court of appeals said (Supp. Br. Jt. Pet. 11a, fn. 23):

> "It might be noted, though, that these same 'business considerations' were marshalled in opposition to the enactment of the Equal Rights Law one year before the enactment of Title VII and were discarded by the Congress. *See* U.S. Code Congr. & Admn. News, 88th Congr., 1st Sess., 1963, p. 687 and 689. Since the two Acts (i.e., the Equal Pay Law and Title VII as directed at sex discrimination) had a similar purpose, Congress no more regarded 'business considerations,' that is claimed greater absenteeism by women employees, etc., as a basis for escape from the prohibitions of Title VII than it did for the Equal Pay Law."



The courts have regarded the Equal Pay Act and Title VII as in *pari materia*. *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 266 (3rd Cir. 1970), cert. denied 398 U.S. 905.

Both the Equal Pay Act and Title VII deal with the subject of discrimination because of sex, the Equal Pay Act in respect to wages, and Title VII with respect to wages and all other incidents of employment, and were enacted by the same Congress. The appropriateness of looking to the legislative history of the Equal Pay Act in construing Title VII has been ably demonstrated by Bessie Margolin in, *Equal Pay and Equal Opportunities For Women,* N.Y.U., 19th Conference on Labor, p. 297 (1967). Ms. Margolin, who for more than 25 years was either Assistant or Associate General Counsel for the Department of Labor, stated (*id.,* pp. 297, 301-302, 306):

> "The most illuminating measure of the significance of both the Equal Pay Act and the 'sex' amendment of Title VII is this common legislative history and background. This requires particular emphasis because the mistaken idea has been circulating that, in contrast to race, color and creed discrimination, there is little or no legislative history or documentation bearing on the legislative intent or objectives of the 'sex' amendment to Title VII. Anyone who asserts that the case against sex discrimination has not been documented prior to the inclusion of sex discrimination in Title VII, or that 'the legislative history was virtually blank' and 'the intent and reach of the amendment were shrouded in doubt' has manifestly overlooked the overwhelmingly impressive documentation presented at the hearings on the Equal Pay bills. This documentation is certainly no less thorough and convincing than the documentation of discrimination against the Negro.

"The chronology of the enactment of the Equal Pay Act and the Civil Rights Act, and the extensively documented facts and statistics emphasized at the hearings and in the debates on the Equal Pay bills can leave no doubt, I submit, of the direct relevance of this legislative history to the 'sex' amendment of Title VII of the Civil Rights Act.

* * *

"It seems fair to say, therefore, that only ignorance or thoughtless oversight of the pertinent legislative background, if not simply 'entrenched prejudice' rooted in a psychological downgrading of women generally, can explain the view that the inclusion of sex discrimination in Title VII was no more than a 'fluke' not to be taken seriously * * * Commissioner Graham in his speech to the Personnel Conference of the American Management Association of February 9, 1966, specifically denounced the 'fluke' charge and warned against the negative approach implicit in that characterization. He also made clear that the Commission is quite aware of the impressive legislative background underlying the Equal Pay Act and its manifest pertinence to the 'sex' amendment of Title VII."

Congress voted in favor of inclusion of sex in Title VII because of the real education in the seriousness of discrimination because of sex which Congress had received during the hearings and debates on the Equal Pay Act (29 U.S.C. 216(d)).[50] Bills for equal pay were

[50] Berger, Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law For Women, 5 Valparaiso Univ. L.R. 326 (1971), noted that feminists, and their organizations had been simultaneously working for passage of both the Equal Pay Act and the sex discrimination amendment in Title VII and had therefore provided Congress with a wealth of information during the legislative hearings on the Equal Pay Act which in turn was influential in convincing Congress of the need for the sex discrimination provision in Title VII. For Berger the hearings on the Equal Pay Act revealed the severe plight of women to Congress and acted as the motivating force for passage of the sex discrimination provision of Title VII. Also indicative that the insertion of the word "sex" along with race, etc., in Title VII was not a mere accident is the success that feminists were having in securing similar legislation in the states. The following states enacted such legislation prior to the ~~enactment of~~ effective date of Title VII:

Wisconsin Session Laws 1961, L. 1961, c. 529, 32, c. 628, pars. 1-3, approved September 27, 1961, amending the Wisconsin Fair Employment Act, WIS. STAT. ANN. pars. 111.31-111.325 (1945).

The Hawaii Fair Employment Practices Act, HAWAII REV. STAT. tit. 21, ch. 278, par. 378-2, approved June 3, 1963, effective January 1, 1964 (L. 1963, Art. 180, par. 1(b)(c), and (d)) (sex in original act).

The Wyoming Fair Employment Practices Act of 1965, WYO. STAT. 1957 vol. 7, tit. 27, pars. 27-261 approved March 1, 1965 (sex in original act).

The Arizona Civil Rights Act, ARIZ. REV. STAT., title 41, pars. 41-1462 (1965) approved by Governor April 1, 1965 (sex in original act).

Massachusetts Session Laws 1965, c. 397, pars. 1-7, approved May 3, 1965, amending the Massachusetts Fair Employment Practices Law, MASS. GEN. LAWS. ANN. ch. 151B, par. 4 (1946).

Missouri Session Laws 1965, L. 1965, p. 442, par. 1, approved June 30, 1965, amending the Missouri Fair Employment Practices Act, ANN. MO. STAT., ch. 296, par. 296.020 (1961).

New York Session Laws 1965, L. 1965, c. 516, par. 1, effective September 1, 1965, amending the New York Human Rights Law, CONSOL. LAWS N.Y., Art. 15, pars. 291, 296 (McKinney's 1951), approved by Governor June 28, 1965, effective September 1, 1965.

[51] S. 779, 1178, 79th Cong.

[52] H.R. 1584, 2483, 81st Cong.

[53] S. 1502, 2494, H.R. 11677, 87th Cong.

[54] S. 1552, H.R. 298, 88th Cong.



first introduced in Congress in 1945,[51] reintroduced in 1947,[52] 1962,[53] and 1963,[54] and finally the Equal Pay Act (29 U.S.C. 216(d)) was enacted in 1963.

The Eighty Eighth Congress in connection with its enactment of the Equal Pay Act considered and re-

jected the contention that since women allegedly cost more than males with respect to health benefits, absenteeism and turnover, the payment of sickness and accident benefits for pregnancy in fact created an inequality in favor of females rather than an equalization.

Opponents of the bill which became the Equal Pay Act put on a concerted drive to secure the reporting out of committee of the Martin bill[55] and, when unsuccessful in that regard, to secure adoption of an amendment introduced on the floor of the House by Congressman Findley of Illinois.[56] Each the Martin bill and the Findley amendment would have enabled employers who paid sickness and accident benefits to women disabled by pregnancy or hospital and medical

[55] The Martin bill (H.R. 1936, 88th Cong.) provided:

"PROHIBITION OF WAGE RATE DIFFERENTIAL BASED ON SEX

"SEC. 4. No employer * * * shall discriminate * * * between employees on the basis of sex by paying wages to any employee * * * at a rate less than the rate at which he pays wages to any employee of the opposite sex * * * for equal work or jobs the performance of which requires equal skills, except where such payment is made pursuant to a seniority or merit increase system or a job classification program which does not discriminate on the basis of sex, *where such payment is attributable to ascertainable and specific added costs resulting from employment of the opposite sex,* or where such payment is attributable to other reasonable differentiation based on a factor or factors other than sex" (emphasis supplied).

[56] The Findley amendment, which was introduced on the floor of the House during the 1963 debate, was not put into the form of a House bill. Findley introduced it in the debate at 109 Cong. Record 9206, May 23, 1963, and formally offered it at 109 Cong. Record 9217, that same day. The amendment would have excepted from the prohibition of differential wage payments based on sex:

"a differential which does not exceed ascertainable and specific added cost resulting from employment of the opposite sex."



expenses connected with maternity or had other special costs attributable to the employment of females, to deduct these additional costs from wages so that the law would not require them to pay both the added cost of maternity benefits and equal pay.

The Congressional hearings on the subject of discrimination in employment because of sex were filled with the pleas and statistics of employers in support of their contention that women, from an economic point of view, must be paid lower wages because of the costs of industry arising from women's childbearing function, the cost to industry of maintaining her income during periods of absence for childbirth, and the lower worth of women because of their long absences and turnover due to childbirth. Illustrative is the following excerpt from the testimony of Jerry Markham, Thatcher Glass Co.:[57]

See pp. 51-54, supra.

"Mr. Markham. * * * You say, 'why are you paying the female $1.75 and the male $1.95?' We point out to you that female experience over the years has cost us 20 to 23 cents an hour to maintain them as a part of our work force due to experience in employment, maternity, facilities.

"Mr. Thompson. Is this not why you pay them 20 cents an hour less?

"Mr. Markham. Yes, sir."

Mr. Markham specified the cost of his company of disability benefits upon which it relied in paying females lower wages.[58]

"To illustrate the cost in question, we selected two of our glass container manufacturing plants and

[57] Hearings on H.R. 3861 and related bills before the Special Subcom. on Labor of the House Com. on Education and Labor, 88th Cong., 1st Sess., Mar. 27, 1963, pp. 258-9.

[58] Hearings on H.R. 3861, *supra*, at p. 243.

made an analysis of some of the additional costs of having women as part of our work force for a 2-year period, 1960-61. The following is the result of our study

| | Per Hour | Per Year |
|---|---|---|
| "1. Absenteeism—Females were absent an average of 20 days more than male employees per year. The average yearly cost for excessive female absenteeism compared to males was | $0.074 | $75,000 |

"This is excessive cost for excessive absenteeism as compared to male absenteeism for this 2-year period.

| | | |
|---|---|---|
| "2. Turnover—Female turnover was more than twice (2.25-1) that of the male resulting an an additional excessive cost per year of | $0.02 | 20,000 |
| "4. Insurance—Based on figures submitted by our insurance carrier, the excessive cost per year of insurance covering female employees for maternity benefits is 11.49 per employee, equal to | .005 | 5,000 |

"That using only the maternal part of our whole insurance program as applied to females our costs were half a cent more or $5,000 a year."

The general practice of industry at that time of relying on the cost of sickness and accident coverage for



pregnancy-related disabilities as one of the increased costs incurred by employing women which justified paying them lower wages is documented in the hearings on bills for equal pay. The prevailing wage structure in the United States was based on the theory women would have to be paid sickness and accident benefits during maternity leave and hence should be paid lower hourly rates. *See* the testimony of W. Boyd Owen, Vice President of Personnel of Owens-Illinois Glass Co.[59] that the "typical" plan in industry provides disability benefits for pregnancy-related disabilities, quoted pp. 51-52 *supra.*

The statement of Mr. Owen that the typical disability benefit plan included the payment of such benefits in connection with pregnancy was accurate. Both in 1963 and today the majority of women covered by such plans receive at least six weeks of coverage in connection with a normal pregnancy often accompanied by the same maximum coverage for a complication of pregnancy as for any other disability. See Appendix A, 1a-3a, *infra,* II App. 737-738. The Society of Actuaries, Transactions 1972, No. 2, June 1972, pp. 190-202, shows a coverage for at least six weeks in connection with childbirth or a complication of pregnancy of 60% of the women covered by temporary disability benefits plans. As the district court found, about 95% of pregnancies are disabling for only six to eight weeks (Jt. App. 20a).

The meat packing companies Armour and Swift, and related food industries, Campbell Soup for in-

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[59] Hearings on S. 882 & S. 910 Before the Senate Subcom. on Labor & Public Welfare. 88th Cong. 1st Sess. April 3, 1963, p. 142. See also other witnesses whose testimony is cited fn. ~~27, p. 14~~ 15, pp. 53-54 *supra.*

stance, pay for a maximum of 8 weeks for disabilities due to pregnancy. The auto industry, steel and related can industry and part of the electrical industry pay up to a maximum of 6 weeks. See Appendix A, pp. 1a-3a, *infra.*

The Martin bill was rejected in committee and the Findley amendment was voted down on the floor of Congress.[60]

The rejection by Congress of the Martin bill and the Findley amendment shows that Congress did not agree with the contention of the sponsors of these two measures that to pay pregnant women sickness and accident benefits in addition to equal pay would create an inequality in favor of women. Rather this legislative history supports the interpretation of Title VII which has been adopted by EEOC, that equality for the sexes in the field of employment requires the payment of the same disability benefits to women disabled by pregnancy as are paid in connection with other disabilities.

In addition to the legislative history above quoted further evidence of Congressional intent to treat disabilities from pregnancy the same as any other disability, is found in the following:

The Railroad Unemployment Insurance Act. In 1946 when Congress enacted the first temporary disability law for railroad employees[61] and at all times

[60] 109 Cong. Rec. 9217.

[61] 54 Stat. 1094, 1095, see S. Rep. 1710, 79th Cong., 2nd Sess., U.S. Cong. & Adm. News 1946, pp. 702, 1316, 1319-1320. See IV App. 1309-1320.



since[62] females employed by the railroads have received temporary disability benefits figured and paid on the same basis as benefits for other disabilities. The definition of disability, as it appeared in 1946 was as follows (60 Stat. 736):

> "Sec. 303. The first paragraph of subsection 1(k) is amended by inserting * * * (2) a 'day of sickness' with respect to any employee, means a calendar day on which because of any physical mental, psychological, or nervous injury, illness, sickness, or disease he is not able to work or which is included in a maternity period.

In 1968 the foregoing language was amended and the present formulation enacted. The present definition of sickness appears in 45 USC Section 351(k)(2) and reads as follows:

> A 'day of sickness' with respect to any employee means a calendar day on which because of any physical, mental, psychological, or nervous injury, illness, sickness, or disease he is not able to work, or, with respect to a female employee, a calendar day on which, because of pregnancy, miscarriage, or the birth of a child, (i) she is unable to work or (ii) working would be injurious to her health."

HEW, Regulation, Non-Discrimination on Basis of Sex, in Education. The regulations of the Department of Health, Education and Welfare, issued under Title IX of the Education Amendments of 1972, 20 USC § 1681, et seq. adopt essentially the EEOC position respecting disability benefits for pregnancy-re-

[62] The Railroad Retirement Board's Annual Report to Congress, regularly includes full data on the payment of benefits in its statistical table under "Type of sickness group" a group designated "Pregnancy, childbirth and the puerperium" (II App. 1317-1319).

lated disabilities. 40 Fed. Reg. 241 44, 45 CFR par. 86.57. These regulations were transmitted to Congress and to the President pursuant to statutory provisions and went into effect without alteration after being approved by the President. The failure of Congress to make any alterations constitutes, in effect, Congressional approval.

United States Civil Service Commission provision regarding sick leave for government employees absent due to pregnancy disability. Congress is aware that Civil Service Commission Regulations require all agencies to permit the use of sick pay for "a period of incapacitation related to pregnancy and confinement."[63]

Social Security Disability Insurance Benefit under the Social Security Act, Section 223(d), 42 U.S.C. 423(d). While it is a most rare and unusual event for any disability from pregnancy to last long enough to qualify for social security disability benefits, there is no exception in the Act and social security benefits are paid to women whose disabilities originated in childbirth or pregnancy. See Appendix T, pp. 92a-93a *infra*. Congress must be deemed aware of this practice and to have approved.

Title VII based on reports to Congress. Congress must be deemed to have been aware of EEOC activity in this field. Congress received reports from EEOC which have described their decisions holding that discrimination because of pregnancy constitutes discrimination because of sex (see pp. 105-106 *supra*). In its first annual report to Congress the EEOC reported

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[63] Federal Personnel Manual, Revised June 1967, Subchapter 13, II App. 738; U.S. Dept. of Labor, Maternity Benefit Provisions for Employed Women, IV App. 1309.



that equal opportunity for women required the devising of policies which would give "reasonable job protection during periods of pregnancy" (see pp. *supra*). Congress must be deemed to have approved.

The Congressional intent that non-discrimination requires reasonable accommodation. Congressional intention as to its view of non-discrimination is provided by several other instances arising under the Civil Rights Act of 1964, as to both Title VII and Title VI. First, with respect to the duty not to discriminate because of religion, the obligation of accommodation is clear.

When the courts, in cases alleging discrimination because of religion, held that an employer did not discriminate within the meaning of Title VII by refusing to accommodate, the Senate unanimously and the House overwhelmingly amended Title VII to add a new Section 701(j), 42 U.S.C. 2000e-(j), requiring reasonable accommodation to the religious needs of employees. The legislative history of the amendment showed Congress had from the outset intended the concept of non-discrimination to include the obligation of accommodation and the courts have given retroactive application to the clarifying amendment, *Riley* v. *Bendix Corp.*, 464 F.2d 1113, 1116-1117 (5th Cir. 1972), citing and quoting at length the applicable legislative history; *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346 (6th Cir., 1972); *Shaffield* v. *Northrop Worldwide Aircraft Services*, 373 F.Supp. 937, 7 FEP Cases 465 (M.D. Ala. 1973); *Scott* v. *Southern California Gas Co.*, 7 FEP Cases 1030 (S.D. Calif. 1973).

In *Lau* v. *Nichols*, 414 U.S. 563 (1974) this Court construed the concept of non-discrimination which

Congress had adopted by Title VI of the Civil Rights Act of 1964 (42 USCA 2000d). This Court determined that Congress had empowered the administering agency to require accommodation to the special language needs of Chinese speaking children in order to achieve an equality in educational opportunity with English speaking children. The Court declined to place its decision on Fourteenth amendment grounds although Judge Hufstedler, dissenting in the Ninth Circuit from an affirmance of the dismissal, had found a violation of the equal protection clause of the Fourteenth Amendment. Judge Hufstedler's opinion is instructive because it points up the difference between identity of treatment and equality, Judge Hufstedler stated (*Lau* v. *Nichols,* 483 F.2d 791, 805-806, 9th Cir. 1973):

> "The majority opinion says that state action is absent because the State did not directly or indirectly cause the children's 'language deficiency', and that discrimination is not invidious because the state offers the same instruction to all children.
>
> Both premises are wrong.
>
> "The state does not cause children to start school speaking only Chinese. Neither does a state cause children to have black skin rather than white nor cause a person charged with a crime to be indigent rather than rich. State action depends upon state responses to differences otherwise created."

The ruling of this Court in *Lau* refutes GE's contention that this Court applies the same tests to determine discrimination under the Civil Rights Act of 1964 as it does under the Fourteenth Amendment (GE Br. pp. 31-33).

For another case in which this Court construed Congressional intent as requiring an accommodation which



would not have been required by constitutional standards see *Oregon* v. *Mitchell,* 400 U.S. 112 (1970), where this Court expressly distinguished its earlier contrary results where the issue arose only under the Fourteenth Amendment, by pointing to a broader Congressional power.

For another area in which Congress uses the word "discriminate" as requiring such accommodation to differences as to achieve as much equality as possible, see legislation with respect to employment of the physically handicapped. E.g., Section 503 of the Rehabilitation Act of 1973, Pub. L 93-112, 1973 U.S. Cong. & Ad. News 455, 479 and Proposed Affirmative Action Obligation of Contractors and Subcontractors For Handicapped Workers, 40 FR 39887. See also *Mills* v. *Bd. of Ed. of D.C.,* 384 F. Supp. 866, 876 (D.C. D.C. 1973).

The district court in the instant case held that Title VII imposes a similar duty of reasonable accommodation to the condition of pregnancy. It stated that "[i]f Title VII intends to sexually equalize employment opportunity" then industry must shape its employment practices to meet the biological needs of its female employees in order to provide "such sexual equality as is within its power to produce" (Jt. Pet. 32a-33a).

Equal Rights Amendment legislative history. Congresswoman Griffiths, who, during Congressional debates on ERA, was the sponsor of the bill in the House and managed the bill on the floor of Congress, unequivocally stated that discrimination because of pregnancy constituted sex discrimination which would be outlawed by the Equal Rights Amendment to the Consti-

tution of the United States if it were adopted and ratified. She stated:[64]

> "Another discriminatory practice is the common one of expelling from public school unmarried female students who become pregnant. * * * Sometimes even married girls who become pregnant are permanently excluded from public high school. * * * *This is a clear example of sex discrimination which would be corrected by the equal rights amendment.*" (emphasis supplied)

Professor Thomas I. Emerson, Lines Professor of Law, Yale Law School, whose analysis of the proposed ERA is characterized by GE "as the most comprehensive" (Br. pp. 40-41), in his article in the Yale Law Journal, which was repeatedly cited and quoted on the floor of Congress and in hearings by both proponents and opponents, expressly stated that exclusionary maternity laws would be struck down by the ERA. Thus he stated:[65]

> "Laws which exclude women from certain occupations or from all employment under certain circumstances are always discriminatory. * * * These laws, which are gradually being struck down under Title VII and would also be expected to fall under

[64] Hearings on H. J. Res. 35,208 and Related Bills and H.R. 916 and Related Bills before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Congress, 1st Sess. p. 38, hereinafter cited as ERA House Hearings.

[65] Barbara A. Brown, Thomas I. Emerson, Gail Falk and Ann E. Freedman, The Equal Rights Amendment: A Constitution Basis for Equal Rights for Women, 30 Yale Law Journal 871, 928-929 (April 1971). The Emerson article was praised by principal proponents of ERA (118 Cong. Rec. S 9083 (1972) cited with approval in congressional reports (S Rep. No. 92-689, 92nd Cong., 2nd Sess. (1972); H.R. Rep. No. 92-359, 92nd Cong., 1st Sess. (1971), and referred to by ERA's most vocal opponent, Senator Ervin, as the "primary legislative history" of the ERA (118 Cong. Rec. S 9097 (1972)).



> the Equal Rights Amendment, are discussed below under two classifications: occupational exclusions and compulsory maternity leave regulations.
>
> * * *
>
> "b. Compulsory Maternity Leave Regulations. Laws which require employers to impose leave on pregnant employees for a specified period before and after childbirth, without providing job security or retention of accrued benefits, such as seniority credits, are similarly exclusionary."

Professor Emerson discussed the district court decision in *Cohen* v. *Chesterfield County School Board,* 326 F. Supp. 1159 (E.D. Va. 1971), which was reviewed and approved by this Court in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974). Professor Emerson expressed the view that the ERA would require the same invalidation of state action imposing compulsory leave during pregnancy as this Court reached on due process grounds. Professor Emerson stated:[66]

> "Two recent federal court decisions provide a preview of the kind of close scrutiny which the Equal Rights Amendment will require. One struck down a compulsory maternity leave regulation under Title VII; the other reached the same result under the Equal Protection Clause of the Fourteenth Amendment. Both courts recognized that compulsory maternity leave provisions are not genuinely protective either of women's health or of their employment rights.[116]
>
> * * *
>
> "[116] Since denying pregnant women the right to work when they are medically able and willing to work means that they cannot support themselves, this type of legislation, whatever its ostensible purpose embodies an *unrealistic assumption that all pregnant women have men to support them during their forced confinement.*" (emphasis supplied)

[66] 30 Yale Law Journal, *op. cit.,* at pp. 930, 932.

"This decision, if cast in terms of the Equal Rights Amendment standards, would be similar * * * the state was unable to make an elementary showing of a job-related problem linked to the physical characteristic at issue. In addition, the court made two other findings that parallel the application of Equal Rights Amendment standards. First, the court held that in its relation to employment, *pregnancy was only a small part of the larger problem of temporary disabilities which could not constitutionally be dealt with separately.* Second, the imposition of compulsory leave was found to be impermissible where a rule letting a woman and her doctor decide when optional leave should commence would meet any medical need for leave and would be less onerous to pregnant women. In other words, the regulation discriminatorily selected out a small sex-linked part of a larger problem, and imposed a more drastic solution than was necessary. A court operating under the Equal Rights Amendment might also find that a sex-neutral rule, allowing any temporarily disabled worker and his or her doctor to determine the duration and timing of leave, would also be an available less drastic alternative.

* * *

Both proponents and opponents of the Equal Rights Amendment were agreed that the Equal Rights Amendment would wipe out many existing laws and practices respecting pregnancy. Professor Dorsen, Professor of Law, New York University Law School, in listing the discriminatory laws included the provision in two state disability laws which exclude pregnant women from temporary disability benefits.[67]

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[67] Hearings before the Committee on Judiciary, Senate, 91st Cong., 2d Sess., on S. J. Res. 61 and S. J. Res. 231, pp. 312.314-315, 316-317, 322-323, hereafter cited as ERA Senate Judiciary Hearings.



In this connection Dr. Berniece Sandler, testifying on behalf of the Women's Equity Action League, observed that disabilities from childbirth should be brought under the rules governing other disabilities. She stated:[68]

"Dr. Sandler. * * * Insofar as pregnancy is a disabling condition and one goes to the hospital and may die from it, it is a disability and you might very well cover it with the same rules that cover disability.

* * *

"Mr. Wiggins. * * * But I think that class legislation concerning pregnancy would be appropriate * * *

"Dr. Sandler. It would depend on the legislation pertaining to pregnancy. I wouldn't say that they must take six months leave, all of them. I think there is a state law in Missouri that all employees must take a six months leave whether they want it or not in having a baby. That would be discriminatory."

One of the opponents of ERA, Mrs. Myra Wolfgang, in her testimony, which was placed in the Congressional Record by Senator Ervin, illustrated the evils which opponents feared would result if ERA was enacted. She averted to her experience with EEOC guidelines as applied to afford equal health benefits, with the alleged result that male employees were contributing to the high cost of pregnancies and hysterectomies for female members.[69]

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[68] ERA House Hearings, pp. 281, 284-285.

[69] 118 Cong. Rec. 9302, 9667, cols. 1, 2; ERA Judiciary Hearings p. 40 (September 9, 1970).

The statements of the supporters of ERA with respect to the effect on laws dealing with unique physical characteristics were only to the effect that reasonable distinctions could be made but that unreasonable classifications based on unique physical characteristics would be barred. Senator Gurney, one of the sponsors of the bill in the Senate, stated (118 Cong. Rec. 9336, March 21, 1972):

> "As the Judiciary Committee report points out, equality should not be confused with sameness; to adhere to the principle of equality does not mean that the sexes must be regarded as identical or that reasonable classifications based on characteristics unique to one sex must be abandoned."

Finally, the Senate defeated the Ervin Amendment which would have allowed legal distinctions between men and women based on physiological and functional differences. Speaking in support of the Ervin amendment Senator Stennis stated (118 Cong. Rec. 9320):

> "It is obvious that some laws must treat men and women differently, and even the strongest advocates of the equal rights amendment recognize the need for legal recognition of certain differences. Laws protecting the rights of working women during pregnancy, and to establish paternity are good examples."

The rejection of Stennis' view by defeat of the Senator Ervin amendment shows Congress did not intend that laws based on unique physical characteristics should be excepted from the category condemned as discriminatory. It shows Congress did intend, as Professor Dorsen said, to wipe out the laws making distinctions in employment because of pregnancy.



All of the foregoing established that Congress understood when it enacted Title VII and continued unchanged in 1972 the prohibition of discrimination in employment because of sex, it was thereby prohibiting discrimination in employment because of pregnancy.

## V

### GE's Defense of Cost Is Not Properly Before This Court Because GE Did Not Present Any Question Here Involving Cost and Has Never Pleaded Business Necessity or Any Other Defense Which Would Have Made Cost Relevant.

It is fortunate that, as the court below held (Supp. Br. Jt. Pet. 10a-11a, fn. 23), cost is legally irrelevant to the issues to be decided here, for the quality of the evidence submitted by GE in support of its cost argument is on the level with the now long forgotten Southerner who was an expert on race because he had a black cook. GE's only witness on cost was an actuary, who when pressed on cross examination as to the basis of his calculation, rested his expertise on the fact that he had had twelve secretaries who became pregnant (II App. ~~203~~ 563).

Nor has GE stated as a question presented for decision here any issue as to the correctness of the holding of the Court of Appeals in this case that "business considerations," of the type GE urged, were not a defense under Title VII where an employer claimed neither business necessity nor a bona fide occupational qualification under Section 703(e) of Title VII (Supp. Br. Jt. Pet. 10a-11a, fn. 23). GE has always disclaimed in the courts below and again disclaims here that its cost evidence had any relevance in this case except as one of the "business considerations" which led it to

adopt the pregnancy exclusion provisions in its sickness and accident benefit program.[70]

In addition to its failure to raise any questions here with respect to the ruling of the court below that cost was not a defense, the position of GE is further curious in the absence in its brief of any consideration of any evidence relating to GE, as distinguished from industry generally. This case was tried and decided by the district court and reviewed in the court of appeals upon a record in which the issue related to the conduct of GE. However, neither the brief of GE nor any of the numerous briefs *amici* take notice of the facts as shown in the record here and as found by the district court. Rather, GE and its supportive *amici* would have this Court rule on assumed nationwide practices of employers which were never presented as evidence nor tried in the courts below and which are not now before this Court.

Although GE uses the word insurance more than 90 times in its brief, page in and page out, there is no insurance involved in this case. It was stipulated that GE has not insured the risk of disability of any of its employees but rather maintains the income of its male employees during absences because of any disability, and of its female employees during such absences as are covered for female employees, by direct payments to employees. GE pays Metropolitan an administrative fee for the processing of claims after which it serves as a conduit to pay claims (I App. 175-176). GE has

[70] For its position in the district court as to the relevance of costs see testimony of GE's chief witness, Labor Relations Counsel Hilbert (II App. 595-601). For its position in the court of appeals see its Reply Brief, p. 14, quoted by the court, Supp. Br. Jt. Pet. 10a-11a. For its position in this court see Brief for GE, p. 60, fn. 67.



not even contended that it applied actuarial principles in its administration of its weekly sickness and accident benefit plan

Similarly, the briefs of GE and of various of the amici make assertions as to the dollars and cents figure for paying all claims based on pregnancy-disability throughout the United States. (GE Br. pp. 8-9, 23, 58; Westinghouse Br. pp. 35-36 fn. 62 Am. Soc. Per. Ad. Br. pp. 3-4; Airlines Br., p. 10) or at AT&T, (AT&T Br. p. 7; C of C Br. pp. 1a-2a; Am. Soc. Per. Ad. Br. pp. 4-6) or at Celanese (Celanese Br. pp. 4-10), or for Xerox, the latter figures based on a short Wall Street Journal newspaper notice (GE Gr. p. 58; Br. Am. Life Ins. Assn. p. 33). We are certain this Court will appreciate that decisions of courts cannot be influenced by such unsupportable contentions. We have printed as Appendix S, pp. 76a-91a, *infra,* a copy of the study of the Xerox Corporation experience, entitled "Pregnancy Disability—Time Duration and Disability Benefits Costs, a study conducted by Margaret E. Hutchinson, R.N. and C. Craig Wright, M.D. of the Xerox Medical Department," (the Appendix does not reprint the charts or graphs, as the only copy available was not clear enough for reproduction). This study comes from the staff of Xerox, and has never been subjected to the truth revealing processes of cross-examination essential to judicial due process. We do not cite the report because we rely upon it but to suggest that GE's reliance on the Wall Street Journal article is misleading. For example, the Xerox report, which is based on a study on the first year of a new plan, indicates that the periods of disability may be reduced in the future. It states:

> "The frustrations of the initial period in administration of the expanded pregnancy disability

> policy have abated somewhat. We suspect that there will always be a few claims which are excessive. We have found that, in these cases, a telephone conversation between the Xerox physician and the attending physician often results in a reduction of the disability period claimed. Compared to claims for other causes of disability, effort, diplomacy and expertise for administration." (App. S, p. 82a, *infra*)

pregnancy claims require considerably more time,

In transmitting the report to EEOC, Thomas C. Abbott wrote (p. 75a, *infra*):

> "This study covered the first full year of this policy. No detailed study of subsequent experience has been completed as yet, but, in general, we feel it would be misleading to assume that similar statistics would be applicable to the 1974-75 period."

In fact, the report contains information, if relied upon, supportive of plaintiffs' position.[71]

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[71] The Report States: 1. "The majority of employees stopped receiving benefits immediately following their 6 week post-partum checkup." The study noted, however, that some obstetricians are now conducting a post-partum check 4 weeks following delivery, which will no doubt result in women returning to work at an earlier time (App. S, p. 80a, *infra*).

2. Xerox pays a greater disability benefit than GE, 100% in the first 26 weeks and 70% for the next 2 years. Although the average disability claim in the first "shake-down" year was 74.8 days, some employees were absent for as little as 7 or 8 days, while one employee with complications was disabled for 226 days. (App. S, pp. 77a, 79a).

3. The plan "encouraged employees to remain at work until personally disabled, and to return to work as soon as feasible after delivery". (App. S, p. 78a, *infra*).

4. The Xerox report does not indicate its experience with non-pregnancy related disabilities. For various reasons, including the fact that Xerox pays greater disability benefits than GE, the data is not meaningful, except to indicate that whatever the meaning of the data, Xerox expects the number of disability days to be reduced in the future.



The figures offered by GE, as to the alleged nationwide cost, rather than serving as an argument for defendant GE, rather serve as a measure of the unjust enrichment which employers enjoy as a result of this aspect of "unfair employer exploitation of this source of cheap labor." *Corning Glass Workers* v. *Brennan,* 417 U.S. 188, 94 S.Ct. 2223, 2234 (1974).

The leading case defining the relevance of cost is *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 798 (4th Cir. 1971), cert. dismissed 404 U.S. 1006, 1007 (1971), which held that cost could only be a defense in a Title VII action where:

> "there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." (footnotes omitted)

GE has not and cannot bring itself within these requirements.

Moreover, as the district court held (Jt. Pet. 30a-31a), GE had no obligation to establish any fringe benefit program and hence its covering certain types of fringe benefits but not others, constituted a voluntarily assumed discrimination not necessitated by compelling business necessity.

Nevertheless, we address ourselves to GE's cost argument because GE has attempted to inject cost as

one of the "business considerations" which justified its exclusion of pregnancy-related disabilities from the coverage of its temporary disability program.

GE has never in any brief or pleading made any statement as to its estimate of the dollars and cents cost to it of paying sickness and accident benefits. Since, as the district court found (Jt. Pet. 22a) and as the evidence showed (see pp. 40-41, *supra*) GE had imposed mandatory leave at the end of the sixth month or seventh month of pregnancy, a policy which was not changed until May of 1973, there is no basis in GE's experience for determining the expected average length of absences for pregnancy-related disabilities. Based on medical evidence (pp. 41-42, *supra*), the district court found that the absences would average 6 to 8 weeks (Jt. Pet. 10a). The testimony of GE's only medical witness, Dr. George Wilbanks, indicates an even shorter period of absences can be expected (II App. 685-688, 708, 708-709, 921-924, 958, 959). GE's asserted reliance on cost is a complete reversal of the position it has taken in bargaining with the IUE over the years. At bargaining sessions between GE and IUE in 1960, 1963, 1966 and 1969, GE insisted on talking only "level of benefits, not costs" (see pp. 55-56, *supra.*)

The presentation of this case to this Court on the basis of allegedly nationwide issues is not due to any lack of specific evidence as to GE in the record before this Court. The record here contains a full documentation of GE's historic pattern of discrimination against its female employees and of the integral part that its treatment of pregnancy played in that pattern.

We trust this Court will agree that there is no issue before this Court as to whether the number of other



employers whom GE, the Chamber of Commerce and American Telephone and Telegraph assume are not paying such benefits, are in fact in a situation in which their failure constitutes discrimination because of sex, or what the sum of their cost would be. Rather this case was tried and decided in the district court, reviewed in the court of appeals and should be reviewed here solely on the facts applicable to GE and which were presented in the lower court.

Although the plaintiffs requested figures as to numbers of pregnancies, average claim paid and other relevant data for the years 1967-1972, GE objected to data for 1967-1969 as irrelevant (I App. 294, 315) and supplied no data on those years and only partial data for 1970 and 1971 (I App. 204-209, 230-234, 238-239, 241-242, 256-259, 261-262, 266, 284). The district court accordingly very properly determined that "merely showing, as GE has, that in two previous years the coverage given women's per capita disabilities has cost somewhat more is insufficient especially in light of the myriad of factors which might have and undoubtedly did contribute to such a result" (Jt. Pet. 32a).

The GE assumption that its cost of disability payments is greater for women than for men is accurate only because more women have claims than men, not that the amount of disability claim paid the average woman exceeds that paid the average male. Although the selected years for which GE supplied data show that the average duration of female disability claims (52 days) exceeded those of men (48 days) by 8%, the actual cost of disability payments was less for each disabled woman than it was for each disabled man. The difference results from the lower discriminatory

wage rates paid women. In 1970, the average amount paid for male nonoccupational disability claim was $592.23 (plus or minus 2% per female) (I App. 227, 260). In 1971, male, $623.95, female $518.71 (I App. 227-228, 260).

GE supplied no figures as to claims paid for occupational injury. GE also pays, under the same plan, claims for occupational injury by way of supplementary "workmen's compensation (I App. 173-174, III App. 1063, 1066-1073).

GE's experience of more female than male disability days in 1970 differs from the nationwide experience that year. The Census Bureau reports that "about 12 percent of all men and about 10 percent of all females in the labor force had some work disability in 1970."[72] The Census Bureau also reports longer periods of disability for nonwhite employees,[73] a difference which, if it exists in GE, would hardly justify a lower disability payment for black employees, and would be equally violative of Title VII.

The cost data supplied by GE is misleading. Among other things, it does not compare the disability claims on the basis of wage rates or age, and, therefore, cannot be considered relevant. Industrial studies uniformly show that the rate of absenteeism and disability claims decreases in inverse proportion to the increase in wage rates, i.e., as the responsibility and pay increase, the number of claims is reduced for men and women and are relatively equal for both sexes.

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[72] Source: Public Health Association, "Health and Work in America: A Chart Book":, p. 45, Figure 30 (November 1975), citing a Census Bureau Study.

[73] *Ibid,* Figure 31, p. 46.



During the hearings on the Equal Pay Act Secretary of Labor Willard Wirtz in opposing the Martin bill (see pp. 124-128, *supra*) testified as follows:[74]

> "any comparison of wage costs should of course be based on similar jobs. Many of the figures cited by those who make the charge (that women are more costly to employ) are not careful to make this distinction. *If we look at the quit rates for skilled professional and managerial workers . . . we find it is low for both men and women.* Similarly, for both men and women, the highest quit rates occur among sales, services and unskilled workers. The fact that large numbers of women are in these latter groups and relatively few in the skilled groups accounts to a large extent for the unfavorable generalization about the labor turnover rates of women workers." (Emphasis supplied)

The Senate Report accompanying the bill which as adopted became the Equal Pay Act and rejecting the Martin bill (see pp. 121-129, *supra*) stated:[75]

> "During the course of the Hearings, testimony was introduced on the question of the cost which employers encounter in the employment of women which they do not encounter in the employment of men. * * * Some employers stated that the cost of their pension and welfare plans were higher for women than men because of maternity costs in their health benefits and because of the longer lifespan of women in pension benefits.
>
> "This question of added cost resulting from the employment of women is one that can be only an-

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[74] Hearings on S.882 and 910, 88th Cong., 1st Sess., before Senate Subcommittee on Labor of Committee on Labor and Public Welfare, April 2, 3, 16, 1963, p. 17.

[75] S. Rep. No. 176, 88th Cong., 1st Sess. (1963), reprinted at 109 Cong. Rec. 8914, 8915 (1963).

swered by an ad hoc investigation. Evidence was presented to indicate that while there may be alleged added costs, these were more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer was a lesser production cost than would result from the hiring of only men. * * * It has been pointed out that the higher susceptibility of men to disabling injury can result in a greater cost to the employer, and that these figures as to health and welfare costs can only be applied plant-wide. It may be that it is more expensive to hire women in one department but it is more expensive to hire men in another, and overall cost figures may demonstrate conclusively that the employer has made a sound decision to hire women and pay them on an equal basis."

A study of experience under the California and New Jersey disability benefits statutes also showed greater relation in days disabled by wage level than by sex. See Stefan A. Riesenfeld, *Temporary Disability Insurance,* University of Hawaii, Legislative Reference Bureau, Report No. 1, 1969, pp. 84-86:

> "It is likewise demonstrable that wage levels exert an important effect on the average duration of benefit payments or, at least, show a significant correlation with average duration. This holds true for male as well as female recipients. Both California and New Jersey data support this proposition.
>
> "The California study classified male and female recipients into workers with base period earnings of less than $4,000 and workers with base period earnings of $4,000 or more. It also "divided both categories into age groups. The *findings showed that the difference in average duration of claims by male and female disabled in different age*



*groups tended to be greatly minimized or even reversed if the earning levels of recipients are taken into account.* The results of the California study are tabularized in Table 29. They were summarized by the report with the sentence:

> "When employment status and base period wages are held constant, there is very little difference in average duration between male and female claimants."

"The New Jersey study presented the relation between average weekly benefits and average duration of disability for male and female recipients.[45] Again the data show that there is an *inverse correlation between average weekly benefits and average durations.* In other words, since the average weekly benefit depends on the wage level, *the analysis proves that the claims of low-wage earners are subject to a greater average duration.* Table 30 shows the relation for both male and female claimants. *The values for each income level indicate the perhaps surprising result that in all wage brackets, except in the highest, the average duration of benefit payments of women is more favorable than that of men." (Emphasis added)*

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" [44] California, Joint Committee on Unemployment Compensation Disability Insurance, p. 81. The report found that the composite average duration of claimants with less than $4,000 annual income was 8.1 weeks for males and 8.0 weeks for females, while in the $4,000 and more wage bracket the respective average durations were 6.5 and 6.9 weeks. *Ibid.* at p. 51.

" [45] New Jersey, Department of Labor and Industry, Division of Employment Security, *Temporary Disability Insurance Cases in 1964,* Table 40, p. 74."

Table 29 discussed in the above quotation is as follows (*id.*, p. 87):

TABLE 29

EFFECT OF WAGE ON AVERAGE DURATION (WEEKS)
BY SEX AND AGE
CALIFORNIA EMPLOYED DISABLED
1964

| Income | Under 25 | | 25-44 | | 45-54 | | 55-65 | |
|---|---|---|---|---|---|---|---|---|
| | Male | Female | Male | Female | Male | Female | Male | Female |
| Under $4,000 | 5.6 | 4.8 | 7.1 | 7.6 | 8.6 | 8.6 | 10.9 | 9.7 |
| $4,000 and above | 4.5 | 4.1 | 5.3 | 6.4 | 6.7 | 7.0 | 8.3 | 8.2 |

| | 65 and Above | | Composite | |
|---|---|---|---|---|
| | Male | Female | Male | Female |
| Under $4,000 | 13.0 | 12.8 | 8.1 | 8.0 |
| $4,000 & above | 11.0 | 11.9 | 6.5 | 6.9 |

SOURCE: Joint Committee on Unemployment Compensation Disability Insurance, Final Report, Table 17, at p. 80 (1967).

Table 30 discussed in the above quotation is as follows (id., p. 89):

TABLE 30

NEW JERSEY
EFFECT OF WAGE (AS REFLECTED IN WEEKLY BENEFIT RATE ON DURATION (WEEKS) BY SEX—EMPLOYED DISABLED 1964

| Sex | Under $20 | $20-$24 | $25-$29 | $30-$34 | $35-$39 | $40-$44 | $45-$50 |
|---|---|---|---|---|---|---|---|
| Male | 13.88 | 11.40 | 11.07 | 10.19 | 9.36 | 8.36 | 7.35 |
| Female | 11.03 | 10.02 | 9.54 | 9.12 | 8.24 | 8.00 | 7.72 |

SOURCE: State of New Jersey, Department of Labor and Industry, Division of Employment Security, Temporary Disability Insurance Cases in 1964 (Research Series No. 19), Table 40, p. 74 (1967).



If cost of disability benefits is a factor, such costs can hardly be separated from the overall cost of the insurance plan, including hospitalization, life insurance and other benefits.[76] For example:

1. GE's life insurance program contains no exclusion for pregnancy-related deaths, those resulting from childbirth or pregnancy complications.[77]

2. Men get the same life insurance benefits as women, although females have a much lower death rate and a life expectancy of 7.5 years more than males. The cost of life insurance is substantially less for men.[78] Non whites get the same life insurance as whites, although non whites have a higher death rate and a life expectancy of 7.5 years less than whites.

3. The basic insurance plan pays the same benefit to all employees irrespective of age or number of dependents. (A greater number of male employees have dependents) GE never suggested that the benefits should be reduced to accommodate for the number of

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[76] The welfare plan is incorporated in a single document signed by GE and IUE. It covers hospitalization, life insurance, accidental death, sickness and accident benefits. Plaintiff's Exh. 4, Part 2.

[77] Plaintiff's Exh. 4, Part Two, Exh. A.

[78] "Death rates in general declined between 1950 and 1969 by 6 percent for males and 20 percent for females." Women have a longer life expectancy. The average length of life in 1969 for women is 7.5 years greater than for men (74.3 years compared with 66.8 years). The disparity between the average length of life and death rate for men and women has steadily increased. Source: U.S. Dept. of Commerce, Social and Economic Statistics Administration, Bureau of the Census, Series P-23, No. 49, Population of the U.S., pp. 43-44, 48, Tables 2.16 and 2.17, May 1974); See also U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 1880, Chart 56 (1975).

dependents or the increased medical costs of older employees.[79]

Even if GE had established that females as a group, without the effects of sex discrimination, cost GE more than males, the principles of non-discrimination require a unisex average. As the court in *Taylor* v. *Goodyear Tire & Rubber Co.*, 5 EPD ¶8545 (U.S.D.C.N.D. Ala. M.D. 1972), stated (at p. 7570):

> It was established that the cost of providing sickness and accident benefits for the female employees at this plant was higher than the cost of providing such benefits for the male employees. It was also established that the percentage of the difference in the costs of sickness and accident benefits for the female and male employees exceeded the percentage of the difference in benefits in every year between 1965 and 1970.
>
> However, the Court is of the opinion that these facts do not constitute a legal justification for the differential in benefits. In the first place, the higher cost of providing these benefits for female employees cannot be regarded as proof that the cost of providing these benefits for each of the female employees was higher than the cost of providing them for each of the male employees. In the second place, the EEOC Guidelines provide in unequivocal terms that "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." EEOC Guidelines on Discrimination Because of Sex, 29 CFR §1604.9(e). The differential in the amount of benefits was unlawful under Title VII, and the plaintiffs are entitled to relief.

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[79] "* * * the older the applicant, the more he shall pay for a given amount of insurance." *Couch on Insurance* 2d, § 30.40; Plaintiff Exh. 86, p. 285-295.



For an excellent analysis of the inherently discriminatory effect of determining costs for females by averaging only costs for females or costs for blacks see *Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 82 Harv. L. Rev. 1111, 1170-1174 (March 1971), which was cited with approval in *Frontiero* v. *Richardson,* 411 U.S. 677 at 686 (1973).

## VI

### The District Court Erred in Receiving in Evidence Defendant GE's Exhibit 12.

As set forth in plaintiff's objections to defendant GE's proposed Exhibit 12, upon being tendered what purported to be carbon copies of letters dated November 10 and 15, 1966 respectively, on the stationary of EEOC (II App. 732-736), counsel for plaintiffs inquired at the EEOC as to the authenticity of the letters (I App. 305-306). As further set forth in the plaintiff's objections, the EEOC was unable to verify the authenticity of the letters and counsel for plaintiffs then inquired of counsel for the defendants as to the source of the purported letters, and he replied that the letters were received from some law publishing firm (I App. 306), probably from the Chicago, Illinois office of Commerce Clearing House. The district court nevertheless received GE's Exhibit 12 in evidence (II App. 732-736, 1000-1002).

The copies introduced had typed on them the name of Charles T. Duncan, General Counsel, as the sender. Charles Duncan testified as a witness for GE (II App. 666, 877). He testified that he ceased to be General Counsel of EEOC in October 1966, had not signed the letters offered as GE's Exhibit 12, and had no knowledge as to whether said letters had ever been

signed or sent by anyone (II App. 654-655, 665-668, 879, 896-900). Plaintiffs renewed its objection to the receipt in evidence of those letters when counsel for defendant began examining Duncan with respect to the content of those letters (II App. 655-660, 880-886). The district court overruled the objection (II App. 656-659). We submit that the district court erred in receiving them in evidence and they should not be considered by this Court.

## VII

**The District Court Erred in Refusing To Consider Pre-Act Events.**

Although the district court did receive in evidence all the exhibits which the plaintiffs offered with respect to GE's discrimination because of sex prior to 1965 (I App. 178-179, 310), the district judge in his decision stated that the pre-Title VII evidence was legally irrelevant (Jt. Pet. 26a). In cases in which the issue of either race or sex discrimination is presented, this and other courts have regularly received and considered evidence of pre-Act events. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 427 (1971); *Albemarle Paper Co.* v. *Moody*, 95 S.Ct. 2362, 2376 (1975); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 95 S.Ct. 2223, 2226 (1974).

The plaintiffs raised this issue in the court of appeals and the court affirmed without considering the issue. We have presented a question here raising this issue. (Question No. 4 in Jt. Pet., p. 4, fn. 2). As far as we can ascertain, the ruling of the district court emanated from an excess of caution and did not rest on any legal principle. Because of the fact we believe the district court was clearly in error on this ruling, we have included the pre-Title VII evidence in our



statement of the facts and relied upon it in our argument. We urge that this Court decide the case in light of all the evidence, without eliminating any from consideration because of its pre-Act character.

## CONCLUSION

For the foregoing reasons, we urge that the judgment below should be affirmed.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

**Plans of "Leading Firms in a Variety of Industries" [1] Which Pay Temporary Disability Benefits for Disabilities Arising Out of Pregnancy**

Source: U.S. Department of Labor, Bureau of Labor Statistics, "Digest of One-hundred Selected Health and Insurance Plans Under Collective Bargaining, 1954," Bulletin No. 1180 (June 1955); U.S. Department of Labor, Bureau of Labor Statistics, "Digest of Health and Insurance Plans" 1971 Edition (GPO 1972), Vol. II, and 1974 Edition (GPO 1975) Vol. II.

| Name of Company | Digest of 100 Selected Health & Insurance Plans, 1954 [2] | | Digest of Health & Insurance Plans, 1971 Edition, Volume II | | Digest of Health & Insurance Plans, 1974 Edition, Volume II | |
|---|---|---|---|---|---|---|
| | Weeks | Page | Weeks | Page | Weeks | Page |
| Alum. Co. of Amer. | 6 | 91 | 6 | 1 | 6 | 1 |
| Amer. Can. | 6 | 103 | 6 | 7 | 6 | 7 |
| Amer. Seating | 6 | 43 | 26 | 9 | 26 | 9 |
| Amer. Standard | not listed | | 6 | 11 | 6 | 11 |
| Amer. Sugar | 6 | 7 | not listed | | not listed | |
| Amer. Viscose | 6 | 67 | not listed | | not listed | |
| Amstar Corp. | 6 | 19 | 6 | 15 | 6 | 15 |
| Armour & Co. | 6 | 19 | 8 | 17 | 8 | 17 |
| Armstrong Cork | 6 | 25 | 6 | 19 | 6 | 19 |
| Assn. Master Painters | 13 | 163 | not listed | | not li | |
| Beth. Steel | 6 | 97 | 6 | 21 | 6 | 21 |
| Borden, Inc. | not listed | | 6 | 23 | 6 | 23 |
| Brewers' Bd. of Trade | not listed | | none | | 26 | 25 |
| Campbell Soup | 4 | 7 | 8 | 31 | 8 | 33 |
| Caterpillar | 6 | 115 | 6 | 35 | 6 | 37 |
| Chase Brass & Copper | none | 91 | 6 | 41 | 6 | 43 |
| Chicago Lithographers | 6 | 61 | not listed | | not listed | |
| Cluett Peabody | not listed | | 6 | 49 | 6 | 51 |
| Colt's Mfg. Co. | 6 | 7 | not listed | | not listed | |
| Cone Mills | 6 | 25 | 6 | 53 | 6 | 55 |
| Construction Ind. | not listed | | 13 | 61 | 13 | 63 |
| Continental Can. | 6 | 109 | 6 | 63 | 6 | 65 |
| Crown Fellerbach | not listed | | 6 | 67 | 6 | 67 |
| Deere & Co. | 6 | 109 | 6 | 69 | 6 | 71 |
| Distillery Ind. | not listed | | 6 | 73 | 6 | 75 |
| Dow Chemical | 6 | 61 | 6 | 79 | 6 | 79 |
| E. I. duPont | not listed | | 6 | 97 | 6 | 85 |
| Firestone | 6 | 79 | 6 | 87 | 52 | 93 |
| F.N.I.C. Corp. | not listed | | not listed | | 6 | 95 |
| Ford | 6 | 127 | 6 | 97 | 6 | 99 |
| Furniture Industry | 6 | 43 [3] | 6 | 101 | 6 | 103 |

| Name of Company | Digest of 100 Selected Health & Insurance Plans, 1954 [2] | | Digest of Health & Insurance Plans, 1971 Edition, Volume II | | Digest of Health & Insurance Plans, 1974 Edition, Volume II | |
|---|---|---|---|---|---|---|
| | Weeks | Page | Weeks | Page | Weeks | Page |
| GM | 6 | 127 | 6 | 111 | 6 | 113 |
| B F Goodrich | 6 | 73 | 6 | 117 | 6 | 119 |
| Greyhound | not listed | | 6 | 122 | 6 | 124 |
| Hotel Assn. of NYC | ? | | 6 | 125 | 6 | 125 |
| Florsheim Shoe | 6 | 79 | 6 | 135 [4] | 6 | 139 [5] |
| IBM | not listed | | 52 | 143 | 52 | 143 |
| Int'l Harvester | | 115 [11] | 6 | 141 | 6 | 146 |
| Int'l Paper | 6 | 49 | 6 | 147 | 6 | 151 |
| Jewerly Mftrs. | 6 | 145 [6] | 6 | 151 | 6 | 155 |
| Johnson & Johnson | 6 | 145 | 8 | 153 | 8 | 157 |
| Kennecott Copper | 6 | 151 | 6 | 155 | 6 | 159 |
| Kroehler Mfg. | not listed | | 6 | 159 | 6 | 163 [7] |
| LTV Aerospace | not listed | | 6 | 167 | 52 | 171 |
| Luggage & Leather Ind.[3] | 6 | 85 | 6 | 171 | 6 | 173 |
| Maritime Ind.[3] | none | 175 [4] | 6 | 177 | 6 | 179 |
| Mass. Leather Mfrs. Assn. | 6 | 85 | 6 | 181 | 6 | 183 |
| Metalworking & Repair Services | not listed | | 6 | 187 | 6 | 189 |
| Nabisco | 6 | 7 [8] | 6 | 201 | 6 | 203 |
| Nat'l Auto Transporters Assn. | 6 | 169 | 6 | 203 | not listed | |
| Nat'l Steel | not listed | | 6 | 205 | 6 | 205 |
| NY Shipping Assn. | not listed | | 6 | 207 | 6 | 207 |
| N. Amer. Rockwell | not listed | | 6 | 211 | 6 | 211 |
| Northwest Forest Products Assn. | not listed | | 6 | 215 | 6 | 211 |
| Owens-Ill. | 6 | 91 | 6 | 217 | 6 | 213 |
| Pacific Maritime Assn. | not listed | | 6 | 221 | 6 | 221 |
| PPG Industries | not listed | | 6 | 233 | 6 | 229 |
| Printing Industry Lithographers | not listed | | 6 | 239 | 26 | 239 |
| Publishers Assn. of NYC | none | 61 | none | 243 | 26 | 239 |
| Pullman | 6 | 133 [9] | 6 | 245 | 6 | 241 |
| RCA | none | 121 | 8 | 251 [7] | 8 | 251 [7] |
| Retail Trade Ind. | not listed | | 20 | 257 | 20 | 257 |
| Retail Drug Ind. | not listed | | not listed | | 6 | 83 |
| Retail, Wholesale & Warehouse Inc. | not listed | | 6 | 247 | 6 | 253 |
| Rockwell Int'l. Corp. | not listed | | not listed | | 6 | 255 |



| Name of Company | Digest of 100 Selected Health & Insurance Plans, 1954 [2] | | Digest of Health & Insurance Plans, 1971 Edition, Volume II | | Digest of Health & Insurance Plans, 1974 Edition, Volume II | |
|---|---|---|---|---|---|---|
| | Weeks | Page | Weeks | Page | Weeks | Page |
| Sperry Rand | 6 | 138 [10] | 6 | 265 | 6 | 263 |
| Swift & Co. | | 18 [12] | 8 | 277 | 8 | 273 |
| Trucking Industry Central States | 6 | 169 | 6 | 283 | 6 | 279 |
| Trucking, Warehousing & Ind. W'ern States | not listed | | none | | 6 | 281 |
| TRW, Inc. | not listed | | 6 | 275 | 6 | 283 |
| Uniroyal | not listed | | 6 | 291 | 6 | 287 |
| United Air Lines | not listed | | 6 | 293 | 6 | 289 |
| U S Steel | 6 | 103 | 6 | 297 | 6 | 291 |
| Upholstering & Allied Trades [3] | 6 | 49 | 6 | 303 | 6 | 289 |
| Westvaco | not listed | | 6 | 307 | 6 | 303 |
| Wyandotte Worsted Co. | not listed | | 6 | 311 | 6 | 307 |

[1] The preface to U.S. Department of Labor, Bureau of Labor Statistics, Digest of Health and Insurance Plans, 1974 Edition, Vol. I (GPO 1975), p. iii states: "This two-volume digest, a continuation of a series begun in 1955, summarizes the principal features of selected health and insurance plans for office and nonoffice employees in the private sector of the economy. * * * The two volumes in combination present a picture of the health and insurance programs available to employees of leading firms in a variety of industries."

[2] Listing in this publication taken from column in each plan description headed "Maternity Provisions", "Accident & Sickness" sub-column. In all cases the number of weeks refers to the maximum number of weeks for which regular benefits were provided for maternity. All plans listed in columns 2 and 3 were in effect in 1954. Preface to 1954 Bulletins at iii.

[3] Various employers.

[4] There were three listings—one for each of three Florsheim units.

[5] Called "Interco Inc., The Florsheim Shoe Co."

[6] "Jewelry Industry, Assoc. Jewelers, Inc., Jewelry Crafts Assoc., & other employers."

[7] For non union salaried employees.

[8] Called "National Biscuit Co."

[9] Called "Pullman-Standard Car Mfg. Co."

[10] Called "Sperry Gyroscope Co."

[11] No number of weeks, paid in lump sum of $50.00.

[12] Covered by paid sick leave plan.

## APPENDIX B

**States in Which FEP Agencies Have Issued Guidelines or Decisions Providing that the Failure of Private Employers To Afford Income Maintenance During Absences Due to Pregnancy Related Disabilities on the Same Basis as for Absences Due to Other Disabilities Constitutes Discrimination Because of Sex.**

I. In the following states, FEP Agencies have issued guidelines identical with 29 CFR 1604.10(b):

1. Colorado Sex Discrimination Guidelines, Section 7(b) FEP451:196c

2. Iowa Sex Discrimination Guidelines, Section 410 (601A) FEP451:421. Same construction placed on Iowa Civil Rights Act by the Courts, *Cedar Rapids Community School District* v. *Parr,* 6 FEP Cases 101 (Iowa District Court, Linn County 1973).

3. Kansas Commission on Civil Rights K.A.R. 21-33-2(c), which pursuant to KSA 1974 Supp. 77-426 was subjected to and passed legislative scrutiny by Kansas State legislature, after extensive committee study, letter from Lawrence C. Wilson, Chairperson, State of Kansas Commission on Civil Rights, dated November 5, 1975, a copy of which is printed as Appendix H, pp. 49a-51a *infra.*

4. Kentucky Commission on Human Rights ¶ 3950.10(b).

5. Maine, Employment Guidelines of the Maine Human Rights Commission § 3.04G(2) and (4) approved by the Attorney General of Maine, May 15, 1975.

6. Maryland Sex Discrimination Guidelines, Section 8 FEP451:544.



7. Massachusetts Maternity Leave Regulations, Section FEP451:560(c), cited with approval in decision reaching same result on constitutional grounds: *Black* v. *School Committee of Malden,* 8 FEP Cases 132 (Mass. Sup. Jud. Ct. 1974).

8. Michigan Civil Rights Commission, Employment Guides and Interpretations ¶ 3950.10(b), issued September 26, 1972.

9. Minnesota Sex Discrimination Guidelines, Section 6(b) FEP451:650.

10. Missouri Commission on Human Rights, Guidelines on Sex Discrimination, Article X, Par. 2.

11. New York Pregnancy Guidelines, Section C(3) FEP451:905. Same construction placed on N.Y. State Human Rights Act by courts without reference to Guidelines; *Union Free School District No. 6* v. NYS HR Appeal Bd., 35 NY2d 371, 362 NYS2d 139, 10 FEP Cases 431, 9 FEP 109863 (NY Ct. App. 1974).

12. Rhode Island Commission for Human Rights, Guidelines on Discrimination Because of Sex § 7(a), upheld *The Narrangansett Electric Company* v. *Rhode Island Commission For Human Rights,* Rhode Island Supreme Ct. Providence, CA No. 74-1379, decided May 7, 1975, printed Appendix C, pp. 11a-15a *infra.*

13. Washington Sex Discrimination Guidelines, WAC 162-30-020(f) FEP451:1248c, in evidence because it contains findings, see Plaintiffs' Exh. 95, IV App. 1320-1321.

II. In the following states FEP Agencies have issued guidelines not identical but substantially the same as the first sentence of 29 CFR 1604.10(b)

14. Illinois Fair Employment Practices Commission Guidelines on Discrimination in Employment Section 2.10 D, which provides:

"Section 2.10 *Pregnancy, Childbirth and Childrearing*

• • •

D) Illness or disability caused or contributed to by a pregnancy, miscarriage, abortion, childbirth, and recovery therefrom must be treated as any other temporary disability under a sick leave, disability or medical benefit plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, must be applied to disability due to or related to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

The decisions issued under this guideline treat it as in substance the same as 29 CFR 1604.10(e). *In the Matter of Josephine Fragate, Complainant and Metropolitan Sanitary District of Greater Chicago,* Decision of Illinois State FEP Commission, Charges 73C-45 and 73NS-33 (1-16-73) 2 CCH EPG ¶ 5212.

15. New Hampshire Commission for Human Rights Guidelines for Maternity Benefits 1001(a) which provides:

"1001(a). Any employer having a policy of accrued sick leave must apply said policy for maternity benefits to the extent of accrual."

16. Pennsylvania Human Relations Commission, Regulation entitled "Employment Policies Relating to



Pregnancy Childbirth and Childbearing," Pa. R. Doc. No. 75,892, filed May 16, 1975, which provides:

"§ 11.103 Employment benefits and security during disability.

(a) Temporary disability due to pregnancy or childbirth.

Written and unwritten employment practices and policies regarding job benefits and job security, including, but not limited to, commencement and duration of leave, the availability of extensions, the accural of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(b) Permanent disability due to pregnancy or childbirth.

Written and unwritten employment practices and policies regarding job benefits and job security, including, but not limited to, commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to permanent disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other permanent disabilities."

17. South Dakota Commission on Human Rights, Guidelines Interpretations of Discrimination in Employment, Chap. 20:03:09:12(2) which provides:

"20:03:09:12 *Employment policies relating to pregnancy and childbirth:*

No employer shall:

(1) Have a written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy or which treats pregnancy as other than a temporary disability;

(2) Treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom as other than temporary disabilities under any health, temporary disability insurance or any sick leave plan available in connection with employment. Written and unwritten employment policies and practices shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities;"

III. In the following states, where no guideline is in effect, state FEP Agencies have issued, and courts have held they could properly issue, decisions holding that failure to pay disability benefits for pregnancy-related disabilities constitutes sex-discrimination in violation of the State Act.

18. Wisconsin Department of Industry, Labor & Human Relations, see *Wisconsin Telephone Co.* v. *Department of Industry & Human Relations,* 68 Wis. 2d 345, 228 N.W. 2d 649 (1975), distinguishing *Geduldig; Marie Leonard, Complainant* v. *Bd. of Ed. of Eau Clair, Wis.,* Decision of the State of Wisconsin Department of Industry, Labor and Human Relations January 7, 1974, 2 CCH EPG ¶ 5210; *Marilyn Reidel, et al., Complainant* v. *Wisconsin Department of Employee Trust Funds, etc.,* Decision of the State of Wisconsin Department of Industry,



Labor and Human Welfare, 1-2-74, 2 CCH-EPG ¶ 5211.

IV. In the following states, FEP Agencies state that they have issued no guidelines and no decisions respecting pregnancy disability but that they follow 29 CFR 1604.10(b):

19. Delaware, Department of Labor, Division of Industrial Affairs, letter from Jon A. Larkin, Director, Anti-Discrimination Section, dated November 3, 1975, a copy of which is printed as Appendix I, pp. 52a-53a *infra.*

20. New Jersey, Division on Civil Rights, letter from Helen Forsythe, Deputy Attorney General, dated December 17, 1975, which is printed as Appendix Q, pp. ~~72a-73a~~ 73a - 74a *infra.*

21. Utah, Industrial Commission of Utah, Anti-Discrimination Division, letter from John R. Schone, Commissioner and Division Coordinator, dated November 13, 1975, a copy of which is printed as Appendix J, p. 54a *infra.*

22. Wyoming Fair Employment Practices Commission, letter from Bert Convey, Program Analyst, dated November 13, 1975 that Wyoming follows EEOC guideline but has issued no relevant decisions since it has conciliated all cases raising this issue, a copy of which is printed as Appendix K, pp. 55a-57a *infra.*

V. In the following states the legislature has amended state FEP Acts to include the substance of the first sentence of 29 CFR 1604.10(b)

23. Conn. Serv. Stat. 531-126(g):

The Connecticut State Commission of Human Rights and Opportunities has processed or is currently proc-

essing 130 pregnancy related cases of which 48 involved benefits denied, letter from Susan Krell, Attorney on staff of Commission, dated December 9, 1975, a copy of which is printed as Appendix L, pp. 58a-60a *infra*. The following order of the Connecticut Commission has been enforced by the courts: *Nancy O. Hall* v. *Bristol Bd. of Ed.*, Connecticut Commission Case Nos. FEP Sex 75-3rd 74-3 (August 20, 1973) printed as Appendix E, pp. 21a-44a *infra*, enforced *sub nom Commission on Human Rights* v. *Bristol Bd. of Ed.*, Superior Court, County of Hartford, February 19, 1974, printed as Appendix F, pp. 45a-46a *infra*.

24. Montana Maternity Leave Act, § 41.2602(1)(e) FEP 451:709.



## APPENDIX C

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

C.A. No. 74-1379

THE NARRAGANSETT ELECTRIC COMPANY

v.

RHODE ISLAND COMMISSION FOR HUMAN RIGHTS

**Decision**

COCHRAN, J.

This appeal is from an order of the Rhode Island Commission for Human Rights dated April 18, 1974. The Commission charged that *§ 28-5-7* of the *General Laws of Rhode Island* was violated by the Narragansett Electric Company which maintains an employment policy that does not treat pregnancy related disabilities as it does other temporary disabilities.

Narragansett Electric Company provides its employees with an income plan which includes the payment of income to employees during periods of disability. No benefits are paid under this plan for disability due to pregnancy or for any disability related to pregnancy. The Commission found this policy of treating pregnancy-related disabilities differently from other disabilities to be a violation of *§ 28-5-7 of the General Laws* which provides that it shall be an unlawful employment practice for any employer because of sex to discriminate against an employee with respect to hire, tenure, compensation, terms, conditions or privileges of employment. The Commission ordered that the Company treat pregnancy-related disabilities in the same way as it treats other disabilities in regards to time off, compensation, return to work, continuance of health insurance premiums and any other company benefits.

The Company requests that the order be set aside for failure of the Commission to join Local 310 and Local 314 of the Brotherhood of Utility Workers as indispensable parties to the proceedings. In support of this proposition, the Company cites *Floyd Smith, et al.* v. *Hughes Tool Company,* 2EPD, p. 10,213 (1970). In that case, however, the Union's absence prevented complete relief for the parties. The Union claimed an interest relating to the subject matter of the action such that disposition of the action in their absence might leave the present parties "subject to substantial risk of incurring multiple or inconsistent obligations by reason of said claimed interest." There has been no evidence presented by the Electric Company that the Union has claimed an interest relating to the Company's maternity leave policies. Following the reasoning of *Ostapowicz* v. *Johnson Bronze Co.,* 7 EPD p. 9211 (1973), the court is unable to see how the Union would be affected by a decree requiring the employer to end sex discrimination and therefore holds the Union not an indispensable party.

The Electric Company next contends that the Commission's order failed to set forth any discriminatory practice on the part of the Electric Company based upon sex. This contention is directed at that part of the Order which would require the Electric Company to treat pregnancy-related disabilities as temporary disabilities under its agreement with the Union.

In a recent decision of the United States Court of Appeals for the Third Circuit, *Wetzel* v. *Liberty Mutual Insurance Company,* 511 F2d 199, (Docket No. 74-1233, decided February 11, 1975), the denial of disability benefits for pregnancy related disabilities was held to be violative of Title VII of the 1964 Civil Rights Act 42 USC § 2000e, et seq. This decision is particularly apposite since the practices involved in *Wetzel* are substantially the same as those followed by Narragansett Electric Company, and the



pertinent section of the Civil Rights Act, § 703(a)(1), is almost identical to *§ 28-5-7* of the *General Laws of Rhode Island.*

The Electric Company relies heavily on *Geduldig* v. *Aiello,* 417 U.S. 484 (1974) wherein a California legislative policy of excluding normal pregnancy and delivery related disability from temporary disability insurance was upheld. The Court in *Wetzel* noted, however, that *Geduldig* held the legislation not to be violative of the Fourteenth Amendment to the United States Constitution. The assertion in *Wetzel,* and in the instant case, is not that the practice is unconstitutional but that the practice is violative of a civil rights statute. As the Court said in *Wetzel,* "In this posture our case is one of statutory interpretation rather than one of constitutional analysis. On this distinction alone we believe appellant's reliance on Aiello is misplaced", *supra* (at 6).

Narragansett Electric Company expressly treats all pregnancy disabilities differently from the way it treats other temporary non-occupational disabilities. In justification of the policy, the Company argues that the plan covers only those disabilities arising from sickness, and since pregnancy is not a sickness it is properly excluded from coverage. Again quoting from *Wetzel, supra* (at 12):

> "We believe that pregnancy should be treated as any other temporary disability. Employers offer disability insurance plans to their employees to alleviate the economic burdens caused by the loss of income and the incurrance of medical expenses that arise from the inability to work. A woman, disabled by pregnancy, has much in common with a person disabled by a temporary illness. They both suffer a loss of income because of absence from work; they both incur medical expenses; and the pregnant woman will probably have hospitalization expenses while the other person may have none, choosing to convalesce at home.

> Thus, pregnancy is no different than any other temporary disability under an income protection plan offered to help employees through financially difficult times caused by illness."
>
> ". . . We believe that an income protection plan that covers so many temporary disabilities but excludes pregnancy because it is not a sickness discriminates against women and cannot stand."

Thus Narragansett Electric Company's policy of denying pregnant women disability benefits while extending such benefits to other kinds of temporary disabilities violate *§ 28-5-7* of the *General Laws of Rhode Island.*

The Electric Company also argues that terms, conditions and privileges of employment which are the result of collective bargaining cannot be discriminatory. Without commenting on the validity of this argument, suffice it to say that the initial premise is contrary to the Commission's findings. Paragraph #4 of the Commission's Findings of Fact states explicitly that the maternity policy is a Company policy imposed by the Company alone. It was not negotiated with Local No. 310 and Local No. 314 of the Brotherhood of Utility Workers and cannot be found in the agreement presently in effect with said Union. This finding will not be questioned without evidence of a clear abuse in the Commission's Interpretation of the evidence.

Finally, Narragansett argues that the Order should be set aside with respect to the provisions of Paragraph 6 since Susan L. Casale was no longer an employee of the Electric Company when the Commission issued its order and is therefore not entitled to any of its provisions. Ms. Casale had standing before the Commission as an aggrieved individual. The fact that she terminated her employment at some point in January 1974, does not deprive the Commission of its power to remedy any discriminatory prac-



tices that it found as to Ms. Casale prior to that time. Part of the relief ordered by the Commission with respect to Ms. Casale, however, should be modified. The Commission ordered the Electric Company to seek a letter from Ms. Casale's physician certifying the first day she could have returned to work. If that date was prior to the time the Electric Company required women to stay out from work after delivery, then the Electric Company shall pay Ms. Casale for those days of work lost due to their mandatory leave policy. Since Ms. Casale terminated her employment after delivery, she did not lose days of work due to the Company's mandatory leave policy. She is, however, entitled to the wages she would have earned had she been allowed to stay on her job until she became disabled, and to temporary disability benefits during the period of advanced pregnancy, childbirth and recovery therefrom.

Subject to the above modification, the Order of the Human Rights Commission is affirmed.

## APPENDIX D

**Findings of Fact,Conclusions of Law, and Order.**

COMMISSION ON HUMAN RIGHTS
STATE CAPITAL
PIERRE, SOUTH DAKOTA

In the matter of the Complaints of

MARGARET ANN TREFZ AND MYRA WEIER, *Complainants*

v.

WEBSTER INDEPENDENT SCHOOL DISTRICT # 101,
*Respondent*

EM-75-157-18 and EM-76-279-18

This cause having come on for hearing before the Commission on Human Rights with members Blanche Robertson, Ben Stead, Ester Munoz, and Kay Folkerts present on the 10th day of November, 1975, at 10:30 A.M., Room 468, State Capitol, Pierre, South Dakota. Final argument by Complainants was made to the Commission at the time, Respondent having waived their right to same in an October 28, 1975 letter to the Commission.

By unanimous decision, the majority of the total membership of the Commission on Human Rights, namely Robertson, Stead, Munoz and Folkerts hereby makes the following Findings of Fact, Conclusions of Law and Order.

### FINDINGS OF FACT

1. Respondent is an Independent School District organized pursuant to SDLC 13-5-1; which is governed by the Wester Board of Education.

2. Complainant Trefz and Complainant Weier have been continualy employed by the Webster School District from 1968 and 1969, respectively, to the present.

3. Complainant Frefz became pregnant in 1973, continued teaching under medical advice until delivery of her child



October 2, 1973. Dr. Kumud Shinghal, 422 S.E. Fifth Avenue, Aberdeen, South Dakota, stated in correspondence with the Webster Board of Education that Complainant Trefz was disabled following childbirth and recovery therefrom for a three week period beginning October 2, 1973.

4. By October 2, 1973, Complainant Trefz had accrued more than fifteen (15) days of sick leave. Complainant Trefz requested that fifteen (15) of the twenty (20) working days that she was absent resulting from childbirth and recovery therefrom be charged against her accrued sick leave; this request was denied.

5. From March 19 through April 11, 1975, only twelve (12) actual working days because of snow or holidays, Complainant Weier was absent from her job. Complainant Weier's absence mentioned above was due to pregnancy, childbirth and recovery therefrom; this was verified by her physician Dr. Lloyd Vegelgesang in subsequent correspondence with Dale Meyer, Superintendent of Schools, Webster, South Dakota.

6. Complainant Weier took two (2) days of available personal leave during the twelve (12) day absence described above for which she was compensated; however, she was required to employ a substitute teacher at a cost of $20.00 per day.

7. Respondent denied Complainant Weier's request that the remaining ten (10) days be charged against the sick leave that she had accrued as of that time even though available records indicate that she had acrued an adequate amount to cover the request.

8. The amount of $790.00 or salary for twenty (20) working days was withheld from Complainant Trefz's July and August, 1974, checks and the amount of $475.10 or salary for ten (10) working days was withheld from Complainant Weier's June, 1975, check in accordance with Respondent's business practice to make no deductions from

an employee's pay until the final check was written for the school term; at that time all absences, according to the Webster School Policy Manual, which are the responsibility of the employee and which have been paid by the school district are deducted from the employee's last check or checks for the school term.

9. The Sick Leave policy of the Webster Independent School District # 101 adopted in 1969 and in effect since that time reads as follows:

> *Sick Leave.* All full-time employees will be allowed leave of absence that is intended primarily to protect individual employees from loss of pay during an illness. The number of days allowed for sick leave annually and the maximum accumulation of unused sick leave shall be determined by the length of an employee's contract term (number of months per year) as illustrated in the following table:

| Contract Term | Annual Sick Leave | Maximum Accumulation |
|---|---|---|
| 9 months | 10 days | 60 days |
| 10 months | 11 days | 66 days |
| 11 months | 12 days | 72 days |
| 12 months | 13 days | 78 days |

In addition to actual illness of an employee, certain other reasons may qualify for sick leave and be included in the allowable annual number of days without pay deduction: (1) Illness in the immediate family may be allowed for a period of three days. (2) Funeral attendance of members in the immediate family may be allowed for a period of two days plus a reasonable amount of time for travel. Members of the immediate family is defined to include: Parent, brother, sister, husband, wife, child, ward, guardian, grand parent, grand child, mother-in-law, and father-in-law.



> The superintendant shall make decisions as to sick leave and funeral leave when there is no board policy to cover the situation. Maternity leave shall not be considered as sick leave.

10. Respondent's Sick Leave policy does not cover absences due to pregnancy, childbirth and recovery therefrom even though no other temporary disability is similarly excluded.

## CONCLUSIONS OF LAW

1. The Commission on Human Rights has jurisdiction over the parties to the complaints and over the subject matter of the complaints.

2. The Respondent is a covered employer under the South Dakota Human Relations Act of 1972, as amended.

3. Respondent's policy of excluding maternity-related disabilities from coverage under its Sick Leave Policy and the application of this policy in Complainants' cases are found to be illegal sex discrimination under the South Dakota Human Relations Act of 1972, as amended, and Commission on Human Rights' Rule § 20:03:09:12.

## REMEDIES

The Commission on Human Rights hereby orders pursuant to SDCL 20-13 *et seq.* that Respondent Webster Independent School District # 101, its agents, successors and assigns, shall:

1. Cease and desist from the discriminatory and unfair practice of treating disabilities resulting from pregnancy, childbirth and recovery therefrom on different terms and conditions than other temporary disabilities are treated under sick leave or long-term health leave policies.

BEST COPY AVAILABLE

2. Take the following affirmative action which the Commission on Human Rights finds necessary to effectuate the purposes of SDCL 20-13 *et seq.*

a) Make Complaint Trefz whole for the fifteen (15) days of backpay or $592.50, the sum that was illegally deducted from her July and August, 1974, checks for her October, 1973, pregnancy-related absenses, plus 8% per annum interest from the date that this amount should have been paid to Trefz.

b) Make Complainant Weier whole for the ten (10) days of backpay or $475.10, the sum that was illegally deducted from her June, 1975, check for her March and April, 1975, pregnancy-related absences, plus 8% per annum interest from the date that this sum should have been paid to Weier.

c) Remove all references, if any, in Camplaints' personnel records regarding these complaints; further, Respondent shall not engaged in or allow any of its employees to engage in any conduct against Complainants or any party to these proceedings the nature of which might be construed at retaliatory.

c) Notify the South Dakota Division of Human Rights, in writing, within 45 days from the date of this Order of Respondent's compliance with this Order.

Dated this 21 day of November, 1975.

Commissioners Blanche Robertson
Ester Munoz
Kay Folkerts
Ben Stead

/s/ Ben Stead
Ben Stead
Chair, Commission on Human Rights



## APPENDIX E

Case No. F.E.P. Sex 75-3

In the Matter of Nancy O. Hall

v.

Bristol Board of Education

Case No. F.E.P. Sex 74-3

In the Matter of Bonnie R. Ferranti

v.

Bristol Board of Education

### Decision Hearing Tribunal

Statement of the Case

On June 23, 1972, Bonnie R. Ferranti filed a complaint with the Commission on Human Rights and Opportunities. Complainant Ferranti charged that she was discriminated against because of her female sex in that the Board of Education terminated her employment with the Bristol Board of Education and denied her the use of any accumulated sick time, all in violation of Section 31-126 of the Connecticut General Statutes.

The Complainant, Nancy Hall, similarly charged that the policies of the Bristol Board of Education in not crediting her with continuous service during the time of certain prior maternity leave in 1970 discriminated against her on the basis of sex wherein said Board of Education took the position that her prior maternity leave amounted to a break in continuous service and accordingly, Complainant Hall was not given tenure. Thereafter, the Board terminated her services on the basis of a subsequent pregnancy as a non tenured teacher as of May 3, 1972.

The Complaint was investigated by the Commission on Human Rights and Opportunities. After a failure of

conciliation in both of the above cases the investigator certified the Complaint to the Commission. The Commission thereafter pursuant to Section 31-127 and its own regulations, issued a Notice of Public Hearing. On December 11, 1972, both of the above cases were consolidated and heard together before Emanuel N. Psarakis, Esq., a duly appointed Hearing Examiner.

Complainants Hall and Ferranti, and Defendant, the Bristol Board of Education, were all represented by counsel, and were all given a full opportunity to present evidence, cross examine witnesses and present arguments. Extensive and able briefs were filed on behalf of all parties.

Upon examination of the entire record, the testimony, witnesses and exhibits submitted in that hearing, the Examiner makes the following Opinion and Decision setting forth his finding of facts, reasoning and conclusions of law:

FINDINGS OF FACTS, OPINION AND DECISION

*Nancy Hall*

Complainant Nancy Hall was a teacher in the Bristol school system, having commenced employment November 7, 1968. In May of 1970, Mrs. Hall took maternity leave and returned to the school system in September, 1970. From that date on she worked until May 3, 1972.

Towards the end of January, 1972, the Complainant Hall informed her principal that she was pregnant. The principal at this time requested of Hall a doctor's statement as to the probable date of birth. Complainant did not comply with the principal's request.

By letter dated June 15, 1972, the Bristol Board of Education terminated Mrs. Hall's employment. At the insistence of Complainant's counsel, the Board of Education did on June 27, 1972, state that the reasons for termination



were that Complainant was insubordinate in not following a reasonable request of the Board of Education by not informing the Board of her pregnancy and that by this she attempted to subvert the maternity leave provisions of the contract by withholding the required doctor's statement. The Board further stated that Complainant Hall was not entitled to maternity leave under the provisions of the contract because she had not had three years continuous service as a teacher in the Bristol school system.

Complainant appealed the decision of the Board of Education and was granted a hearing which did not result in any change of the Board's original decision to terminate her effective May 3, 1972.

On July 20, 1972 the Complainant Hall filed a complaint with the Commission on Human Rights and Opportunities. Complainant as Plaintiff, also commenced an action in the Court of Common Pleas asking the court to reverse its decision of the Board of Education in accordance with the court's jurisdiction under Section 1015(f) of the Connecticut General Statutes.

Complainant Hall gave birth to her second child on May 3, 1972. Credible testimony was given to the effect that Complainant was able to resume normal household duties within five days after she left the hospital, namely May 10, 1972. Complainant's physician indicated by letter that in his medical judgment Complainant would be able to resume duties as teacher in the Bristol School System by June 8, 1972.

During Mrs. Hall's first pregnancy, the Complainant was not credited with accrual of sick leave for the period that she was out on maternity leave for her first childbirth, a period of May 3, 1970 to the end of June 1970. Also, the school administratioin took the position that such leave for the first pregnancy interrupted her employment and accordingly as she had not acquired tenure as a school

teacher the Board treated her as a non tenured teacher for the purposes of her second pregnancy. However, Complainant Hall did not lose other benefits from the school system as a result of her first pregnancy and accordingly, for example, was advanced in proper step sequence even though she did take maternity leave.

A decision of the Court of Common Pleas for Hartford County dated November 1, 1972, ruled that Mrs. Hall, as Plaintiff in that action, acquired "tenure" and that the continuity of employment was not severed by her leave of absence for her first pregnancy.

*Bonnie R. Ferranti*

Complainant Bonnie Ferranti in the second case herein was employed as a learning disabilities teacher at Bristol Central High School in September of 1970. In February 1972 Complainant Ferranti informed her supervisor and principal that she was pregnant and was due to deliver in October. Plans were made with school administrators to have a coordinator of learning disabilities cover the class for the period of time Mrs. Ferranti would be unable to work after childbirth. On July 19, 1972, the Board of Education informed Complainant Ferranti that she submit her resignation on or before August 7, 1972 "approximating a period of two months prior to the expected date of delivery". It confirmed her earlier designation of continuing a teaching assignment until June 21, 1972.

It should be noted here that Complainant Ferranti did not request leave of absence nor did she resign. She nad asked for an application of sick time that she had accrued so that she could recuperate from the temporary disability due to pregnancy.

On August 30, 1972 Mrs. Ferranti gave birth to a baby girl and her doctor advised that she would be fully able to return to work on October 20, 1972.



*Claims and Relief Sought*

Both Complainants request that the Bristol Board of Education cease and desist from applying any provisions of the collective bargaining contract or Board regulations whereby female teachers are deprived of teaching opportunities due to pregnancy, and that all consequences of such discriminatory leave be abolished, that any provision of such collective bargaining contract or Board of Education regulation relating to such discrimination be declared void.

Complainants further request that the Board of Education restore to them all the rights and benefits to which they would have been entitled including but not limited to seniority, sick leave benefits, medical benefits, life insurance, retirement benefits and any and all other rights and benefits relating to any condition of employment that they would have received but for the alleged forbidden discrimination.

Complainants further request the Board of Education pay the Complainants back pay and also restore Complainants to their prior teaching positions prior to such termination.

*Collective Bargaining Contract*

During the relevant times herein, there was a collective bargaining contract in effect between the Bristol Board of Education and the Bristol Education Association effective December 1, 1971 and continuing in full force and effect to and including June 30, 1974.

Under this agreement Article XIX entitled "Maternity Leave" provided that unless a teacher has had three years of continuous teaching service in the Bristol School System, such leave will not be granted. The other maternity leave provisions stated that requests for leave of absence for maternity should be made as soon as the

teacher is aware of her condition. The contract further stated that the teachers requesting such leave are expected to leave at the end of the sixth month of pregnancy and to remain out at least three months after birth. It further provided that these dates are contingent upon written permission from the attending physician and the approval of the superintendent of the school.

The entire Article XIX is more fully set forth in Appendix A attached to this decision.

The contract contains no written provisions requiring a so called "pre delivery" statement as was requested of Mrs. Hall; (the lack of this "pre delivery" statement was the reason the Board stated that Mrs. Hall was insubordinate and formed a basis for her termination.)

Effective May 1, 1972, the Bristol Board of Education and the Bristol Education Association negotiated a revised maternity leave policy in effect as of May 1, 1972.

This new policy outlined in considerable detail the required procedures to be followed with respect to maternity leave. It also revised the maternity leave policy to allow employees to elect in writing to commence maternity leave only *two* months before the anticipated date of birth and/or to extend such leave only *two* months after. This election is contingent upon the teacher obtaining a statement from the attending physician during the sixth month of pregnancy and prior to returning to duty in a form acceptable to the superintendent certifying fitness to perform duties.

The revised maternity leave policy spelled out in writing for the first time that any employee who does not request or is not eligible for maternity leave shall resign at least three months before the anticipated date of birth but may elect in writing to resign two months before the anticipated date of birth.

The revised maternity leave policy is still in force and is set forth in its entirety as Appendix B. It also includes



the directions to principals and supervisors, the revised maternity leave policy and a written notification of pregnancy, a physicians "pre delivery" statement and a physicians "post delivery" statement.

This maternity leave policy set forth for the first time as a matter of written Board policy the notification of pregnancy, the physicians "pre delivery" and "post delivery" statements.

*Issues*

In the case before this Tribunal, the following issues are relevant:

1. Whether the requirement of the Bristol Board of Education that maternity leave was compulsory on account of pregnancy after the fifth month of pregnancy and up to and including at least three months after the birth of the child was discriminatory within the meaning of Section 31-126(a) of the Connecticut General Statutes.

2. Whether the contractual provisions in the collective bargaining agreement relating to maternity leave discriminated against Complainants because of their sex.

3. Whether the Board of Education discriminated against Complainants by allowing maternity leave only for "tenured" teachers and requiring "non tenured" teachers to be terminated rather than take maternity leave.

4. Whether pregnancy under the circumstances of this case can be equated to personal illness, temporary disability or physicial incapacity for any job related purpose.

5. What are the appropriate remedies to put Complainants in the same position they would have been but for any discrimination, assuming discrimination is found.

*Discussion*

The evidence is clear in this case that maternity leave, if granted, was required only of pregnant female teachers.

Also, only the condition of pregnancy is treated in the manner as set forth under the collective bargaining contract whereby a teacher is barred from returning until more than three months after the birth of a child.

Although the evidence in the case shows that there have been some variations with regard to treatment of maternity policy in that some teachers are allowed to teach after the sixth month of pregnancy (and indeed this was the case with regard to Complainant Ferranti), the line drawn by the Board of Education—whether in the old policy set forth in the original collective bargaining contract or the new policy as bargained between the Board of Education and the Bristol Education Association—appears to be an arbitrary one. It is a fixed line regardless of whether competent medical evidence indicates that a particular teacher can continue to perform her job after the sixth month (or seventh month) of pregnancy and before three (or two) months after the birth of the child. It is clear from the evidence in this case pregnancy is the only physical condition that is treated in this manner by the Board of Education.

Section 31-126 of the Connecticut Fair Employment Practices Law prohibits discrimination under any term, condition or privilege of employment because of race, color, religious creed, age, sex, national origin or ancestry of any individual. Once the Commission has shown forbidden discriminatory treatment has occurred, it has made out a *prima facie* case, and then it is incumbent upon Respondent to show a bona fide occupational qualification or need in order to avoid the prescriptions of the Act.

As stated in a prior decision, *Kathleen Staten* vs. *East Hartford Board of Education,* Case No. FEP-6-34-1, dated March 28, 1972 in a decision rendered by a hearing tribunal, once the Commission has made out a prima facie case of discriminatory treatment within the meaning of the Act, Respondent runs the risk of violating the Act unless it



comes forward and shows sufficient evidence proving a bona fide occupational qualification. Thus, cases cited by Respondent with regard to the legal tests used in ascertaining discrimination under the Federal Constitution are not relevant here, since there, some courts have held the test is that *any* classification having some rational basis does not necessarily offend the Fourteenth Amendment and discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

The burden of proof or burden of persuasion under the Connecticut Act therefore differs from cases brought under certain other Federal Civil Rights Acts where there, the test is whether or not certain action violated the Equal Protection clause of the Federal Constitution.

This tribunal concludes that the policy of the Board of Education of Bristol discriminates against both Complainants because of conditions attendant to their sex. By virtue of its policy the Board of Education only requires such leave of women. Women are terminated or put on maternity leave as a mandatory requirement not because of their willingness to continue work, their job performance, or their need for personal medical safety. but solely because of the condition attendant to their sex.

Paragraph 3 of the maternity leave policy (whether it be the old maternity leave policy or the new policy) sets forth a fixed requirement that leave commence at the end of the sixth month of pregnancy (or the seventh) and continue until three months (or two) after birth. These same contracts impose no such arbitrary requirements on any other form of disability.

The Bristol Board of Education has taken the position that the basic reason for the maternity leave policy is to facilitate the "uninterrupted flow of the educational process of all students within the Bristol school system", and that the maternity leave provision is established as a measure to minimize a sudden disruption of student class-

rooms programs due to unforeseen complication in teachers' conditions and to allow time for substitute teachers to work and train with the intended class.

Yet assuming that planning is proper and essential, other rights set forth by statute cannot be superseded by planning or other procedures which simply basically discriminate against women with regard to a condition attended to their sex. No persausive reason has been advanced by the Bristol Board of Education to justify use of these automatic and arbitrary planning procedures in the instance of pregnancy on the one hand, and yet allow it to treat all other cases involving disability on an individualized basis on the other. The Board of Education does not require arbitrary leave policies or termination of employment in any other illness, whether such illness be seen or unforeseen, nor in any other situation involving disability leave whether such disability leave is seen or unforeseen. Testimony given at the hearing shows that of all disabilities, only pregnancy is treated in this particular manner.

Respondent did not establish a bona fide need or qualification to rebut the forbidden discrimination in this instance nor give any rational reason as to why only pregnant women must be treated in such a manner.

There was no evidence advanced whatsoever that pregnant teachers in advanced conditions of pregnancy from or after the sixth or seventh month of pregnancy, or teachers who have given birth to the child and who were within the two or three months period after birth could not properly teach or handle students nor handle all teaching situations. Indeed, Complainant Ferranti was allowed to teach up to and *beyond* the required time for leaving and yet the evidence showed that she performed her job capably and well during the time period beyond seven months. There was no evidence that the teachers in this particular instance could not and did not perform their particular jobs.



This tribunal has no quarrel with the fact that the Bristol Board of Education finds it necessary in the interest of proper planning to attempt as best as possible to facilitate educational instruction for children and promulgate rational measures to minimize sudden disruption of students classroom programs. Yet such planning must be done in a non discriminatory manner and not fall within the proscriptions of the Connecticut law. No valid reason was advanced to meet the burden of persuasion under the Connecticut Act to show why such planning must lead to an arbitrary determination excluding treatment of maternity cases on an individual basis. The argument by the Respondent that its mandatory maternity leave policy is dictated by sound administrative considerations totally ignores the fact that the Board has failed to differentiate pregnancy from other temporarily debilitating conditions. It appears to this tribunal that in some ways pregnancy creates less of an administrative problem in this regard than does truly unexpected accidents or illnesses.

It is the conclusion of this tribunal that any contract, regulation or policy which sets an arbitrary and fixed date by which pregnant employees must resign or must take maternity leave absent support in fact as to necessity due to bona fide occupational qualifications is discriminatory against women and violates the Connecticut Act.

The conclusion of this tribunal applies with equal force both as to the so called old contract provision in effect prior to May 1, 1972, and to the new contract provisions negotiated between the Education Association and the Bristol Board of Education.

The tribunal reaches the same conclusion with regard to the mandatory termination policy set forth by the Bristol Board of Education for those teachers who are not yet tenured. The evidence in this case clearly indicates that unless non tenured teachers resign, they would be terminated by virtue of unwritten policies of the Board of Edu-

cation and by virtue of interpretation of the collective bargaining contract.

This tribunal concludes that such portions of the collective bargaining contract and any policies or interpretations by the Board of Education which deny maternity leave or require termination from employment untenured pregnant teachers of less than three years service are discriminatory and violate the Connecticut Act.

The tribunal now considers the question of whether by not granting Mrs. Ferranti the opportunity to use accumulated sick leave the Bristol Board of Education violated the Connecticut Act.

She requested that she be granted accumulated sick leave to be applied toward the time that she was disabled from working due to maternity. The Bristol Board of Education draws no line between tenure and non-tenure teachers in the granting of sick leave and allows both to take sick leave. Although it allows a non-tenured teacher disabled by reason of other disease or injury to take sick leave, it does not allow sick leave to be taken by non-tenured teachers as a result of pregnancy.

It is clear from the policies of the Bristol Board of Education and the collective bargaining treatment that employees may use accumulated sick leave for any kind of disability. Thus, there is testimony that sick leave provisions can be used in cases of cold, flu, broken leg, deviated septum, cataract operations, heart operations and even for cosmetic elective surgery such as removal of a mole. Given the practice of this Board of Education allowing the use of sick time for basically any and all sicknesses temporary disabilities or elective medical procedures, no rational reason was advanced to justify denying sick leave for the temporary disability occasioned by pregnancy. This conclusion is based upon the actual practice in effect at the Bristol Board of Education where all disabilities are treated as sickness.



Moreover, this tribunal concludes that disabilities caused or to contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom are, for all job related purposes, temporary disabilities and should be treated as such in connection with any health or temporary disability insurance or sick leave plan available in connection with employment.

For these reasons the tribunal concludes that the Bristol Board of Education in denying Mrs. Ferranti the opportunity to use accumulated sick leave violated the Connecticut Fair Employment Practices Act.

The final question is whether the Bristol Board of Education's reasons in stating that Mrs. Hall was terminated for insubordination constitute a valid defense to her complaint.

Discharge for insubordination or a failure to follow proper rules may be proper if not in fact a pretext to mask forbidden discrimination.

However, it seems to this tribunal that before any discharge for insubordination can clearly be made out, clear instructions must be given by supervisors to employees so that employees can clearly understand the penalty for failure to comply. The evidence here revealed that there was never any requirement written by the Board of Education requiring any "pre delivery" statements of the type that were later clearly incorporated into the modified policy.

If any act of insubordination did in fact occur in this case, it occurred within a reasonable time after January 27, 1972, when the principal requested Mrs. Hall to submit the written statement of expected delivery date. If, in fact, the discharge is for insubordination, the discharge must follow within a reasonable time after an act of insubordination justifying discharge occurs.

This tribunal believes the request of the principal to put in writing a fact that the employee had orally given to the

principal under the circumstances of this case, where the request was not pursuant to any stated Board of Education policy, where the employee had no warning of the fact that it was considered insubordination, and where no warning was given of any penalty for refusal to comply is not sufficient basis for discharge. Secondly, moreover, Complainant was not discharged within a reasonable time following failure to comply, but only after her seventh month of pregnancy, a point in time which was almost four months *after* the alleged act of insubordination.

For these reasons, this tribunal concludes that the real reason or the substantial motivating reason for the discharge of Mrs. Hall, was due to the fact of pregnancy and not to the fact of insubordination.[1]

THE REMEDY AND ORDER

In carrying out its responsibilities under the statute the Tribunal has the power to order Respondent to cease and desist from continuing the practices that were in effect and to take such affirmative action as may be appropriate to remove the consequences of the discrimination so as to effectuate the policies of the Act, provided there is basis for such action in the record.

In granting such relief this Tribunal must be mindful of all the equities so as to render the proposed relief appropriate under the particular facts of this case and accordingly has given such due consideration. Any action or

[1] In its brief for the first time Respondent raises the issue that the Commission lacks jurisdiction to consider this case in view of the pending actions in the Court of Common Pleas. In light of the fact that Respondent submitted fully to the jurisdiction of the Commission, fully participated on the merits at the hearing, and never raised this question at the hearing, the Tribunal concludes the issue was not timely raised and Respondent has waived its right. Moreover, the mere pendency of such action cannot oust the Commission of jurisdiction over the subject matter as it is empowered to prevent unfair employment practices particularly where such pending actions have not been concluded.



orders by this Tribunal must cure the present effects of discriminatory policies applied against Complainants and must put Complainants in the same position they would have been but for the forbidden discrimination. Because of the findings in this case and because of the fact that the employees lost substantial wages, this Tribunal, acting under the statutes, believes they should also be reimbursed for wages lost because of the discrimination practiced.

## ORDER

Based upon the evidence drawn from the record as a whole, and the conclusions set forth above, the Tribunal hereby ORDERS Respondent to:

1. Cease and desist from maintaining in force and effect any regulations, policies or requirements and cease and desist from applying any provisions of the collective bargaining contract whereby female teachers are deprived of teaching opportunities from and after the sixth or seventh month of pregnancy up to and including the second or third month following termination of pregnancy. All consequences of such discriminatory leave or termination policy must be abolished and any provision of such collective bargaining contract or any regulations, policies and requirements of the Board of Education relating to such discrimination are void.

2. For all job related purposes, apply all regulations, policies and requirements of the Board of Education and all contract provisions of the collective bargaining contract that constituted the subject matter of this hearing in a manner that does not discriminate on the basis of sex, including all provisions relating to so called sick or disability leave.

3. Restore or credit to Complainants all the rights and benefits to which they would have been entitled including, but not limited to seniority, sick leave benefits, medical benefits, life insurance, retirement and any and all other

rights and benefits relating to any condition of their employment that they would have received but for the forbidden discrimination.

4. Pay Complainants back pay. The Tribunal is of the opinion that Complainants under all the circumstances of this case, are entitled to back pay. This is not a fine, but Complainants are merely put into the same position they would have been but for the forbidden discrimination, and are made whole.

Accordingly, Complainants shall receive back pay calculated on the basis of the entire period of their enforced absences during which they would otherwise be normally receiving pay, less any other earnings which Complainants received during the enforced period of absence or termination.

Although Complainants should receive full pay less any other earnings for the period of the forced absence or termination Complainants should not receive back pay for that period which the evidence herein shows they would have been away from school because of the physical effects of their maternity.

Nevertheless, under the circumstances of this case, to the extent Complainants had accumulated available sick leave, Complainants must be granted the opportunity to use such leave during the time they were disabled from working due to maternity.

If there is any question as to the amount of any reimbursement, or as to the restoration of any other benefits denied Complainants herein, and if no agreement can be reached between counsel for the Commission and counsel for Respondent, additional hearings may be requested solely to resolve such questions.

/s/ Emanuel N. Psarakis
Emanuel N. Psarakis

*Hearing Tribunal*

August 20, 1973



## APPENDIX 'A'

### Article XIX

1. Unless a teacher has had three years of continuous teaching service in the Bristol School System, such leave will not be granted.

2. The request for a leave of absence for maternity should be made as soon as a teacher is aware of her condition in order to permit the necessary arrangements to be made.

3. Teachers requesting this leave of absence are expected to leave at the end of the sixth month of pregnancy and to remain out at least three months after the birth. These dates are contingent upon written permission from the attending physician and the approval of the Superintendent of Schools.

4. All cases will be reviewed individually by the Superintendent's office both as to date of leaving and date of return.

5. Maternity leaves of absence will be considered terminated one full calendar year following the withdrawal from active teaching duties.

6. There will be no experience credit and no compensation granted during this leave.

7. When returning, an effort will be made to place the teacher in a position comparable to the one held at the time of leaving. Date of return may be continuent upon availability of vacancy which returning teacher can fill.

## APPENDIX 'B'

## BOARD OF EDUCATION

BRISTOL, CONNECTICUT

To: All Principals and Supervisors, President of theBristol Education Association

From: Constant W. Blum, Assistant Superintendent for Personnel

Re: Revised Maternity Leave Policy in Effect as of May 1, 1972

Attached you will find a copy of the revised maternity leave policy in effect since May 1, 1972. This revised policy was formally approved by the Bristol Education Association as outlined in a letter from their President, Mr. Henry Witlicki, dated May 1, 1972, and as approved by the Bristol Board of Education at its May 3, 1972 meeting.

Please insert the Revised Maternity Leave Policy in your blue booklet ("Board of Educaton Policies—Contract Agreement") and delete the previous maternity leave section from both the Contract and Policies sections of that blue booklet.

Please be certain you review this new policy very carefully to be sure that you fully understand all of its provisions so that we may properly implement this new policy with a minimum of confusion of misunderstanding.

I would respectfully request the President of the Bristol Eduction Association to give full publicity regarding this new policy to all teachers, perhaps through an early issue of BEActions.

There are two supporting maternity leave forms (Physician's pre-delivery and post-delivery statements) which have been approved by the Bristol Education Association



and the Bristol Board of Education which are enclosed for use by all teachers in maternity situations. Teachers are to continue to use notification of pregnancy forms as well. Enclosed are new "notification of pregnancy" forms consistent with the revised maternity leave policy. Please discard all copies of the earlier forms in your possession.

*The following step procedures are to be followed:*

1. Upon being approached by a teacher indicating her pregnancy, principal/supervisor shall request teacher to complete the "notification of pregnancy" form. Principal/supervisor shall initial form where required and forward it immediately to Mr. Blum (Such form shall be filed whether teacher is requesting leave of absence or will be resigning.)

2. Teacher then should file letter indicating request for maternity leave if desired and if eligible under contract provisions or letter indicating resignation.

3. If teacher wishes to remain through the seventh month of pregnancy, she must file "Physician's Pre-Delivery" statement during sixth month of pregnancy. This form is to be sent immediately to Mr. Blum.

4. If teacher wishes to return after delivery of child, she must file "Physicians Post Delivery" statement.

5. All cases will be reviewed individually by the Superintendent's Office as to date of leaving or date of return.

Please call my office if you have any questions regarding this matter.

BOARD OF EDUCATION

BRISTOL, CONNECTICUT

REVISED MATERNITY LEAVE POLICY

EFFECTIVE MAY 1, 1972

1. Unless a teacher has had three years of continuous teaching service in the Bristol School System, such leave will not be granted.

2. The request for a leave of absence for maternity should be made as soon as a teacher is aware of her condition, in order to permit the necessary arrangements to be made.

3a. Teachers requesting a maternity leave of absence normally shall leave at least three (3) months before the anticipated date of birth, and remain out at least three (3) months thereafter. However, such employee may elect, in writing, to commence such leave only two (2) months before the anticipated date of birth and/or to extend such leave only (2) months thereafter. This is contingent upon her obtaining a statement from her attending physician during her sixth month of pregnancy and prior to returning to duty in a form acceptable to the Superintendent certifying her fitness to perform her duties. The total leave shall not exceed a period of twelve (12) calendar months.

b. Any employee who becomes pregnant and who does not request or is not eligible for a maternity leave of absence normally shall resign at least three (3) months before the anticipated date of birth, but may elect, in writing to resign two (2) months before the anticipated date of birth under the conditions set forth in paragraph 3a immediately above.



4. No employee shall return to her duties after bearing a child without first providing a statement from her physician acceptable to the Supertintendent certifying her fitness to perform her duties.

5. All cases will be reviewed individually by the Superintendent's office both as to date of leaving and date of return.

6. Maternity leaves of absenec shall be considered terminated one full calendar year following the withdrawal from active teaching duties.

7. There will be no experience credit and no compensation granted during this leave.

8. When returning, an effort will be made to place the teacher in a position comparable to the one held at the time of leaving. Date of return may be contingent upon availability of vacancy which returning teacher can fill.

(Per Bristol Education Association approval on May 1, 1972 and Board of Education approval on May 3, 1972)

42a

BOARD OF EDUCATION

BRISTOL, CONNECTICUT

NOTIFICATION OF PREGNANCY

.....
Date

Dear Mr. .....:

My Physician, Dr. ....., has told me that I may expect my baby the .... week of ....., 19...

I anticipate continuing my teaching assignment until ..... *. If a situation develops making it advisable for me to leave before this date, I will notify you immediately.

.....
Signed

* Board of Education Policy:

Teachers requesting leaves of absence for maternity purposes are obligated to leave at the end of the seventh month of pregnancy and to remain out from work a minimum of two calendar months following the child's birth.

Received by:

.....
Principal Date

.....
For Board of Education Office Date

43a

BOARD OF EDUCATION

BRISTOL, CONNECTICUT

MATERNITY LEAVE—PHYSICIAN'S STATEMENT
(PRE-DELIVERY)

To: Superintendent of Schools

From: .....
Physician

Patient: .....

Expected Date of Delivery: ..... .....

On ..... I have examined Mrs. ..... and find her physically fit and able to perform all of her normally assigned duties through ..... (i.e., (date)
through the seventh month of pregnancy).

.....
Physician's Signature

.....
Date

cwb:dsw-1000-5/1/72

BOARD OF EDUCATION

Bristol, Connecticut

MATERNITY LEAVE—PHYSICIAN'S STATEMENT
(POST-DELIVERY)

To: Superintendent of Schools

From: .....
Physician

Patient: .....

Actual Date of Delivery: .....

On ..... I have examined Mrs. .....
(date)
and find her physically fit and able to perform all of her normally assigned duties beninning on .....
(date)

.....
Physician's Signature

.....
Date

cwb:dsw-1000-5/1/72



**APPENDIX F**

SUPERIOR COURT
COUNTY OF HARTFORD

February 19, 1974

Commission on Human Rights and Opportunities

v.

Bristol Board of Education

**Order**

The petition of the Commission on Human Rights and Opportunities of the State of Connecticut, dated January 23, 1974, praying for reasons set forth in the petition for enforcement of its orders, having been presented to the undersigned, an order for a hearing thereon before me on the 7th day of February, 1974 at 10:00 o'clock in the forenoon having been issued and return having been made of the service of said order as directed therein, the same came to a hearing before me at said time and place, when the petitioners appeared by Sidney D. Giber, Assistant Attorney General, and the defendant's special appearance was entered by Kenneth John Laske, City Attorney, and the parties having been heard, it is found that Notice was given to the Bristol Board of Education pursuant to Section 31-128(e) and that said order was duly served, that the allegations of the petition are true, and that an order for the enforcement of the orders of the Commission on Human Rights and Opportunities of the State of Connecticut ought to be issued forthwith.

Now, therefore, it is ordered:

1. That the Bristol Board of Education pay to Bonnie R. Ferranti the back pay due her in the sum of $5,174.30 plus $271.65 interest for a total sum of $5,345.95. In addition to back pay, she is to be credited with 17 2/6 days of sick leave as of September 5, 1973.

2. That the Bristol Board of Education pay to Nancy O. Hall the back pay due her in the sum of $6,055.11 plus $317.89 interest for a total sum of $6,378.00. In addition to back pay she is to be credited with 29 4/6 days of sick leave as of September 1, 1972.

3. That the Bristol Board of Education rescind its childbearing leave Article XIX(a) and adopt the following in lieu thereof on or before the 15th day of March, 1974:

(a) A teacher who becomes sick or disabled due to pregnancy or childbirth shall, upon her request, be placed on sick leave for childbearing purposes. Any teacher who becomes pregnant shall so notify the Superintendent, or his designee, at least one (1) month prior to the expected date of commencement of said sick leave. When there is reason to believe that she may have become unable to perform her duties she shall provide a doctor's certificate indicating her continued fitness for work. Leave shall begin when, in the opinion of her doctor, she is no longer physically able to work and said leave shall expire when, in the opinion of her doctor, she is physically able to return to work. Except in the case of medical difficulties, sick leave is not normally expected to continue for more than six (6) weeks after delivery. Upon her return the teacher shall be assigned to her former or an equivalent position.

Dated at Hartford this 19th day of February, 1974.

/s/ ILLEGIBLE

*A Judge of the Superior Court*



## APPENDIX G

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS

AFL-CIO AND CLC
1126 16th Street, N.W.
Washington, D. C. 20036
Phone: 296-1206

October 28, 1975

[Addressed to Chairperson of each State FEP Agency which has jurisdiction of discrimination because of sex except those whose guidelines were printed in the BNA FEP Manual or the CCH EPG]

Dear:

I am an attorney for Martha V. Gilbert and the class composed of all female employees of the General Electric Company in the case of *Gilbert* v. *General Electric Co.*, 519 F.2d 661 (4th Cir., June 27, 1975), *cert. granted*, Nos. 74-1589 and 74-1590, 44 U.S.L.W. 3200 (Oct. 7, 1975), currently pending in the Supreme Court of the United States. In this case both the trial court and the Court of Appeals held that General Electric Company violated Title VII of the Federal Civil Rights Act by excluding income maintenance for female employees disabled by childbirth or pregnancy from a sick pay system provided in the form of a sickness and accident insurance plan which covered all employee disabilities except those related to pregnancy. I am writing to inquire as to the status of such plans in your state.

In order to have all the facts necessary to make a full presentation to the Supreme Court in our brief, I would appreciate your answering the following questions:

(1) Under state law or by court decision or your agency's interpretation of applicable law, whether by way

of guidelines, decisions, or otherwise, is such a plan prohibited discrimination on the basis of sex?

(2) If there is no express statutory provision, regulation or case authority prohibiting such discrimination, has your agency formulated a policy with regard to disability insurance programs and pregnancy?

(3) Based on your experience with employer practices in your state, is it common for income maintenance plans or other benefit plans to exclude payment for pregnancy and pregnancy-related disabilities? Have employers, in an effort to comply with fair employment practice laws, modified their income maintenance plans to cover payments for pregnancy disabilities?

Please send us a copy of any guideline, regulation, decision, or opinion which could be cited or furnished to the Supreme Court as authority for any statement as to the status of the law in your state on this issue.

Any further information you can provide will be welcome.

I would appreciate your prompt reply, as the deadline for our brief is fast approaching. Thank you for your cooperation.

Sincerely,

/s/ RUTH WEYAND (DRL)
Ruth Weyand
*Attorney for*
*Martha V. Gilbert, et al.,*
Respondents in No. 74-1589
and Petitioners in No. 74-1580



## APPENDIX H

STATE OF KANSAS

COMMISSION ON CIVIL RIGHTS
535 Kansas Ave., 5th Floor
Topeka, Kansas 66603
Phone (913) 296-3206

November 5, 1975

Ms. Ruth Weyand
1126 16th Street, N.W.
Washington, D. C. 20036

Dear Ms. Weyand:

In response to your letter of October 28, 1975, please let me advise that the Kansas Commission on Civil Rights has adopted, among others, the following administrative regulations:

K.A.R. 21-32-2 (c)

"It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is the situation in which wives of male employees receive maternity benefits while female employees receive no such benefits."

K.A.R. 21-32-6 (b)

"Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom, are for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

The Kansas Statutes, and particularly K.S.A. 44-1009 (a)(1), deal with sex discrimination in broad generalities, and do not directly address the areas of pregnancy and childbirth, nor have any cases dealing with the issue come before our courts. However, under the provisions of K.S.A. 1974 Supp. 77-426, all new rules and regulations are subject to modification or rejection by the legislature. The above-quoted regulations were subjected to the required legislative scrutiny in the 1975 session, and passed unscathed, following extensive committee study. Thus it would appear that they now enjoy almost equal status with statutory enactment, or are at least a clear indication of legislative intent in the enactment of the Kansas Act Against Discrimination.

I have questioned our compliance section concerning our experience with employers relative to income maintenance plans, and related problems arising out of pregnancy. While we have encountered little resistance in the elimination of mandatory pregnancy leaves or the granting of



pregnancy leaves on the same basis as other disability leaves, we have been unable to resolve the income maintenance questions, which seem to arise principally in the communications industry. In fact, all resolutions seem to be awaiting the ultimate outcome of your case.

Sincerely,

/s/ LAWRENCE C. WILSON
Lawrence C. Wilson
*Chairperson*

LCW:kl

## APPENDIX I

STATE OF DELAWARE
DEPARTMENT OF LABOR
DIVISION OF INDUSTRIAL AFFAIRS
618 N. Union Street
Wilmington 19805

November 3, 1975

Ruth Weyand, Esq.
International Union of Electrical,
Radio and Machine Workers
1126 16th Street, N.W.
Washington, D.C. 20036

RE: *Gilbert, et al* v. *General Electric*

Dear Ms. Weyand:

As response to your letter of October 28, it is this Agency's policy to regard pregnancy as a disability unique to the female sex. Any employer with disability insurance programs which excludes pregnancy coverage would be deemed illegal by our Agency.

There has been no court decision for this policy; however, we have settled a case in the midst of an administrative hearing, providing for such a policy.

Based on our experience with employers' practices in Delaware, it is not common for income maintenance plans or other benefit plans to include payment for pregnancy and pregnancy related disabilities. Employers have not modified their income maintenance plans to cover payments for pregnancy disabilities. On the other hand, many employers no longer require that a woman resign her job upon becoming pregnant, nor do they prohibit a woman from regaining her job after delivery. The general prac-



tice in Delaware seems to be that employers will allow a pregnancy leave of absence without pay.

Sorry we can't be more helpful, but good luck in this case.

Very truly yours,
/s/ JON A. LARKIN
Jon A. Larkin
*Director*
*Anti-Discrimination Section*

JAL: cl
cc: File

## APPENDIX J

THE STATE OF UTAH
INDUSTRIAL COMMISSION AND
UTAH LABOR RELATIONS BOARD
350 East 500 South
Salt Lake City, Utah 84111

November 13, 1975

Ruth Weyand, Attorney at Law
International Union of Electrical,
Radio and Machine Workers
1126 16th Street, N.W.
Washington, D. C. 20036

Dear Ms. Weyand:

In reply to your October 28, 1975 letter re: Gilbert, et al. v. General Electric Company, we advise that we are aware of no court action in Utah specifically concerning questions raised in your inquiry.

It is the general position of the Utah Anti-Discrimination Division that group health plans established through employment programs should apply equally to male and female employees and that pregnancy shall have the same status as other illness or disability under the program.

You may be interested in a recent Utah Supreme Court decision involving claim for unemployment compensation benefits during pregnancy period, wherein the Court held that the statute denying benefits for certain weeks of the pregnancy period was not illegal. (copy enclosed)

Sincerely,

INDUSTRIAL COMMISSION OF UTAH
ANTI-DISCRIMINATION DIVISION

By /s/ JOHN R. SHONE
John R. Schone,
*Commissioner and*
*Division Coordinator*

JRS:lw
Encl.



## APPENDIX K

THE STATE OF WYOMING
DEPARTMENT OF LABOR AND STATISTICS
State Office Building East
Cheyenne, Wyoming 82002
(307) 777-7261

November 13, 1975

Ruth Weyand
Attorney at Law
International Union of Electrical,
Radio, and Machine Workers
1126 16th Street, N.W.
Washington, D. C. 20036

Dear Ruth:

Your letter of October 28, 1975, to Commissioner Bachman concerning inquiries regarding the statutes and policies of Wyoming for pregnancy related benefits has been referred to my attention. Commissioner Bachman retired at the end of February 1975 and Vernie E. Martin is presently the Wyoming Commissioner of Labor and Statistics and by Wyoming Statute is the Chairman of the Fair Employment Practices Commission.

The Wyoming Statute provides in essence that it shall be a discriminatory or unfair employment practice for an employer to discriminate in matters of compensation against any person otherwise qualified because of sex. It has been concluded therefore that the withholding of pregnancy related benefits would reduce the compensation due a pregnant employee and consequently reduce her compensation or fringe benefits. No court decision has been rendered regarding this matter within Wyoming and complaints concerning such matters have, to date, been conciliated. The basic thinking is that since employers provide sick leave benefits to their employees on a broad and

general basis that such benefits should include pregnancy related disabilities.

Generally speaking it has been common for employers to provide income maintenance and other benefits to employees for illnesses and disabilities. This has excluded, however, benefits for pregnancy and pregnancy related disabilities. Subsequent to the Supreme Court holdings concerning maternity matters where due process of law items were taken into consideration, employers have modified their benefit plans. This permitted pregnant employees to remain on the job longer periods of time than previously. Subsequent to these decisions by the U.S. Supreme Court based on the U.S. Constitution, decisions initiated in accordance with Title VII of the Civil Rights Act of 1964, as amended, have been rendered. These latter decisions have provided even greater fringe benefits to pregnant employees.

The defenses of volunteerism, lack of intent to discriminate, and that pregnancy is not a disease, illness, or injury have not been argued to any substantial extent by employers. The one r maining contention, however, is that disabilities arising from a normal pregnancy and normal delivery should not receive sick leave benefits. This argument, stated differently, involves the administrative cost defenses which the federal courts have not accepted as valid. Conciliations have continued within Wyoming despite this controversy. It is understood that the U.S. Supreme Court has accepted for review the Wetzel v. Liberty Mutual Insurance Co. case. A decision in this matter should settle the controversy regarding what appears to be the last issue, namely, benefits for normal pregnancy and delivery related disabilities.

The guidelines followed within Wyoming are those provided by the federal courts since no Wyoming courts have provided decisions in this area. As indicated previously, the single remaining issue pertains to normal pregnancy



and we are awaiting some decision from the U.S. Supreme Court for further guidelines but this controversy has not, to date, limited our conciliations.

I hope this information will be of assistance to you and if I can be of any further assistance, please do not hesitate to contact me.

Yours truly,

/s/ BERT K. CONVEY
Bert K. Convey,
*Program Analyst*
*Wyoming Fair Employment*
*Practices Commission*

BKC: ms

## APPENDIX L

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
90 Washington Street
Hartford, Connecticut 06115
Telephone: Area Code (203) 566-7061

December 9, 1975

Ruth Weyand, Attorney at Law
International Union of Electrical,
Radio and Machine Workers
AFL-CIO and CLC
1126 16th Street, N.W.
Washington, D. C. 20036

Dear Ms. Weyand:

I am writing in reply to your letter of October 28th, addressed to Janusz J. Bruks, Chairman of the Connecticut Commission on Human Rights and Opportunities.

Between 1967 and the present time, the Commission has processed (or is currently processing) one hundred and thirty (130) pregnancy related cases. The nature of the allegations break down as follows:

| | |
|---|---|
| Benefits denied | 48 |
| Employment status | 45 |
| Terms and conditions | 30 |
| Other | 7 |
| | 130 |

The largest number of cases, twenty eight (28), have been against local boards of education. Eleven cases were filed with insurance companies as respondents; nine against the State of Connecticut; eight against machine and tool companies, six against transportation equipment businesses, and five each against colleges and universities, telephone companies and various medical facilities.



Four complaints each were filed against municipalities, electrical equipment companies, retail stores and food service companies. The remainder of the complaints were lodged against disparate types of industries and firms both public and private.

In answer to your questions:

1. Connecticut state law explicitly prohibits an employer from denying a pregnant employee any accrued compensation or leave benefits, *Conn. Gen. Stat.* § 31-126 (g). A copy of the fair employment practices sections of the Connecticut statutes, including § 31-126(g) are enclosed.

   The statutory procedures mandate that once reasonable cause is found in a complaint an attempt to conciliate the issue is made.

   Enclosed are the preliminary and final conciliation agreements in *Hart* v. *U.S. Plastic and Chemical Corp., and Local 599 United Rubber, Cork, Linoleum and Plastic Workers of America.*

   If conciliation fails the matter is certified to public hearing for a decision. Two such tribunal decisions, *Staten* v. *East Hartford Board of Education* and *Hall and Ferranti* v. *Bristol Board of Education* are enclosed.

   Appeal from, or enforcement of, such a tribunal decision is to the Superior Court of Connecticut. Both *Staten* and *Hall and Ferranti* went to Superior Court. The final order in *Hall* is also enclosed. The preliminary court decision in *Staten* is enclosed while the final decision is presently pending.

2. See 1. above.

3. Although exact statistics are unavailable the general impression is that a number of large employers with federal contracts have complied with the statutory

mandate and now treat maternity sick leave or disability leave on a par with all other illnesses or disabilities. Other large employers appear to be awaiting the Supreme Court decision in *Wetzel* and *Gilbert*.

As may be inferred from the statistics in paragraph three above, the greatest reluctance to conform with the statutes seems to come from employers with a large number of female employees whose cost of implementing such a program would be high.

We hope this information will be of use to you. If we can be of any further help, please let us know.

Sincerely yours,

/s/ SUSAN KRELL
Susan Krell,
*Attorney at Law*

SK/fw
Enclosures



## APPENDIX M

MAINE HUMAN RIGHTS COMMISSION
STATE HOUSE AUGUSTA, MAINE 04333 (207)289-2326

November 18, 1975

James B. Longley
*Governor*

Timothy P. Wilson
*Chairman*

David W. Kee
Rev. Clement Thibodeau
Jeannine D. Clark

Terry Ann Lunt-Aucoin
*Executive Director*

Ruth Weyand, Attorney
Int. Union of Electrical,
Radio & Machine Workers
AFL-CIO and CLC
1126 16th St., N.W.
Washington, D.C. 20036

Dear Ms. Weyand:

Enclosed are the responses to questions asked in your letter of October 28, 1975.

(1) By our agency's interpretation of applicable state law (guidelines & determinations) such a policy is prohibited discrimination on the basis of sex.

(2) Not applicable.

(3) It is a common employer practice in our state for income maintenance plans to exclude payment for pregnancy and pregnancy-related disabilities. Only a few employers (Scott Paper Co. most notably) have modified their income maintenance plan.

We have many similar complaints now on file in the Superior Court and at least one which will be reported to the Maine Supreme Court.

Sincerely,

/s/ Terry Ann Lunt-Aucoin
Terry Ann Lunt-Aucoin
Executive Director

Enc. Complaint by Atty. Gary Libby
Employment Guidelines



**APPENDIX N**

SUPERIOR COURT

Civil Action Docket No. ——

State of Maine
Cumberland, ss.

Maine Human Rights Commission, of Augusta, County of Kennebec, and State of Maine, for the use of Linda Moen, and all other persons similarly situated, *Plaintiff*

v.

School Administrative District Number 61, a body politic and corporate, of Bridgton, Casco, Naples and Sebago, County of Cumberland, and State of Maine

and

Maurice Robbins; Sandra Collins; George Dennison; Linwood Meserve; Theodore Harriman; Pershing Myers; Pamela Hayward; David Hunt; Robert MacDonald; Milton McKeen; Clifford Lind; Herbert Lehmann; Donald Paul; Max L. Powell, III; William Pedford; and David Diller, III, individually and in their capacities as members of the Board of Directors of School Administrative District Number 61

and

Jan ter Weele, individually and in his capacity as Superintendent of Schools of School Administrative District Number 61, *Defendants*

**Complaint**

Class Action

To the Honorable Justice of the Superior Court:

Now Comes the Plaintiff, by and through its attorneys, and states the following:

NATURE OF CLAIM

1. This is a proceeding for declaratory and injunctive relief and damages to redress the deprivation of certain civil rights secured to Plaintiff's complainant and all other persons similarly situated by the Maine Human Rights Act, 5. M.R.S.A. § 4551 *et seq.*

JURISDICTION

2. The court has jurisdiction over this action under 5 M.R.S.A. § 4613(1), 14 M.R.S.A. § 6051(13), and 4 M.R.S.A. § 105.

PARTIES

3. Plaintiff, the Maine Human Rights Commission, is an independent commission established by the Maine Human Rights Act, 5 M.R.S.A. § 4551, *et seq.* (hereinafter referred to as "the Act"). The Act empowers the Plaintiff to file civil actions in the Superior Court, which actions shall be brought in the name of the Plaintiff for the use of the victim of the alleged discrimination (hereinafter referred to as "Plaintiff's complainant), or of a described class, seeking appropriate relief.

4. Plaintiff's complainant, Mrs. Linda Moen, is of the female gender and is a certified public school teacher under Maine law.

5. Plaintiff's complainant has at all times relevant to this action been employed by the defendants and is an "employee" as that term is defined in 5 M.R.S.A. § 4553(3) and as used in 5 M.R.S.A. § 4572(1)(A).

6. Defendant School Administrative District Number 61 (hereinafter SAD #61), is a body politic and corporate responsible for the administration of educational facilities in the municipalities of Bridgton, Casco, Naples and Sebago, in the County of Cumberland and State of Maine.



7. Defendants Maurice Robbins; Sandra Collins; George Dennison; Linwood Meserve; Theodore Harriman; Pershing Myers; David Hunt; Pamela Hayward; Robert MacDonald; Milton McKenn; Clifford Lind; Herbert Lehmann; Donald Paul; Max L. Powell, III; William Pedford; and David Diller, III, are, and were at all relevant times, the individual duly elected or appointed members of the Board of Directors of defendant SAD #61.

8. Defendant Jan ter Weele is, and was at all relevant times, the duly appointed Superintendent of Schools employed by defendant SAD # 61, who acts as its agent or servant.

9. Each and all of the aforenamed defendants is, and was at all relevant times, an "employer" as that term is defined in 5 M.R.S.A. § 4553(4) and as used in 5 M.R.S.A. § 4572(1)(A).

CONCILIATION

10. After making a finding of reasonable grounds to believe that the aforenamed defendants had engaged in unlawful employment discrimination, plaintiff unsuccessfully endeavored to eliminate such discrimination by informal means pursuant to 5 M.R.S.A. § 4612(3).

CLASS ACTION ALLEGATIONS

11. Plaintiff, the Maine Human Rights Commission, brings this action pursuant to 5 M.R.S.A. § 4613(1) and Rule 23(a) of the Maine Rules of Civil Procedure in the name of the Commission for the use of its complainant and all other persons similarly situated. The class is composed of all female certified public school teachers currently or formerly employed by the defendants who have been, are being, or will be denied the use of their accrued sick leave days during the period of their pregnancy-related disability because of the present and continued maintenance and administration of the defendants' sick

leave policy. The members of this class are too numerous to be joined in one action.

12. The defendants maintain and administer a policy of providing to their teachers, as a term, condition or privilege of employment, a sick leave plan, which allows the teachers to use accumulated sick leave days during periods of temporary physical disability. The defendants maintain and administer a policy or practice of excluding from the operation of their above-described sick leave plan a temporary physical disability, pregnancy, incurred exclusively by women, while including within the operation of their sick leave plan all temporary physical disabilities incurred by men. Pursuant to their above-described policy or practice of excluding pregnancy-related disabilities from the coverage of their sick leave plan, the defendants have failed or refused to allow plaintiff's complainant to use her accumulated sick leave days during her period of pregnancy-related disability. For this reason, the claims of plaintiff's complainant are typical of the members of the class whose interests she can fairly and adequately represent.

13. The questions of law common to the above-described class are whether the defendants' failure or refusal to allow pregnant female teachers to use their accumulated sick leave days during their periods of pregnancy-related disability constitutes unlawful employment discrimination in violation of 5 M.R.S.A. § 4572(1)(A).

The defendants have acted, or refused to act, on grounds generally applicable to the class, thereby making appropriate injunctive relief with respect to the class as a whole.

### Statement of Claim

14. At all relevant times during plaintiff's complainant's period of employment, defendants have maintained and administered a personnel policy providing as a term, condition or privilege of employment, a sick leave plan which permitted teachers a minimum of fifteen (15) sick days per year, accumulative to a maximum of one hundred and fifty (150) days, without loss of salary.



15. The purpose of the defendants' sick leave plan is to compensate teachers for wages and other benefits which would otherwise be lost because of temporary physical disabilities which prevent such teachers from performing their regular employment duties.

16. The defendants exclude from the operation of their sick leave policy only pregnancy-related temporary physical disabilities, which disabilities can be incurred only by women. The defendants include within the coverage of their sick leave all other temporary physical disabilities, including those such as prostate gland disorders which are incurred only by men.

17. During her period of employment by the defendants, plaintiff's complainant became pregnant and requested that she be allowed to use her accumulated sick leave days during her period of pregnancy-related disability.

18. Defendants failed or refused to grant plaintiff's complainant's request referred to in paragraph 17; but rather granted her an unpaid maternity leave of absence in accordance with defendants' extended leave of absence policy.

19. Plaintiff's complainant commenced her unpaid maternity leave of absence on or about January 22, 1975.

20. Plaintiff's complainant gave birth on January 21, 1975.

21. Plaintiff's complainant returned to her regular teaching duties on or about February 10, 1975.

22. During all or part of her unpaid maternity leave of absence, plaintiff's complainant was temporarily physi-

cally disabled due to her pregnancy, childbirth and recovery therefrom and unable to perform her regular teaching duties.

23. Had plaintiff's complainant been temporarily physically disabled due to any cause other than pregnancy, childbirth and recovery therefrom, and unable to perform her regular teaching duties, she would have been allowed to use her accumulated sick leave days pursuant to defendants' sick leave policy.

24. At the commencement of her unpaid maternity leave of absence, plaintiff's complainant had accumulated seventeen and one-half (17½) sick leave days.

25. In accordance with defendants' extended leave of absence policy, plaintiff's complainant neither earned nor received any compensation or other benefits during her period of pregnancy-related disability.

26. Defendants have failed or refused, and continue to fail or refuse, to compensate plaintiff's complainant for the period of her pregnancy-related disability to the full extent of her accumulated sick leave days.

27. Defendants' failure or refusal to allow plaintiff's complainant, and all other women similarly situated, to use their accumulated sick leave days while disabled due to their pregnancy, childbirth and recovery therefrom constitutes unlawful employment discrimination on account of sex in violation of 5 M.R.S.A. § 4572(1)(A).

RELIEF

WHEREFORE, plaintiff respectfully prays this Court:

1. To rule that the matter is properly maintained as a class action.

2. For judgment declaring that the defendants' pratices complained of herein are unlawful and violative of 5 M.R.S.A. § 4572(1)(A).



3. To issue both a preliminary and a permanent injunction enjoining the defendants, their successors, agents, employees and attorneys from continuing, or suffering to continue, the maintenance and administration of any formal or informal personnel policy or practice which prohibits female teachers from using their sick leave days, to the full extent accumulated, during their periods of pregnancy-related disability.

4. To order the defendants to compensate and make whole plaintiff's complainant, and all other persons similarly situated, for all earnings, wages and other benefits which they would have received but for defendants' discriminatory practices.

5. To award plaintiff its costs and disbursements in this action.

6. To grant such other relief as the court deems appropriate.

DATED: October 27, 1975

/s/ GARY W. LIBBY
Garry W. Libby
*Attorney for Plaintiff*
*Maine Human Rights Commission*
31 Western Avenue
Augusta, Maine 04330

## VERIFICATION

STATE OF MAINE
KENNEBEC, ss.

GARRY W. LIBBY, Legal Counsel to the State of Maine Human Rights Commission, being duly sworn according to law, deposes and says that he is an Attorney at Law duly admitted to the practice of law in the State of Maine, and that the facts stated in the aforementioned complaint are true to the best of his knowledge, information and belief.

/s/ GARY W. LIBBY
Garry W. Libby
*Counsel*
*Maine Human Rights Commission*

Subscribed and sworn to before me on this 27 day of October 1975.

/s/ TOMLIN LUNT-AUERIS
*Justice of the Peace*



## APPENDIX O

November 10, 1975

Mr. Paul Gregorich
IBM Corporation, 39th Floor
One IBM Plaza
Chicago, Illinois 60611

Dear Mr. Gregorich:

I have been informed by Women Employed that IBM currently has an employee benefits insurance program which treats pregnancy as a temporary physical disability. Because this has been an issue frequently raised by complainants before our Commission with respect to sex discrimination in employment, I would like to confirm that such a policy is in effect with respect to your employees. I would also like to have a copy of the insurance program for our files.

Thank you very much for your time and consideration in this matter.

Very truly yours,

SUSAN M. VANCE
*Chairperson*
SUSAN M. VANCE

SMV/mm

IBM Dec 8 1975

## APPENDIX P

ENTERNATIONAL BUSINESS MACHINES CORPORATION

Armonk, New York 10504
914/765-1900

December 1, 1975

Ms. Susan M. Vance
Chairperson
Fair Employment Practices Commission
179 West Washington Street
4th Floor
Chicago, Illinois 60602

Dear Ms. Vance:

Your letter to Mr. Paul Gregorich has been referred to me for handling since your inquiry falls within my area of responsibility.

We have for several years treated disability arising from pregency in the same manner as any other disability. Absences due to disability are covered under our Sickness and Accident Plan which is self-insured by IBM. The plan provides up to 52 weeks of regular salary in a period of 24 consecutive months.
I hope the above is helpful to you. Thank you for writing.

Very truly yours,

L. J. CASSANO, *Manager*
Employee Benefits Administration
kb



## APPENDIX Q

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
CONSUMER AFFAIRS SECTION
1100 RAYMOND BOULEVARD
NEWARK, N.J. 07102

WILLIAM F. HYLAND
ATTORNEY GENERAL

ROBERT J. DEL TUFO
FIRST ASSISTANT ATTORNEY GENERAL

STEPHEN SKILLMAN
ASSISTANT ATTORNEY GENERAL
DIRECTOR

DONALD M. ALTMAN
ASSISTANT ATTORNEY GENERAL
SECTION CHIEF

December 17, 1975

Ruth Weyand, Esq.
National Union of Electrical,
Radio and Machine Workers
AFL-CIO and CLC
1126 16th Street N.W.
Washington, D.C. 20036

Dear Ms. Weyand:

You have requested certain information from Mr. Vernon N. Potter concerning pregnancy disability coverage and New Jersey law. I am responding in his stead.

Although it has not promulgated any formal rules on the subject, the New Jersey Division on Civil Rights has for several years maintained that the statements regarding pregnancy in the EEOC Sex Discrimination Guidelines

reflect the Division's interpretation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq. Debra Kaufman* v. *Paterson Board of Education, et al.,* Docket No. A-2537-73 (Appellate Div. 1975), is the only case involving this position to have yet been decided by the appellate courts of New Jersey. The decision upheld the Division's determination that termination of a pregnant teacher was a violation of the discrimination law. A copy of the unreported decision is enclosed.

The New Jersey Temporary Disability Benefits Law, N.J.S.A. 43:21-25 *et seq.,* requires private employers to participate in a contributory state disability plan or to provide private coverage at least as beneficial to workers as the state plan. The state plan places certain limits on pregnancy coverage which are explained in the enclosed Attorney General's Opinion. We are aware, however, that there are employers in the state who go beyond the state plan's coverage of pregnancy in order to comply with the requirements of Title VII.

I hope that you will find this information helpful.

Very truly yours,

/s/ HELEN FORSYTH
Helen Forsyth
Deputy Attorney General

HF:dpb
Enclosures



**APPENDIX R**

XEROX CORPORATION
STAMFORD, CONNECTICUT 06904
203 329 8711

July 3, 1975

Ms. Beth L. Don
Attorney for the Commission
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Ms. Don:

In response to your request of June 26, 1975, I am enclosing a copy of "Pregnancy Disability—Time Duration and Disability Benefits Cost," a study conducted by Margaret E. Hutchinson, R.N., and C. Craig Wright, M.D., of the Xerox medical department. It consists of an explanation of Xerox Corporation's salaried employee policy concerning pregnancy related disability benefits as they existed in 1973 and a review of the company's experience in administrating that policy during the year 1973.

A report on this study was delivered by Ms. Hutchinson in the spring of 1974 to a meeting of the Industrial Health Conference in Florida.

This study covered the first full year of this policy. No detailed study of subsequent experience has been completed as yet, but, in general, we feel it would be misleading to assume that similar statistics would be applicable to the 1974-75 period.

Sincerely yours,

/s/ THOMAS C. ABBOTT
Thomas C. Abbott
Manager
Public Relations Operations

TCA:nr
Enclosure
c: MEHutchinson
CCWright

**APPENDIX S**

## PREGNANCY DISABILITY— TIME DURATION AND DISABILITY BENEFITS COST—XEROX CORPORATION

Margaret E. Hutchinson, R.N. and C. Craig Wright, M.D.

It has been recognized for years that during some poorly defined period of time preceding and following the delivery of her child a woman employed in industry should not be expected to perform her regularly assigned duties. Many employers, however, have viewed pregnancy as a normal, physiological state whose existence was controlled by the employee, and since it was time limited one quite appropriate for the granting of a leave of absence. [In recent years various groups within our society have taken the position that pregnancy is also a cause of disability and should receive the same recognition as does any injury or illness which prevents an employee from accomplishing her job assignments.]

We will not attempt to discuss the legal questions involved in this matter. We will limit this paper to an explanation of our company's salaried employee policy concerning pregnancy related disability benefits and a review of our experience in administering it during the 12 months of 1973.

Pregnancy disability is not a new concept for our company. In 1962 management established a disability benefits program which recognized serious complications of pregnancy to be disabling. Benefits were based upon salary and length of service, as for any other cause of disability, but were limited to six weeks. The policy did not specifically list the complications which were covered but implied inclusion of eclampsia, placenta previa, etc.

It was difficult to deny coverage to an employee experiencing first trimester nausea and vomiting and after a short period of experience disability was accepted if so certified by the attending physician.



During this period another policy existed which required a pregnant employee to stop work no less than 8 weeks prior to her expected date of delivery and prohibited her return to work earlier than 8 weeks after the birth of her child. An exception was made in the case of a stillborn infant if it was believed the employee would benefit by an early return to work. The rationale for this policy was to allow mother and baby time to adjust. In 1970, this policy was changed to permit the employee to work until 4 weeks prior to her expected date of delivery, but the return to work limitation remained at 8 weeks.

Because the employee was required to stop work at a given time, although not disabled, she became eligible for unemployment benefits prior to delivery. Since an employee who was granted a maternity leave of absence was placed in an inactive status, she was not eligible for income benefits under Temporary Disability. She was, however, covered for hospitalization and physician care.

[In October 1972, management philosophy changed again. Pregnancy was considered to be disabling at the time of delivery, during the early post-partum period and through serious complications arising prior to or after delivery. Pregnancy disability was to be treated as any injury or illness Temporary Disability with all previous restrictions removed. By this policy an employee certified by her physician to be disabled by her pregnancy could receive 6 months of Temporary Disability income benefits. If at the end of 6 months of personal disability she was still unable to perform her duties she could receive Extended Disability benefits at 70% of salary for a period of 2 years. If at the expiration of 2 years it was determined that she was unable to perform any work for which she was reasonably qualified by education and experience Extended Disability could continue to age 65.

The expanded pregnancy coverage beginning in October 1972 created initial chaos for employees, attending physi-

cians and those administering the plan. Xerox physicians were kept busy interpreting the new policy [which encouraged employees to remain at work until personally disabled, and to return ot work as soon as feasible after delivery]. It was difficult for employees and supervisors to comprehend the philosophical change reflected by the new policy. Since under the previous policy disability benefits were paid only for serious complications of pregnancy most pregnant employees requested and were granted maternity leave of absence starting 2 or 3 months prior to their expected date of delivery. [Under the new policy women who wished to quality for disability benefits related to pregnancy were required to work until they were personally disabled or to forfeit their benefits.] Maternity leave of absence became non-existent. Personal leave of absence was still possible.

The major problem in the administration of the new policy was the determination of what combination of symptoms constituted a pregnancy related disability.

The study presented here covers data collected on the 178 salaried employees whose pregnancies terminated in 1973. The study does not include therapeutic abortions. The age range of the group was 17-39 years. Calendar days (including weekends) and 365 day years were used in all computations. Preconceived estimates of correlation between duration of disability, length of service, age, etc. were not borne out by the study.

In the following charts and tables a distinction has been made between Rochester employees and field employees. The Rochester group include those employed in the City of Rochester, New York, and in various research, design, engineering and manufacturing facilities situated in the surrounding County of Monroe. These employees were more effectively supported by and had easier access to Xerox physicians, clinical nurses, visiting nurses and benefits administration personnel than the field employees who worked in more than 300 sales, service and support establishments in cities and towns throughout the United States.



*CHART I*

Chart I reflects the dollars paid as disability benefits. Total cost for disability income benefits paid to the 178 claimants was $274,830. Benefits ranged from $155 to an employee who had only 7 days of disability to $4462 paid to an employee who developed severe complications which produced 226 days of disability. For the 83 field claims the average payment was $1510, while the average payment for the 95 Rochester claims was $1574. The average payment for all claims was $1544.

[Chart I omitted]

*CHART II*

Chart II compares days of disability to the age of the mother at delivery. Rochester employees averaged 73.2 days while field employees averaged 76.6 days. The overall was 74.8 days of disability with a range of 7 to 226 days. It is interesting to note that field employees received fewer dollars per claim but had slightly longer periods of disability. This is attributed to higher salaries paid to clericals in Rochester who tend to have longer tenure than those in field locations. There was no discernible correlation between the length of disability and the age of the mother at the termination of her pregnancy.

[Chart II omitted]

*CHART III*

Chart III compares the number of days of disability with the employee's length of service. While 5 employees had worked for the company for 9 or more years, 20 other employees had between 6 and 9 years of service. Of the remaining employees, 20 had less than one year of service at the time of delivery, and of these 10 had been employed less than 271 days. There was no correlation between length of service and number of disability days.

[Chart III omitted]

*CHART IV*

Chart IV is a comparison of the age of the mother at delivery with her years of service. The largest grouping was of 33 employees who were 24 years of age at delivery. The average and also the median age of the 178 employees was 25 years.

[Chart IV omitted]

*CHART V*

Chart V shows the number of disability days which occurred before and after day of delivery. Rochester employees averaged 29.3 days of disability prior to delivery while the field average was 32.3 days. The overall average was 30.7 days [The average period of disability for the 178 employees following delivery was 44 days. The majority of employees stopped receiving benefits immediately following their 6 week post-partum check-up.] Although some obstetricians are now conducting a post-partum check-up 4 weeks following delivery, the 6 week schedule seemingly has become an American tradition. The most frequent cause for extended periods of disability following delivery was neuropsychiatric disturbances.

[Chart V omitted]

*CHART VI*

Chart VI shows the day of actual delivery relative to the forecast day of delivery, often called the expected date of confinement (EDC). Cases are displayed in the same order as those presented in Chart V. Twelve employees delivered on their forecast of delivery (EDC). Of the 25 employees who worked until the day of actual delivery (see Chart V), 23 delivered prior to the EDC. One employee in the group of 23 delivered a stillborn fetus 3 months prior to her EDC, and another employee had a spontaneous abortion 161 days prior to her due date. The remaining 2 employees in the group of 25 lost no time from work prior to their expected



delivery dates; one worked 22 days beyond her EDC and the other 6 days. Many employees left work using the EDC as their criterion rather than symptoms of their pregnancy. Of the total group, 8 employees were early in their EDC calculations by approximately one month.

[Chart VI omitted]

*CHART VII*

Chart VII compares those who returned to work with those who terminated their employment following their periods of disability. Of 83 field cases, 36 employees returned to work and 47 left employment. Of 95 Rochester cases, 46 returned to work while 49 left employment. Of the total 178 cases, 82 returned and 96 left. The mothers in the field who returned to work had among them 9 other children, while those who left employment had 11 other children. In Rochester those who returned had 16 other children and those who left employment had 12 other children. Of the 178 employees, the 82 who returned to work had 25 other children while the 92 who left employment had 23 other children.

[Chart VII omitted]

The Rochester group had 11 deliveries by Caesarean Section compared to 5 in the field. We do not know the reason for this difference. Urinalysis for the existence of pregnancy has not been a part of our preplacement medical examination and applicants may be hired without our being knowledgeable of their early pregnancy.

*Case Studies*

An unmarried applicant who, during the preplacement medical examination, gave a fictitious date for the start of her last menstrual period was 4 months pregnant when hired. She worked until 5 days before her EDC then requested a vacation to fly to a resort city. She had labor induced and delivered a normal, fully developed infant. The

infant was placed for adoption. She returned to work following 8 days of disability without her co-workers knowing that she had been pregnant.

Another employee received 71 days of disability benefits prior to delivery for symptoms of nausea, vomiting and blood tinged vaginal discharge, and 72 days of disability benefits following delivery. She then refused to return to her original position and left employment.

One employee delivered on December 29, 270 days following her date of employment, qualifying her child for an income deduction. Then she resigned.

Our experience in administering pregnancy disability claims has not been without humor. One field employee who returned to work following her delivery wished to continue breast feeding her infant. She arranged for her babysitter to bring the child to her each work day at noon and nursed the child in a lounge adjacent to the restroom. The Law Department became concerned about the liability involved if the baby became ill. The babysitter, also a Xerox employee, was a female Technical Representative who was receiving pregnancy disability benefits because her physician certified she could not perform the lifting required in her work, but apparently there was no objection to her caring for the first employee's baby. An acceptable alternative nursing plan was arranged by agreement of all those involved.

The frustrations of the initial period in administration of the expanded pregnancy disability policy have abated somewhat. We suspect that there will always be a few claims which are excessive. We have found that, in these cases, a telephone conversation between the Xerox physician and the attending physician often results in a reduction of the disability period claimed. Compared to claims for other causes of disability, pregnancy claims require considerably more time, effort, diplomacy and expertise for administration.



Tables I through VI contain the raw data from which the charts were constructed.

Margaret E. Hutchinson, R.N. is Supervisor of Medical Administration, and C. Craig Wright, M.D. is Manager of Health Services and Medical Director, Xerox Corporation, Information Technology Group, Xerox Square, Rochester, New York 14644.

## TABLE I

## DOLLARS PAID AS DISABILITY BENEFITS

| Case | Rochester | Field | Case | Rochester | Field | Case | Rochester | Field | Case | Rochester | Field |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | | 153 | 46 | | 1087 | 91 | 1437 | | 136 | | 1903 |
| 2 | | 177 | 47 | 1102 | | 92 | 1447 | | 137 | | 1909 |
| 3 | 486 | | 48 | | 1104 | 93 | | 1449 | 138 | 1915 | |
| 4 | | 550 | 49 | | 1133 | 94 | 1455 | | 139 | 1936 | |
| 5 | | 578 | 50 | | 1141 | 95 | | 1457 | 140 | 1936 | |
| 6 | | 625 | 51 | 1147 | | 96 | 1463 | | 141 | | 1956 |
| 7 | 628 | | 52 | 1164 | | 97 | | 1500 | 142 | 1964 | |
| 8 | | 668 | 53 | 1168 | | 90 | 1509 | | 143 | 1967 | |
| 9 | 677 | | 54 | | 1174 | 99 | | 1514 | 144 | 1974 | |
| 10 | | 679 | 55 | 1184 | | 100 | 1525 | | 145 | | 1986 |
| 11 | | 683 | 56 | | 1185 | 101 | | 1531 | 146 | 1986 | |
| 12 | 717 | | 57 | | 1185 | 102 | | 1538 | 147 | 1992 | |
| 13 | 742 | | 58 | | 1190 | 103 | | 1541 | 148 | 2019 | |
| 14 | 784 | | 59 | 1192 | | 104 | 1542 | | 149 | 2022 | |
| 15 | | 798 | 60 | 1202 | | 105 | | 1570 | 150 | 2054 | |
| 16 | 813 | | 61 | | 1230 | 106 | 1576 | | 151 | 2092 | |
| 17 | | 828 | 62 | 1232 | | 107 | 1580 | | 152 | | 2145 |
| 18 | 535 | | 63 | 1240 | | 108 | 1589 | | 153 | 2195 | |
| 19 | | 543 | 64 | | 1242 | 109 | | 1590 | 154 | 2205 | |
| 20 | | 553 | 65 | | 1243 | 110 | 1596 | | 155 | | 2256 |
| 21 | 859 | | 66 | | 1247 | 111 | | 1600 | 156 | | 2352 |
| 22 | 866 | | 67 | 1253 | | 112 | | 1604 | 157 | | 2375 |
| 23 | | 885 | 68 | 1257 | | 113 | 1630 | | 158 | 2388 | |
| 24 | | 888 | 69 | | 1260 | 114 | 1638 | | 159 | | 2390 |
| 25 | | 889 | 70 | | 1262 | 115 | 1645 | | 160 | | 2475 |
| 26 | | 841 | 71 | | 1274 | 116 | 1649 | | 161 | | 2478 |
| 27 | 893 | | 72 | 1275 | | 117 | | 1663 | 162 | 2561 | |
| 28 | | 921 | 73 | | 1275 | 118 | 1625 | | 163 | 2610 | |
| 29 | 922 | | 74 | 1303 | | 119 | 1680 | | 164 | 2615 | |
| 30 | | 947 | 75 | 1305 | | 120 | | 1689 | 165 | 2618 | |
| 31 | 958 | | 76 | 1319 | | 121 | 1690 | | 166 | | 2624 |
| 32 | | 967 | 77 | | 1320 | 122 | 1713 | | 167 | | 2624 |
| 33 | | 968 | 78 | 1328 | | 123 | 1725 | | 168 | | 2688 |
| 34 | 973 | | 79 | | 1331 | 124 | 1738 | | 169 | | 2847 |
| 35 | | 989 | 80 | 1337 | | 125 | | 1758 | 170 | | 2862 |
| 36 | 996 | | 81 | 1368 | | 126 | 1759 | | 171 | | 2864 |
| 37 | | 997 | 82 | 1390 | | 127 | 1772 | | 172 | 2875 | |
| 38 | | 999 | 83 | 1387 | | 128 | | 1775 | 173 | 3319 | |
| 39 | 1026 | | 84 | | 1403 | 129 | 1778 | | 174 | | 3384 |
| 40 | | 1036 | 85 | 1403 | | 130 | | 1787 | 175 | 3527 | |
| 41 | | 1043 | 86 | 1422 | | 131 | 1792 | | 176 | | 3530 |
| 42 | 1050 | | 87 | 1424 | | 132 | | 1825 | 177 | | 4086 |
| 43 | 1054 | | 88 | 1425 | | 133 | 1826 | | 178 | 4462 | |
| 44 | 1060 | | 89 | 1430 | | 134 | 1879 | | | | |
| 45 | | 1082 | 90 | 1432 | | 135 | 1884 | | | | |

LISTED FROM SMALLEST TO LARGEST

**Dollar Amount Paid**



## TABLE 2A.

## DAYS OF DISABILITY

| Case | Rochester | Field | Case | Rochester | Field | Case | Rochester | Field | Case | Rochester | Field |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | | 7 | 46 | 54 | | 91 | 70 | | 136 | | 92 |
| 2 | | 8 | 47 | 55 | | 92 | 71 | | 137 | 92 | |
| 3 | 25 | | 48 | | 56 | 93 | | 71 | 138 | 93 | |
| 4 | 25 | | 49 | | 56 | 94 | 71 | | 139 | 93 | |
| 5 | | 30 | 50 | 57 | | 95 | 71 | | 140 | 94 | |
| 6 | 32 | | 51 | | 58 | 96 | | 71 | 141 | 94 | |
| 7 | | 36 | 52 | 58 | | 97 | 72 | | 142 | 94 | |
| 8 | | 37 | 53 | 58 | | 98 | | 74 | 143 | 94 | |
| 9 | | 38 | 54 | 58 | | 99 | 74 | | 144 | | 95 |
| 10 | 39 | | 55 | | 58 | 100 | 74 | | 145 | 95 | |
| 11 | | 39 | 56 | 58 | | 101 | 74 | | 146 | 97 | |
| 12 | | 39 | 57 | | 59 | 102 | 74 | | 147 | | 98 |
| 13 | | 40 | 58 | 59 | | 103 | 74 | | 148 | 98 | |
| 14 | | 40 | 59 | 59 | | 104 | 74 | | 149 | 98 | |
| 15 | | 40 | 60 | 60 | | 105 | | 74 | 150 | | 99 |
| 16 | | 41 | 61 | 60 | | 106 | | 77 | 151 | | 100 |
| 17 | 42 | | 62 | 60 | | 107 | 77 | | 152 | 100 | |
| 18 | 42 | | 63 | | 60 | 108 | | 78 | 153 | 100 | |
| 19 | | 42 | 64 | | 62 | 109 | 79 | | 154 | | 101 |
| 20 | | 42 | 65 | | 62 | 110 | | 79 | 155 | 102 | |
| 21 | 42 | | 66 | 62 | | 111 | 80 | | 156 | | 102 |
| 22 | 43 | | 67 | 64 | | 112 | | 81 | 157 | 104 | |
| 23 | | 43 | 68 | 65 | | 113 | 81 | | 158 | 105 | |
| 24 | 43 | | 69 | | 65 | 114 | 81 | | 159 | 106 | |
| 25 | 45 | | 70 | | 66 | 115 | 81 | | 160 | | 108 |
| 26 | | 45 | 71 | 66 | | 116 | 81 | | 161 | | 108 |
| 27 | | 45 | 72 | 66 | | 117 | 81 | | 162 | 108 | |
| 28 | | 45 | 73 | | 67 | 118 | | 82 | 163 | | 109 |
| 29 | | 46 | 74 | | 67 | 119 | 83 | | 164 | | 109 |
| 30 | 46 | | 75 | 67 | | 120 | | 84 | 165 | | 109 |
| 31 | 46 | | 76 | 67 | | 121 | 84 | | 166 | | 112 |
| 32 | 46 | | 77 | 67 | | 122 | | 85 | 167 | 115 | |
| 33 | 48 | | 78 | | 67 | 123 | | 86 | 168 | 116 | |
| 34 | | 48 | 79 | 67 | | 124 | 86 | | 169 | 122 | |
| 35 | | 49 | 80 | 67 | | 125 | 86 | | 170 | | 130 |
| 36 | | 49 | 81 | 67 | | 126 | 86 | | 171 | | 133 |
| 37 | | 52 | 82 | 67 | | 127 | | 87 | 172 | | 143 |
| 38 | 53 | | 83 | | 67 | 128 | 88 | | 173 | | 151 |
| 39 | 53 | | 84 | | 67 | 129 | | 88 | 174 | | 179 |
| 40 | 53 | | 85 | | 67 | 130 | | 88 | 175 | | 180 |
| 41 | 53 | | 86 | | 68 | 131 | 88 | | 176 | | 181 |
| 42 | 53 | | 87 | | 68 | 132 | | 88 | 177 | | 186 |
| 43 | 53 | | 88 | 70 | | 133 | | 89 | 178 | 226 | |
| 44 | 53 | | 89 | | 70 | 134 | | 92 | | | |
| 45 | | 53 | 90 | 70 | | 135 | | 92 | | | |

LISTED FROM SMALLEST TO LARGEST NUMBER OF DISABILITY DAYS

## TABLE 2B.

## AGE OF MOTHER AT DELIVERY

| Case | Roch-ester | Field | Case | Roch-ester | Field | Case | Roch-ester | Field | Case | Roch-ester | Field |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | | 23 | 46 | 33 | | 91 | 24 | | 136 | | 28 |
| 2 | | 23 | 47 | 25 | | 92 | 27 | | 137 | 22 | |
| 3 | | | 48 | | 31 | 93 | | 28 | 138 | 24 | |
| 4 | 25 | | 49 | 23 | | 94 | 23 | | 139 | 20 | |
| 5 | | 33 | 50 | 26 | | 95 | 24 | | 140 | 24 | |
| 6 | 22 | | 51 | | 25 | 96 | | 30 | 141 | 26 | |
| 7 | | 26 | 52 | 29 | | 97 | 33 | | 142 | 21 | |
| 8 | | 30 | 53 | 25 | | 98 | | 24 | 143 | 26 | |
| 9 | | 25 | 54 | 26 | | 99 | 24 | | 144 | | 28 |
| 10 | 22 | | 55 | | 24 | 100 | 24 | | 145 | 24 | |
| 11 | | 20 | 56 | 25 | | 101 | 19 | | 146 | 26 | |
| 12 | | 28 | 57 | | 25 | 102 | 26 | | 147 | | 22 |
| 13 | | 24 | 58 | 22 | | 103 | 26 | | 148 | 25 | |
| 14 | | 25 | 59 | 19 | | 104 | 22 | | 149 | 25 | |
| 15 | | 24 | 60 | 27 | | 105 | | 30 | 150 | | 24 |
| 16 | | 26 | 61 | 27 | | 106 | | 29 | 151 | | 24 |
| 17 | 24 | | 62 | 21 | | 107 | 24 | | 152 | 29 | |
| 18 | 24 | | 63 | | 32 | 108 | | 24 | 153 | 20 | |
| 19 | | 30 | 64 | | 24 | 109 | 36 | | 154 | | 23 |
| 20 | | 33 | 65 | | 33 | 110 | | 28 | 155 | 22 | |
| 21 | 26 | | 66 | 21 | | 111 | 23 | | 156 | | 26 |
| 22 | 22 | | 67 | 23 | | 112 | | 22 | 157 | 30 | |
| 23 | | 25 | 68 | 20 | | 113 | 20 | | 158 | 24 | |
| 24 | 24 | | 69 | | 24 | 114 | 23 | | 159 | 27 | |
| 25 | 23 | | 70 | | 26 | 115 | 23 | | 160 | | 28 |
| 26 | | 24 | 71 | 26 | | 116 | 26 | | 161 | | 25 |
| 27 | | 25 | 72 | 27 | | 117 | 21 | | 162 | 26 | |
| 28 | | 31 | 73 | | 20 | 118 | | 24 | 163 | | 27 |
| 29 | | 25 | 74 | | 26 | 119 | 31 | | 164 | | 27 |
| 30 | 31 | | 75 | 25 | | 120 | | 25 | 165 | | 29 |
| 31 | 24 | | 76 | 28 | | 121 | 24 | | 166 | | 26 |
| 32 | 26 | | 77 | 23 | | 122 | | 25 | 167 | 27 | |
| 33 | 21 | | 78 | | 26 | 123 | | 23 | 168 | 21 | |
| 34 | | 26 | 79 | 24 | | 124 | 24 | | 169 | 24 | |
| 35 | | 35 | 80 | 25 | | 125 | 25 | | 170 | | 23 |
| 36 | | 26 | 81 | 38 | | 126 | 33 | | 171 | | 20 |
| 37 | | 24 | 82 | 22 | | 127 | | 20 | 172 | | 24 |
| 38 | 17 | | 83 | | 25 | 128 | 38 | | 173 | | 26 |
| 39 | 25 | | 84 | | 32 | 129 | | 26 | 174 | | 25 |
| 40 | 23 | | 85 | | 29 | 130 | | 26 | 175 | | 22 |
| 41 | 23 | | 86 | | 29 | 131 | 24 | | 176 | | 23 |
| 42 | 33 | | 87 | | 27 | 132 | | 29 | 177 | | 39 |
| 43 | 23 | | 88 | 22 | | 133 | | 30 | 178 | 26 | |
| 44 | 28 | | 89 | | 20 | 134 | | 23 | | | |
| 45 | | 28 | 90 | 21 | | 135 | | 24 | | | |

CASE NUMBER SAME AS THE ORDER FOR TABLE 2A.—

Days of Disability



## TABLE 3

## YEARS OF SERVICE

| Case | Roch-ester | Field | Case | Roch-ester | Field | Case | Roch-cester | Field | Case | Roch-cester | Field |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | | 2.57 | 46 | 2.24 | | 91 | 6.90 | | 136 | | 4.89 |
| 2 | | .31 | 47 | 2.09 | | 92 | 3.75 | | 137 | 4.37 | |
| 3 | 2.56 | | 48 | | 1.14 | 93 | | 5.21 | 138 | .76 | |
| 4 | 6.51 | | 49 | | 3.87 | 94 | 2.47 | | 139 | 4.26 | |
| 5 | | 3.05 | 50 | .79 | | 95 | 5.54 | | 140 | 3.60 | |
| 6 | 1.84 | | 57 | | 1.86 | 96 | | 8.17 | 141 | 1.08 | |
| 7 | | .98 | 52 | 5.01 | | 97 | 9.97 | | 142 | 1.41 | |
| 8 | | 1.62 | 53 | 6.43 | | 98 | | 5.04 | 143 | 6.53 | |
| 9 | | .82 | 54 | 8.22 | | 99 | 4.58 | | 144 | | 3.85 |
| 11 | | 2.59 | 56 | 4.62 | | 100 | 7.03 | | 145 | 3.44 | |
| 10 | 1.66 | | 55 | | 2.66 | 101 | 2.08 | | 146 | 2.30 | |
| 12 | | .79 | 57 | | .97 | 102 | 7.33 | | 147 | | .70 |
| 13 | | 2.11 | 58 | 2.25 | | 103 | .66 | | 148 | 1.95 | |
| 14 | | 4.39 | 59 | 1.54 | | 104 | 4.61 | | 149 | 4.29 | |
| 15 | | .78 | 60 | 2.44 | | 105 | | 4.08 | 150 | | 3.44 |
| 16 | | .83 | 61 | 8.15 | | 106 | | 2.85 | 151 | | 5.99 |
| 17 | 3.15 | | 62 | 1.89 | | 107 | 1.70 | | 152 | 1.39 | |
| 18 | 4.78 | | 63 | | 1.17 | 108 | | 3.37 | 153 | 1.29 | |
| 19 | | 1.98 | 64 | | 5.46 | 109 | 7.03 | | 154 | | 4.10 |
| 20 | | 2.43 | 65 | | 4.07 | 110 | | 1.89 | 155 | 4.14 | |
| 21 | 6.15 | | 66 | 3.48 | | 111 | 3.53 | | 156 | | 1.35 |
| 22 | 2.33 | | 67 | .66 | | 112 | | 2.43 | 157 | 3.92 | |
| 23 | | 3.03 | 68 | 1.14 | | 113 | 1.39 | | 158 | 1.50 | |
| 24 | 6.24 | | 69 | | .91 | 114 | 4.23 | | 159 | 3.40 | |
| 25 | .74 | | 70 | | 4.58 | 115 | 4.46 | | 160 | | 5.32 |
| 26 | | 2.10 | 71 | 2.62 | | 116 | 2.35 | | 161 | | 4.00 |
| 27 | | 2.41 | 72 | 9.02 | | 117 | 3.34 | | 162 | 2.05 | |
| 28 | | 7.22 | 73 | | 1.88 | 118 | | 1.97 | 163 | | 3.74 |
| 29 | | 3.37 | 74 | | .54 | 119 | 4.69 | | 164 | | 6.39 |
| 30 | 8.92 | | 75 | 1.53 | | 120 | | 2.65 | 165 | | 2.94 |
| 31 | .72 | | 76 | 4.48 | | 121 | 4.88 | | 166 | | 5.28 |
| 32 | 7.32 | | 77 | 3.60 | | 122 | | .72 | 167 | 10.06 | |
| 33 | 2.16 | | 78 | | 6.41 | 123 | | 1.21 | 168 | 1.55 | |
| 34 | | 2.48 | 79 | 2.42 | | 124 | 4.40 | | 169 | 4.45 | |
| 35 | | 1.39 | 80 | 7.56 | | 125 | 2.22 | | 170 | | 2.20 |
| 36 | | 5.66 | 81 | 5.16 | | 126 | 7.47 | | 171 | | 1.95 |
| 37 | | 1.45 | 82 | 3.74 | | 127 | | 1.13 | 172 | | 2.67 |
| 38 | 1.05 | | 83 | | 2.43 | 128 | 10.60 | | 173 | | 3.46 |
| 39 | 4.61 | | 84 | | 1.06 | 129 | | 2.26 | 174 | | 4.03 |
| 40 | .94 | | 85 | | 3.55 | 130 | | .75 | 175 | | 4.13 |
| 41 | 3.18 | | 86 | | 9.32 | 131 | 4.04 | | 176 | | 1.59 |
| 42 | 4.84 | | 87 | | 1.55 | 132 | | 1.85 | 177 | | 2.82 |
| 43 | 4.15 | | 88 | 2.88 | | 133 | | 3.72 | 178 | 4.63 | |
| 44 | 4.15 | | 89 | | .75 | 134 | | 1.74 | | | |
| 45 | | 8.18 | 90 | 2.07 | | 135 | | 1.97 | | | |

CASE NUMBER SAME AS THE ORDER FOR TABLE 2A.—

Days of Disability

## TABLE 4A.

## AGE OF MOTHER AT DELIVERY

| Case | Rochester | Field | Case | Rochester | Field | Case | Rochester | Field | Case | Rochester | Field |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 17 | | 46 | | 23 | 91 | | 25 | 136 | 27 | |
| 2 | 19 | | 47 | 23 | | 92 | | 25 | 137 | 27 | |
| 3 | 19 | | 48 | 23 | | 93 | | 25 | 138 | 27 | |
| 4 | | 20 | 49 | 23 | | 94 | | 25 | 139 | | 28 |
| 5 | | 20 | 50 | 24 | | 95 | | 25 | 140 | | 28 |
| 6 | 20 | | 51 | 24 | | 96 | | 25 | 141 | | 28 |
| 7 | 20 | | 52 | | 24 | 97 | | 25 | 142 | 28 | |
| 8 | 20 | | 53 | | 24 | 98 | | 25 | 143 | 28 | |
| 9 | | 20 | 54 | | 24 | 99 | 25 | | 144 | | 28 |
| 10 | | 20 | 55 | 24 | | 100 | | 25 | 145 | | 28 |
| 11 | | 20 | 56 | | 24 | 101 | 25 | | 146 | | 28 |
| 12 | 20 | | 57 | | 24 | 102 | 25 | | 147 | | 28 |
| 13 | 21 | | 58 | | 24 | 103 | 25 | | 148 | 29 | |
| 14 | 21 | | 59 | | 24 | 104 | 25 | | 149 | | 29 |
| 15 | 21 | | 60 | | 24 | 105 | 25 | | 150 | | 29 |
| 16 | 21 | | 61 | 24 | | 106 | | 26 | 151 | | 29 |
| 17 | 21 | | 62 | 24 | | 107 | 26 | | 152 | | 29 |
| 18 | 21 | | 63 | 24 | 24 | 108 | | 26 | 153 | 29 | |
| 19 | 21 | | 64 | | 24 | 109 | 26 | | 154 | | 29 |
| 20 | | 22 | 65 | 24 | | 110 | | 26 | 155 | | 30 |
| 21 | 22 | | 66 | 24 | | 111 | | 26 | 156 | | 30 |
| 22 | 22 | | 67 | | 24 | 112 | 26 | | 157 | | 30 |
| 23 | 22 | | 68 | 24 | | 113 | | 26 | 158 | 30 | |
| 24 | 22 | | 69 | 24 | | 114 | 26 | | 159 | | 30 |
| 25 | | 22 | 70 | 24 | | 115 | | 26 | 160 | | 30 |
| 26 | 22 | | 71 | 24 | | 116 | 26 | | 161 | | 31 |
| 27 | 22 | | 72 | 24 | | 117 | 26 | | 162 | 31 | |
| 28 | | 22 | 73 | 24 | | 118 | | 26 | 163 | | 31 |
| 29 | 22 | | 74 | 24 | | 119 | 26 | | 164 | 31 | |
| 30 | 22 | | 75 | 24 | | 120 | | 26 | 165 | | 32 |
| 31 | 22 | | 76 | | 24 | 121 | 26 | | 166 | | 32 |
| 32 | | 23 | 77 | 24 | | 122 | | 26 | 167 | 33 | |
| 33 | 23 | | 78 | | 24 | 123 | | 26 | 168 | | 33 |
| 34 | 23 | | 79 | | 24 | 124 | | 26 | 169 | | 33 |
| 35 | 23 | | 80 | 24 | | 125 | 26 | | 170 | | 33 |
| 36 | | 23 | 81 | 24 | | 126 | 26 | | 171 | 33 | |
| 37 | | 23 | 82 | 24 | | 127 | | 26 | 172 | 33 | |
| 38 | | 23 | 83 | | 25 | 128 | 26 | | 173 | 33 | |
| 39 | | 23 | 84 | | 25 | 129 | 26 | | 174 | | 35 |
| 40 | 23 | | 85 | | 25 | 130 | 26 | | 175 | 36 | |
| 41 | | 23 | 86 | 25 | | 131 | 27 | | 176 | 38 | |
| 42 | 23 | | 87 | | 25 | 132 | 27 | | 177 | 38 | |
| 43 | 23 | | 88 | 25 | | 133 | 27 | | 178 | | 39 |
| 44 | 23 | | 89 | 25 | | 134 | | 27 | | | |
| 45 | | 23 | 90 | 25 | | 135 | | 27 | | | |

LISTED FROM YOUNGEST TO OLDEST



## TABLE 4B.

## YEARS OF SERVICE

| Case | Rochester | Field | Case | Rochester | Field | Case | Rochester | Field | Case | Rochester | Field |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1.05 | | 46 | | 3.99 | 91 | | 2.41 | 136 | 8.15 | |
| 2 | 1.54 | | 47 | 4.13 | | 92 | | 2.43 | 137 | 9.02 | |
| 3 | 2.03 | | 48 | 4.15 | | 93 | | 2.58 | 138 | 9.82 | |
| 4 | | .73 | 49 | 4.35 | | 94 | | 2.78 | 139 | | .79 |
| 5 | | 1.10 | 50 | .72 | | 95 | | 3.03 | 140 | | 1.85 |
| 6 | 1.18 | | 51 | .74 | | 96 | | 3.37 | 141 | | 3.76 |
| 7 | 1.26 | | 52 | | .78 | 97 | | 3.90 | 142 | 4.15 | |
| 8 | 1.36 | | 53 | | .91 | 98 | | 3.93 | 143 | 4.48 | |
| 9 | | 1.88 | 54 | | 1.45 | 99 | 4.19 | | 144 | | 4.77 |
| 10 | | 1.90 | 55 | 1.47 | | 100 | | 4.39 | 145 | | 5.08 |
| 11 | | 2.57 | 56 | | 1.92 | 101 | 4.61 | | 146 | | 5.19 |
| 12 | 4.16 | | 57 | | 1.92 | 102 | 4.62 | | 147 | | 8.18 |
| 13 | 1.37 | | 58 | | 1.92 | 103 | 6.43 | | 148 | 1.36 | |
| 14 | 1.51 | | 59 | | 2.10 | 104 | 6.51 | | 149 | | 1.66 |
| 15 | 1.89 | | 60 | | 2.11 | 105 | 7.56 | | 150 | | 1.79 |
| 16 | 2.02 | | 61 | 2.42 | | 106 | | .54 | 151 | | 2.87 |
| 17 | 2.16 | | 62 | 2.56 | | 107 | .65 | | 152 | | 3.55 |
| 18 | 3.26 | | 63 | | 2.60 | 108 | | .73 | 153 | 5.01 | |
| 19 | 3.48 | | 64 | | 2.66 | 109 | .79 | | 154 | | 9.32 |
| 20 | | .68 | 65 | 3.15 | | 110 | | .83 | 155 | | 1.62 |
| 21 | 1.66 | | 66 | 3.28 | | 111 | | .98 | 156 | | 1.98 |
| 22 | 1.84 | | 67 | | 3.35 | 112 | 1.05 | | 157 | | 3.63 |
| 23 | 2.25 | | 68 | 3.35 | | 113 | | 1.32 | 158 | 3.82 | |
| 24 | 2.33 | | 69 | 3.52 | | 114 | 2.00 | | 159 | | 3.98 |
| 25 | | 2.37 | 70 | 3.95 | | 115 | | 2.21 | 160 | | 7.97 |
| 26 | 2.81 | | 71 | 4.29 | | 116 | 2.24 | | 161 | | 1.14 |
| 27 | 3.74 | | 72 | 4.34 | | 117 | 2.29 | | 162 | 4.57 | |
| 28 | | 4.03 | 73 | 4.47 | | 118 | | 2.48 | 163 | | 7.22 |
| 29 | 4.04 | | 74 | 4.76 | | 119 | 2.62 | | 164 | 8.92 | |
| 30 | 4.27 | | 75 | 4.78 | | 120 | | 3.38 | 165 | | 1.06 |
| 31 | 4.99 | | 76 | | 4.92 | 121 | 4.52 | | 166 | | 1.17 |
| 32 | | .31 | 77 | 5.40 | | 122 | | 4.58 | 167 | 2.24 | |
| 33 | .66 | | 78 | | 5.46 | 123 | | 5.15 | 168 | | 2.43 |
| 34 | .74 | | 79 | | 5.85 | 124 | | 5.66 | 169 | | 3.05 |
| 35 | .94 | | 80 | 6.24 | | 125 | 6.15 | | 170 | | 4.07 |
| 36 | | 1.18 | 81 | 6.73 | | 126 | 6.37 | | 171 | 4.84 | |
| 37 | | 1.15 | 82 | 6.86 | | 127 | | 6.41 | 172 | 7.29 | |
| 38 | | 1.69 | 83 | | .70 | 128 | 7.15 | | 173 | 9.72 | |
| 39 | | 2.15 | 84 | | .82 | 129 | 7.32 | | 174 | | 1.39 |
| 40 | 2.41 | | 85 | | .97 | 130 | 8.22 | | 175 | 6.86 | |
| 41 | | 2.57 | 86 | 1.53 | | 131 | 2.44 | | 176 | 5.16 | |
| 42 | 3.18 | | 87 | | 1.86 | 132 | 3.32 | | 177 | 10.34 | |
| 43 | 3.44 | | 88 | 1.90 | | 133 | 3.38 | | 178 | | 2.75 |
| 44 | 3.60 | | 89 | 2.09 | | 134 | | 3.65 | | | |
| 45 | | 3.87 | 90 | 2.16 | | 135 | | 6.23 | | | |

CASE NUMBER SAME AS THE ORDER FOR TABLE 4A.—

**Age of Mother at Delivery**

## TABLE 5

### DISABILITY DAYS RELATIVE TO DAY OF DELIVERY
(Delivery day indicated by hyphen between numbers)

| Case | Roch-ester | Field | Case | Roch-ester | Field | Case | Roch-ester | Field | Case | Roch-ester | Field |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | | 0-8 | 46 | | 11-55 | 91 | 25-42 | | 136 | 44-56 | |
| 2 | 0-25 | | 47 | | 11-89 | 92 | 25-42 | | 137 | | 45-22 |
| 3 | 0-25 | | 48 | 12-41 | | 93 | | 25-52 | 138 | 45-41 | |
| 4 | | 0-30 | 49 | 12-33 | | 94 | | 26-22 | 139 | | 45-48 |
| 5 | 0-32 | | 50 | | 13-43 | 95 | | 26-41 | 140 | 46-26 | |
| 6 | | 0-36 | 51 | | 13-43 | 96 | 26-62 | | 141 | | 46-41 |
| 7 | | 0-37 | 52 | | 13-45 | 97 | | 27-57 | 142 | 46-47 | |
| 8 | | 0-38 | 53 | | 13-68 | 98 | | 28-32 | 143 | 46-54 | |
| 9 | 0-39 | | 54 | 13-68 | | 99 | 28-42 | | 144 | 46-56 | |
| 10 | | 0-40 | 55 | | 14-26 | 100 | 28-43 | | 145 | 47-41 | |
| 11 | | 0-40 | 56 | 14-39 | | 101 | | 28-57 | 146 | 48-29 | |
| 12 | | 0-41 | 57 | 15-43 | | 102 | | 30-37 | 147 | 49-32 | |
| 13 | 0-42 | | 58 | 15-43 | | 103 | 30-44 | | 148 | | 49-39 |
| 14 | 0-43 | | 59 | 16-44 | | 104 | 30-44 | | 149 | 49-49 | |
| 15 | 0-45 | | 60 | | 17-36 | 105 | | 30-62 | 150 | | 52-37 |
| 16 | | 0-45 | 61 | | 17-45 | 106 | | 30-62 | 151 | 52-41 | |
| 17 | | 0-45 | 62 | 17-49 | | 107 | 31-43 | | 152 | 52-45 | |
| 18 | | 0-46 | 63 | | 17-53 | 108 | | 31-57 | 153 | | 52-60 |
| 19 | 0-48 | | 64 | | 17-54 | 109 | | 32-33 | 154 | 54-40 | |
| 20 | | 0-49 | 65 | 17-98 | | 110 | 32-49 | | 155 | 54-40 | |
| 21 | 0-53 | | 66 | 18-40 | | 111 | | 32-66 | 156 | 55-40 | |
| 22 | 0-53 | | 67 | | 18-40 | 112 | 33-38 | | 157 | | 56-52 |
| 23 | 0-54 | | 68 | | 18-50 | 113 | 34-40 | | 158 | | 57-44 |
| 24 | | 0-62 | 69 | 19-38 | | 114 | | 34-40 | 159 | 59-45 | |
| 25 | 0-71 | | 70 | 19-41 | | 115 | 35-24 | | 160 | 59-49 | |
| 26 | 1-41 | | 71 | 19-48 | | 116 | 36-43 | | 161 | | 60-42 |
| 27 | | 1-41 | 72 | | 19-55 | 117 | 36-44 | | 162 | 65-40 | |
| 28 | 1-45 | | 73 | 20-40 | | 118 | 36-45 | | 163 | 65-41 | |
| 29 | | 2-46 | 74 | 20-47 | | 119 | 36-48 | | 164 | | 67-42 |
| 30 | | 2-65 | 75 | 21-43 | | 120 | | 37-41 | 165 | 69-29 | |
| 31 | | 3-42 | 76 | | 21-71 | 121 | 38-24 | | 166 | | 71-72 |
| 32 | | 4-3 | 77 | 22-43 | | 122 | | 38-41 | 167 | | 73-36 |
| 33 | 4-38 | | 78 | 22-45 | | 123 | | 39-60 | 168 | | 74-35 |
| 34 | | 4-39 | 79 | 22-52 | | 124 | | 39-69 | 169 | 77-39 | |
| 35 | 5-41 | | 80 | 23-35 | | 125 | | 40-31 | 170 | | 80-50 |
| 36 | 6-40 | | 81 | 23-36 | | 126 | 40-40 | | 171 | 81-41 | |
| 37 | 7-36 | | 82 | | 23-44 | 127 | | 41-33 | 172 | | 81-70 |
| 38 | | 8-31 | 83 | 23-47 | | 128 | | 42-44 | 173 | | 87-46 |
| 39 | 8-45 | | 84 | 23-47 | | 129 | 42-44 | | 174 | | 133-49 |
| 40 | | 9-43 | 85 | | 24-15 | 130 | 42-52 | | 175 | | 138-48 |
| 41 | 9-44 | | 86 | 24-43 | | 131 | | 43-39 | 176 | | 148-33 |
| 42 | 9-44 | | 87 | 34-50 | | 132 | 44-39 | | 177 | | 180-0 |
| 43 | | 10-39 | 88 | 25-30 | | 133 | 44-42 | | 178 | 184-42 | |
| 44 | | 10-57 | 89 | 25-41 | | 134 | 44-48 | | | | |
| 45 | | 11-48 | 90 | 25-42 | | 135 | | 44-51 | | | |

LISTED FROM SMALLEST TO LARGEST NUMBER OF DISABILITY DAYS PRECEDING DELIVERY



## TABLE 6

### ACTUAL DELIVERY RELATIVE TO FORECAST DELIVERY DATE (EDC)

(— Indicates delivery earlier than EDC & later)

| Case | Roch-ester | Field | Case | Roch-ester | Field | Case | Roch-ester | Field | Case | Roch-ester | Field |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | | 0 | 46 | | − 1 | 91 | ..... | ..... | 136 | + 5 | |
| 2 | −90 | | 47 | | −13 | 92 | − 3 | | 137 | | +20 |
| 3 | −12 | | 48 | + 5 | | 93 | | − 2 | 138 | + 8 | |
| 4 | | +22 | 49 | + 9 | | 94 | | + 1 | 139 | | +31 |
| 5 | − 7 | | 50 | | −49 | 95 | | +10 | 140 | + 9 | |
| 6 | | 0 | 51 | | 0 | 96 | +15 | | 141 | | +28 |
| 7 | | −33 | 52 | | − 7 | 97 | | 0 | 142 | + 5 | |
| 8 | | −23 | 53 | | −29 | 98 | | − 3 | 143 | + 7 | |
| 9 | + 6 | | 54 | −11 | | 99 | 0 | | 144 | +10 | |
| 10 | | − 1 | 55 | | + 6 | 100 | + 4 | | 145 | +17 | |
| 11 | | 0 | 56 | − 3 | | 101 | | + 8 | 146 | + 3 | |
| 12 | | − 5 | 57 | +10 | | 102 | | + 7 | 147 | +24 | |
| 13 | −30 | | 58 | − 1 | | 103 | +14 | | 148 | | +13 |
| 14 | −161 | | 59 | −10 | | 104 | − 3 | | 149 | +10 | |
| 15 | − 4 | | 60 | | −10 | 105 | | − 5 | 150 | | + 3 |
| 16 | | −11 | 61 | | −13 | 106 | | + 3 | 151 | +29 | |
| 17 | | −22 | 62 | − 6 | | 107 | − 4 | | 152 | +10 | |
| 18 | | −58 | 63 | | + 2 | 108 | | +13 | 153 | | 0 |
| 19 | −24 | | 64 | | 0 | 109 | | + 9 | 154 | −14 | |
| 20 | | − 8 | 65 | −12 | | 110 | +15 | | 155 | + 3 | |
| 21 | −15 | | 66 | 0 | | 111 | | −28 | 156 | +35 | |
| 22 | −15 | | 67 | | + 9 | 112 | − 3 | | 157 | | +13 |
| 23 | − 1 | | 68 | | −20 | 113 | − 9 | | 158 | | + 7 |
| 24 | | − 7 | 69 | + 8 | | 114 | | + 5 | 159 | + 8 | |
| 25 | − 4 | | 70 | 0 | | 115 | − 3 | | 160 | + 4 | |
| 26 | −91 | | 71 | −10 | | 116 | + 4 | | 161 | | +18 |
| 27 | | −92 | 72 | | −24 | 117 | +12 | | 162 | +13 | |
| 28 | −41 | | 73 | + 3 | | 118 | + 2 | | 163 | +27 | |
| 29 | | − 6 | 74 | − 4 | | 119 | +23 | | 164 | | − 2 |
| 30 | | −17 | 75 | − 1 | | 120 | | + 2 | 165 | − 5 | |
| 31 | | − 3 | 76 | | − 6 | 121 | +10 | | 166 | | −39 |
| 32 | | −175 | 77 | −19 | | 122 | | + 2 | 167 | | − 6 |
| 33 | − 4 | | 78 | − 4 | | 123 | | + 7 | 168 | | − 2 |
| 34 | | −74 | 79 | − 6 | | 124 | | + 2 | 169 | +19 | |
| 35 | −10 | | 80 | 0 | | 125 | | +12 | 170 | | + 2 |
| 36 | − 5 | | 81 | + 1 | | 126 | +14 | | 171 | +40 | |
| 37 | − 7 | | 82 | | + 8 | 127 | | +10 | 172 | | +17 |
| 38 | | −23 | 83 | + 9 | | 128 | | +34 | 173 | | + 6 |
| 39 | −14 | | 84 | −34 | | 129 | +11 | | 174 | | − 3 |
| 40 | | −13 | 85 | | +11 | 130 | + 3 | | 175 | | +14 |
| 41 | −16 | | 86 | − 4 | | 131 | | +15 | 176 | | −40 |
| 42 | − 2 | | 87 | − 5 | | 132 | +15 | | 177 | | −89 |
| 43 | | − 1 | 88 | − 8 | | 133 | 0 | | 178 | + 2 | |
| 44 | | − 2 | 89 | +12 | | 134 | + 4 | | | | |
| 45 | | − 1 | 90 | + 9 | | 135 | | +14 | | | |

CASE NUMBER SAME AS THE ORDER FOR TABLE 5—
Disability Days Relative to Day of Delivery

## APPENDIX T

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
BALTIMORE, MARYLAND 21235
OFFICE OF THE
GENERAL COUNSEL

April 17, 1973

Mrs. Catherine East
Executive Secretary
Citizens' Advisory Council
on the Status of Women
Washington, D.C. 20210

Dear Mrs. East:

Your letter of March 27, 1973 inquires whether a woman suffering from a permanent or long term disability resulting from pregnancy or childbirth would be qualified for a social security disability insurance benefit, assuming she had the necessary insured status.

The definition of disability is contained in section 223(d) of the Social Security Act, 42 U.S.C. 423(d). It is defined as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Thus pregnancy itself would not be a disability. But if a pregnancy or childbirth resulted in a disability as defined in the law (assuming the condition to be unremediable), the woman involved, if otherwise eligible for disability insurance benefits, would not be precluded from receiving them because of the cause of the disability.

Your second question is as to the number of women drawing benefits. As of the end of the year 1972 some 14,359,600



women were receiving social security benefits. This is in addition to women receiving child's insurance benefits, the beneficiaries of which we do not segregate by sex.

Sincerely yours,

/s/ ARTHUR ABRAHAM
Arthur Abraham
Deputy Assistant General Counsel

Supreme Court, U. S.
FILED
JAN 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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**No. 74-1589**

GENERAL ELECTRIC COMPANY,
*Petitioner,*
v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.

---

**No. 74-1590**

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,
*Petitioners,*
v.

GENERAL ELECTRIC COMPANY.

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**On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## REPLY BRIEF FOR GENERAL ELECTRIC COMPANY

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v.
GENERAL ELECTRIC COMPANY.

---

**On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit**

---

## REPLY BRIEF FOR GENERAL ELECTRIC COMPANY

---

## I. RESPONDENTS' ASSERTIONS THAT GE WAS MOTIVATED BY A DISCRIMINATORY ATTITUDE TOWARD FEMALE EMPLOYEES ARE WITHOUT MERIT.

Respondents[1] assert (Resp. Br. 11, 73, 86-101, 144) that the exclusion of pregnancy from GE's sickness and accident coverage was motivated by a generally held, and historically shown, discriminatory attitude by GE toward female employees. They further assert (Resp. Br. 11, 73-74, 86, 87, 97) that the district court so found, and that GE has not challenged the district court's findings in this respect. It is clear (see Resp. Br. 97-98) that these assertions are made by Respondents in an attempt to establish that the pregnancy exclusion here in issue is "pretextual" in origin,[2] and that Respondents would thereby remove this case from the controlling principle of *Geduldig* that the exclusion of pregnancy from coverage under a disability program does not discriminate on the basis of sex unless it is a "mere pretext[] designed to effect an invidious discrimination against members of one sex or the other" (417 U.S. at 496-497, n. 20). Respondents' assertions, however, are plainly without merit.

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[1] As set forth in GE's main brief (n. 2, p. 2), the parties agreed that, subject to the Court's approval, GE would be treated as petitioner with respect to briefing and argument before the Court; and that the parties have been informed by the Court's Clerk to proceed as thus agreed.

[2] In this connection, Respondents contend (Resp. Br. 100) that GE's opposition to the judgment below is predicated upon an effort to maintain in being a discriminatory, but profitable, wage system. Neither the record, however, nor any finding by the courts below supports this contention.



First, only the pregnancy exclusion was attacked in the complaint (I App. 17-26). The complaint charged no other violation of law by GE; attacked no other GE employment practice, or term or condition of employment whether past or present, or whether involving male or female employees; and in no way alleged either general, or specific, bias against female employees on GE's part. Consequently, only the pregnancy exclusion, and no other matter pertaining to GE, whether present or past, was in issue before the district court.

Second, the district court recognized that GE's past history with respect to treatment by GE of its female employees—much of it, moreover, sought to be shown by Respondents through the grossest hearsay and innuendo (e.g., see Resp. Br. 19-21, 96)—was irrelevant to this case. Thus the district court said (Jt. Pet. 26a):

> Plaintiffs have introduced much evidence in an effort to demonstrate the GE's past history is dominated by a strain of male chauvinism. The Court deems that line of inquiry *legally irrelevant and makes no findings with respect to this contention* [emphasis added].

In view of this statement by the district court, Respondents' present assertions concerning the district court's findings border on the frivolous—especially as Respondents, citing the foregoing statement by the district court, are asserting in this Court that the district court erred in refusing to consider what they term as "pre-Act" events.[3] See Resp. Br. 154-

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[3] Respondents, citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 427 (1971), *Albemarle Paper Co.* v. *Moody*, 94 S.Ct.

155. In any case, moreover, events that allegedly transpired in the 1920's and 1930's (see Resp. Br. 19-20, 73, 87-88) have no probative relevance regarding the issue that is here presented. And while perhaps interesting, what GE's Swope said "[i]n a nationwide radio address, given in 1931 . . ." (Resp. Br. 19) is of no consequence in this lawsuit.

Third, Respondents, at Br. 97, have seized upon, and distorted out of context, language in the district court's Opinion to make it appear that the district court found that the pregnancy exclusion was motivated by a general "discriminatory attitude" on GE's part against female employees. The district court did, indeed, in the context of a discussion of the cost to GE of adding pregnancy coverage say that "the discriminatory attitude characterized elsewhere in the Court's findings was in fact a motivat-

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2362, 2367 (1975), and *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 95 S.Ct. 2223, 2226 (1974), contend that the district court erred in refusing to consider so-called "pre-Act" events. It is submitted, however, that the district court's ruling in this connection was entirely correct. The cases Respondents cite concern the perpetuation of the effects of pre-Act discrimination despite employer attempts to comply with the respective anti-discrimination laws involved after their enactment. (In *Griggs* and *Albemarle* the Act involved was Title VII of the Civil Rights Act of 1964; *Corning Glass* was a suit brought under the Equal Pay Act.) Thus, "historical" evidence was not only directly related to the issues litigated in those cases, but was essential to demonstrate the perpetuation from pre-Act times of the specifically charged unfair employment practices. The issue in this case, however, does not involve the perpetuation of the effects of pre-Act discrimination despite intended post-Act compliance; thus the allegedly pre-Act events Respondents cite are not directly related to the narrow unfair employment practice charged in the complaint.



ing factor in [GE's] policy" (Jt. Pet. 32a).[4] The district court, however, in fact made no other findings "elsewhere" in its Opinion in which it so "characterized" GE's attitude, and the words in question accordingly appear singularly unsupported and ill-chosen. A fair reading, moreover, of the entire Opinion sets these bounds on its scope: (1) The district court did *not* find that GE, independently of the pregnancy exclusion, either was discriminatorily motivated against female employees, or adopted the exclusion because it was so motivated; and (2) the district court *did* find, narrowly, that by the very fact of having adopted the exclusion, which was "inextricably sex-linked" (Jt. Pet. 29a), GE in effect demonstrated a discriminatory attitude toward female employees. Certainly, the broad sweep that Respondents attribute to the district court's decision is totally at variance with its careful conclusionary delineation (Jt. Pet. 37a):

> The claim here is not of disparate treatment resulting from sex stereotyping, a claim now familiar in Title VII litigation. See, e.g., *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971). Rather, it is a claim of disparate

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[4] In full, the district court said (Jt. Pet. 32a): "Merely showing, as G.E. has, that in two previous years the coverage given women's per capita disabilities has cost somewhat more is insufficient especially in light of the myriad of factors which might have and undoubtedly did contribute to such a result. Indeed, the concern of defendants in reference to pregnancy risks, coupled with the apparent lack of concern regarding the balancing of other statistically sex-linked disabilities, buttresses the Court's conclusion that the discriminatory attitude characterized elsewhere in the Court's findings was in fact a motivating factor in its policy."

treatment of persons, otherwise similarly situated, on the basis of a particular condition the peculiarity of which is both irrelevant to the purpose of the company program and ineluctably sex linked.

Fourth, Respondents assert (Resp. Br. 11, 73, 86-87, 97) that the broad findings of discrimination they erroneously attribute to the district court have gone "unchallenged" by GE. When, however, Respondents made the same erroneous assertions in the court of appeals with respect to the district court's findings as they now make in this Court, GE in fact "challenged" them in a Reply Brief filed in the court below. In such brief, GE set forth (pp. 8-11) substantially the same response as is here set forth. More importantly, the majority of the court of appeals, as Respondents admittedly recognize (Resp. Br. 11, 86-87, 154), did not rest their opinion on the predicate that the pregnancy exclusion was motivated by a discriminatory attitude by GE toward its female employees. Accordingly, to say, as Respondents now do, that GE did not challenge a finding that was in fact not made by either of the courts below borders on the absurd.

Finally, as set forth at pp. 6, 15, 55-61 of its main brief, GE has amply demonstrated that its decision to exclude pregnancy-related disabilities from sickness and accident coverage was neither arbitrary [5] nor

[5] One of the reasons underlying GE's adoption of the pregnancy exclusion is its fear that the payment of pregnancy benefits would precipitate a "demand for child care leave for men," i.e., for "a kind of allowance for some period of child care" (II App. 601). The district court mistakenly took this to mean that GE anticipated that such demand would be made



discriminatorily motivated;[6] conversely, GE has shown affirmatively that its decision was based on sound business considerations and good faith reliance upon governmental interpretations of Title VII and related acts. In short, under any criterion, the record conclusively establishes that the pregnancy distinctions in GE's sickness and accident plan are *not* "mere pretexts designed to effect an invidious discrimination" against female employees. *Geduldig*, 417 U.S. at 496-497, n. 20.[7]

*under* the disability insurance plan itself (Jt. Pet. 24a), but, of course, this was not the thrust of the pertinent testimony at II App. 601. Respondents mistakenly assert (Br. 94), therefore, that this was "a particularly spurious contention by GE."

[6] Respondents style the cancellation of sickness and accident coverage during pregnancy absences as "vindictiveness towards females" (Br. 98). Respondents overlook, however, the fact that GE experiences a 40 percent non-return rate among its female employees who are absent to have babies (see n. 6, p. 7 of GE's main brief)—a fact which clearly justifies this policy. (Compare the nation-wide non-return rate of 50 percent. See GE's main brief, p. 9; II App. 532.) In this connection Respondents further assert (Br. 98) that GE has deliberately discouraged female employees from returning to work after childbirth. But this assertion ignores Article VII, Paragraph 2(a) (3) of the 1970-1973 GE-IUE National Agreement, to which Respondent IUE is party, which provides that service credits and continuity of service will be lost whenever an employee: "Is absent from work because of personal illness or accident and fails to keep his supervisor notified monthly, stating the probable date of his return to work. *In cases of pregnancy the first such notification must be given not later than eight weeks after termination of pregnancy*" [emphasis added] (Pls.' Exh. 5, not reproduced in Appendix).

[7] Respondents seek to demonstrate that the exclusion of pregnancy from GE's weekly sickness and accident insurance

## II. THERE ARE A NUMBER OF ERRONEOUS CONTENTIONS AND STATEMENTS BY THE SOLICITOR GENERAL AND RESPONDENTS WHICH REQUIRE COMMENT.

Below we comment upon a number of the erroneous contentions and statements in the briefs filed by the Solicitor General and Respondents:

A. The Solicitor General, contending that the failure to cover pregnancy under disability insurance plans constitutes a *prima facie* violation of Title VII, predicates his argument on a number of distinguishable and inapposite sex discrimination cases: e.g., *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), *cert. den.* 404 U.S. 991; *Bowe* v. *Colgate, Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Rosenfeld* v. *So. Pacific Company*, 444 F.2d 1219 (9th Cir. 1971).[8] The cases

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coverage is one more example of GE's discriminatory attitude toward females. See Resp. Br. 11-16, 17-23, 37-41, 47-55. However, such an argument is clearly without merit. Indeed, in all the benefits provided by GE, male and female employees participate equally. These benefits consist of the following: an emergency aid plan, an income extension aid plan, a savings and security program, a savings and stock bonus plan, a vacation plan, a product purchase plan, a suggestion plan, a pension plan, a medical care plan for pensioners, a savings plan, a personal accident insurance plan, a military pay differential plan, and an insurance plan which includes medical, hospital and surgical insurance, life insurance, weekly sickness and accident insurance, and accidental death or dismemberment insurance. See, I App. 173-175; II App. 609-610; III App. 1060-1061.

[8] The Solicitor General cites with approval (Sol. Br. 21) *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), upholding a state



relied on by the Solicitor General establish two broad principles, neither of which has relevance in this case. The first such principle is that an employer may not treat members of one sex differently from members of the other with respect to matters directly affecting employment opportunities.[9] Thus, for example, *Sprogis, supra*, held that an employer could not treat marriage as a relevant employment criterion for women but not men, when to do so would affect the rights of women to compete for jobs on an equal basis.

The second such principle is that employers may not utilize sexual stereotypes in making employment

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restriction on bartending by women, and *West Coast Hotel Co.* v. *Parish*, 300 U.S. 379 (1937), upholding a state minimum wage law for women, in attempting to show that Title VII is much less tolerant of disparate treatment of the female sex than is the Fourteenth Amendment. The short answer, of course, is that these cases represent an outmoded conception of social justice based on the climate of a different day, and therefore they ought not to be regarded as establishing Equal Protection standards for this day. As Judge Knapp stated in *Communication Workers* v. *American Telephone & Telegraph Co., Long Lines Dept.*, 379 F. Supp. 679, 683 (S.D. N.Y. 1974), *rev'd* 513 F.2d 1024 (2nd Cir. 1975), *pet. for cert. pending*, No. 74-1601, in response to the same argument: "The cases cited . . . are in our view more readily explained by the respective dates of decision than by the rubric under which they were decided . . . . It seems a safe guess that, in light of *Frontiero* v. *Richardson* (1973) 411 U.S. 677, *Phillips* v. *Martin Marietta Corp.* (1971) 400 U.S. 542, 3 FEP Cases 40, and *Sprogis* v. *United Air Lines* (7th Cir. 1971) 444 F.2d 1194, 3 FEP Cases 621, cert. den. 404 U.S. 991, 4 FEP Cases 37, both *West Coast Hotel* and *Goesaert* would be decided differently today."

[9] As Judge Widener stated in his dissenting opinion below (Supp. Br. Jt. Pet. 14a): "Title VII seeks to equalize opportunities, not to create an advantage for either men or women."

decisions. Thus, for example, *Martin Marietta, supra*, held that an employer could not maintain a hiring policy which denied employment to women with pre-school-age children, but did not similarly treat similarly situated men. See also *Sprogis, supra*. Cases such as *Bowe, supra, Weeks, supra*, and *Rosenfeld, supra*, which deal with the presumed physical capabilities and physical limitations of women as affecting their eligibility for employment, are also illustrative of instances of impermissible sexual stereotyping.

This case, of course, does not involve the denial of employment opportunities to women. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this case. Nor does this case involve, despite the apparently contrary contention of the Solicitor General, a case of alleged discrimination on the basis of a sexual stereotype. Not all women can or want to become pregnant (see GE's main brief, p. 67); and to say, as Respondents do (Resp. Br. 78), that "[a]fter all, it is the fact that women bear children and men do not, which creates the classification of the human species into male and female," not only misstates the matter factually but also misconstrues the issue in this case. Thus, as stated to this Court at p. 2 of Appellant's (California's) Reply Brief in *Geduldig:* [10]

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[10] At page 15 of Appellant's Reply Brief in *Geduldig*, it was pointed out to the Court that under California's experience claims for disability attributable to pregnancy "average[d] 15 weeks duration." This is in line with the national and GE's experience (see GE's main brief, p. 9 and n. 10), and contrasts with Respondents' 6-8 weeks position (Resp. Br. 144).

[Footnote continued on page 11]



> Appellees do a disservice to women when they make pregnancy the *sine qua non* of being woman. Surely it is common observation that a large part of woman's struggle for equality involves gaining social acceptance for roles alternative to childbearing and childrearing, and to place on equal footing the woman who, through choice or chance, is childless. Childbearing capacity is not an essential or universal or lifelong female trait.

B. The Solicitor General asserts (Sol. Br. 24-26) that Congressional approval of the current EEOC guideline regarding the treatment of pregnancy as a temporary disability can be inferred from legislative history related to the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484, and the subsequent promulgation, in 1975, by the Department of Health, Education and Welfare of regulations dealing, *inter alia*, with pregnancy as a temporary disability. This assertion is based upon the fact that the 1974 Education Amendments provide that regulations promulgated by HEW, which implement Title IX of the

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[10] [Continued]

It is GE's position that pregnancy is a voluntarily induced condition which can either be avoided through the use of contraceptive devices or terminated through abortion. See GE's main brief, p. 64. GE's position concerning the voluntary nature of pregnancy is seemingly disputed by Respondents (Resp. Br. 93). Supportive of GE's position is an article that appeared on the front page of the January 3, 1976 New York Times which stated that "[t]he United States is approaching the point at which, statistically, all of its legitimate babies will be wanted at birth." The Times quoted the author of a study published in the January 9, 1976 issue of "Science," that "[w]e are coming closer and closer to the perfect contraceptive population."

Education Amendments of 1972, 20 U.S.C. (Supp. II) 1681, must be submitted to Congress 45 days prior to their implementation, and the contention based thereon that Congress allegedly failed to disapprove 1975 HEW regulations after their submission to the Congress.[11] The Solicitor General's assertion is faulty, however, as we show below.

First, there is no indication that the House or its members ever considered the corpus of the 1975 HEW regulations during the 45 day period after their publication on Wednesday, June 4, 1975 (and their presumed submission to Congress on or about that date),[12] much less the specific regulation (29 C.F.R. Sec. 86.57(c)) dealing with the treatment of pregnancy disabilities. Moreover, the Solicitor General's reference (Sol. Br. 26, n. 22) to proceedings before the House on December 19, *1974* (a date clearly prior to the submission of the 1975 regulations to the House) is not only misleading, but it shows nothing more than the general opposition of certain House members to the application of the sex discrimination

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[11] A similar argument is made by Respondents. See Resp. Br. 129-130.

[12] Section 509(d)(1) of Public Law 93-380, 88 Stat. 567, requires that regulations implementing Title IX shall be transmitted to the House and Senate *concurrently* with their publication in the Federal Register.

HEW regulations concerning nondiscrimination on the basis of sex in education programs, of which the specific regulation cited by the Solicitor General is a part (Section 86.57(c)), were published in the Federal Register on Wednesday, June 4, 1975. 40 Fed. Reg. 24128-24144. (See also 121 Cong. Rec. S. 13175 (daily ed., July 21, 1975)). The regulations became effective on July 21, 1975. See 40 Fed. Reg. 24128.



provisions of Title IX to such voluntary service or social organizations as the Boy Scouts, Campfire Girls, and college social fraternities. See 120 Cong. Rec. H. 12331-12336 (daily ed., December 19, *1974*).

Second, notwithstanding the provision for transmission of HEW regulations to Congress 45 days before they become effective, the Senate was never offered the opportunity to disapprove the 1975 regulation relied on by the Solicitor General. Senator Helm's introduction, on June 5, 1975, of a resolution[13] to disapprove the newly proposed HEW regulations in their entirety was referred to the Senate Committee on Labor and Public Welfare. 121 Cong. Rec. S. 9713-9715 (daily ed., June 5, 1975). Thereafter, the Committee declined to report the resolution to the full Senate. 121 Cong. Rec. S. 13176 (daily ed., July 21, 1975). Thus, the Committee's action precluded the Senate from voicing either its approval or disapproval of the regulations. Moreover, even assuming, *arguendo*, that the Committee's action could somehow be construed as the consensus of the

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[13] Senator Helms' resolution, S. Con. Res. 46, recited (121 Cong. Rec. S9715 (daily ed., June 5, 1975)):

> *Resolved by the Senate (the House of Representatives concurring)*, that pursuant to the provisions of section 431(d) of the General Education Provisions Act, the Congress of the United States finds that the regulations of the Department of Health, Education, and Welfare relating to non-discrimination on the basis of sex in education programs and activities receiving or benefiting from Federal financial assistance (40 F.R. 21128) [sic] are inconsistent with the provisions of Title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1686), and disapproves such regulations which were transmitted to the Congress on June 3, 1975.

Senate, such "rejection" of Senator Helm's broad proposal hardly furnishes proof that the particular HEW pregnancy disability regulation upon which the Solicitor General relies received Senate approval. See, *Connell Construction Co.* v. *Plumbers & Steamfitters*, —— U.S. ——, 44 L.Ed.2d 418, 433, n. 16 (1975).

In short, there is no meaningful legislative history regarding the adoption of the HEW's pregnancy disability regulation which evidences Congressional approval of the EEOC guideline at issue here.

C. Respondents contend (Resp. Br. 121) that it is appropriate to look to the legislative history of the Equal Pay Act (29 U.S.C. 206(d)) in construing Title VII. Authoritative interpretations of the Equal Pay Act, which are clearly inconsistent with the position Respondents advocate, show, however, that the legislative history of the latter Act cannot be accorded weight in construing Title VII. Thus, as set forth in GE's main brief, p. 46, regulations promulgated by the Wage and Hour Administrator, Department of Labor,[14] pursuant to the Equal Pay Act have consis-

[14] As is also noted in GE's main brief, pp. 45-46, Sex Discrimination Guidelines promulgated by the Secretary of Labor pursuant to Executive Order 11246 (3 C.F.R. 173) do not require that employee medical benefit plans cover pregnancy-related disabilities as long as an employer makes equal contributions to such plans for employees of both sexes (41 C.F.R. § 60-20-3(c)). Although the Solicitor General correctly notes (Sol. Br. 24, n. 20) that the Department of Labor's Office of Federal Contract Compliance has published *proposed* guidelines which would adopt a policy similar to that in the present EEOC guideline on the treatment of pregnancy, the Solicitor General does not advert to the fact that the proposed guidelines were published more than three years ago and no hearings on the proposal have been either held or announced. See GE's main brief, p. 46, n. 50.



tently provided that payments relating to maternity are not wages for purposes of that statute (29 C.F.R. § 800.110), and further state (29 C.F.R. § 800.116 (d)):

> If employer contributions to a plan providing insurance for similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees.

See also, Wage-Hour Opinion Letter dated May 27, 1964 (BNA WHM 95:608-609). Because this has been a *consistent* interpretation by the agency authorized with the Equal Pay Act's enforcement, it is entitled to great deference. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971).

In these circumstances, and assuming on the other hand that the Equal Pay Act's legislative history does have relevancy with respect to Title VII, it almost necessarily follows that the EEOC's 1972 guideline on pregnancy stands as a misinterpretation of Title VII. In this connection, it is also worthy of note that GE has never committed an Equal Pay Act violation. Indeed, in the only two cases brought against GE under the Equal Pay Act, the courts held

in favor of GE. See, *Dunlop* v. *GE* (No. 73-C-156R, E.D. Va., September 16, 1975); *Grimaldi* v. *GE* (No. 74-1555, E.D. Pa., July 24, 1975).

Respondents further assert (Resp. Br. 124-125) that the defeat of the Martin bill and the Findley amendment to the proposed Equal Pay Act demonstrates that Congress rejected efforts which would have "enabled employers who paid sickness and accident benefits to women disabled by pregnancy or hospital and medical expenses connected with maternity or had other special costs attributable to the employment of females, to deduct these additional costs from wages so that the law would not [have] require[d] them to pay both the added cost of maternity benefits and equal pay." However, examination of the texts of the cited bill and amendment (See Resp. Br., p. 134, n. 55) does not support the interpretation Respondents have accorded them.[15]

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[15] At pp. 40-41 of its main brief, GE quotes statements made by Thomas I. Emerson, Lines Professor of Law, Yale Law School, before the Senate and House committees conducting hearings on the proposed Equal Rights Amendment. Seeking to neutralize what they apparently consider damaging statements, Respondents at pp. 134-135 of their brief, refer to an article by Professor Emerson in the Yale Law Journal and claim that the paragraphs they quote demonstrate that Professor Emerson "expressly stated that exclusionary maternity laws would be struck down by the ERA." However, examination reveals that the paragraphs which Respondents quote are clearly out of context. Moreover, the article closely tracks Professor Emerson's statements before Congress which are referred to in GE's main brief. Compare Brown, Emerson, Falk, Freedman, "The Equal Rights Amendment: A Constitutional Basis For Equal Rights For Women," 80 Yale L.J. 871, 893-894 (1971) with Hearings on S.J. Res. 61 and S.J. Res. 231 before the Committee on Judiciary, U.S. Senate, 91st Cong., 2d Sess. 298-299 (1970).



## III. RESPONDENTS' BRIEF DISTORTS THE RECORD.

Respondents' brief is replete with statements that are factually wrong or misleading, or which are based on purported facts that are not part of the record. We list below and comment upon some, but not all, such statements:

| Statements in Respondents' Brief | Comment |
|---|---|
| P. 6 States there are "43 individual named plaintiffs" who are employed at GE plants in Richmond, Portsmouth and Salem, Va.; Tyler, Texas; Fort Wayne and Tell City, Ind.; and, Phil., Pa. | The individually named plaintiffs number 7; all are employed at GE's Salem, Va., plant (I App. 18). Plaintiffs' motion to add parties plaintiffs (I App. 38-42) was denied (I App. 120, 131). |
| P. 12 States that the maximum of 26 weeks disability pay in GE's Plan reflects the fact that after such period Social Security disability benefits are available, citing 42 U.S.C. 423. | There is no support for this in the record. Indeed, GE's S and A insurance coverage was instituted in 1950 (II App. 583), and the addition of disability insurance benefit payments to the Social Security System did not occur until 1956. |
| Pp. 12-13 Implies that GE's Long Term Disability Plan might be an issue in this proceeding. | Not only did the complaint not raise the issue of GE's Long Term Disability Plan, but the district court expressly found that such issue had not been raised (Jt. Pet. 4a, n. 1). |
| Pp. 13, 16-17, 140-141 States that the General Electric Insurance Plan with Comprehensive Medical Expense Benefits is not an insurance plan. | The record demonstrates that GE is clearly insuring its employees against various included risks. See, e.g., I App. 176 ("GE has obtained an insurance policy covering weekly sickness and accident benefits, among others, whereunder a tentative initial premium was paid to Metropolitan Life Insurance Company . . ."). See also, I App. 211, 218-219, 241. |

| Statements in Respondents' Brief | | Comment |
|---|---|---|
| Pp. | 13-14, 93, 98 | States that GE's sickness and accident insurance coverage continues during strikes. | The coverage "automatically . . . terminate[s] on the day immediately preceeding the first full day's absence . . . because of the strike" (III App. 1071). On a number of occasions, GE has opted to continue the insurance during a strike, but it has not always done so (II App. 613-614). |
| P. | 14 | States that a male employee on leave of absence has S and A insurance coverage for 31 days. | So, of course, do all *female* employees (II App. 611-612; III App. 1070-1071). |
| Pp. | 15-16, 93 (See also 17-18, 21) | States that male employees are paid S and A benefits for absences due to enumerated causes, such as injuries incurred in sports activities and fights, alcoholism, drug addiction, and nose jobs and hair transplants (cosmetic surgery). | S and A benefits are also paid to *female* employees for absences due to all the enumerated causes. S and A benefits are also provided when female employees are absent for such uniquely female conditions as ovarian cysts, tubal ligations, and uterine cancer. Moreover, with respect to the causes listed by Respondents, more than half are "infinitesimal" and "rarely occur" (I App. 5). A nose job or a hair transplant "is a minimal occurrence . . . a *de minimus* problem" (II App. 608). |
| Pp. | 15-16, 18 | Implies that GE's income maintenance programs, and particularly military pay differentials and duty allowances are for male employees only. | This is not so. GE's income maintenance programs, including those pertaining to military duty, are applicable to male and female employees alike (I App. 174-175; Pls.' Exh. 5, pp. 81-83). |
| P. | 20 | Refers to "the disability benefits plan initiated in 1925" and over the years described in the annual reports. | Sickness and accident benefits were first provided for GE employees in 1950. See II App. 583. |



| Statements in Respondents' Brief | | Comment |
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| Pp. | 21, 23 | Citing III App. 1963, Respondents' brief states that GE pays all hospital and medical costs "[i]n order to assure the productivity of male employees," and because "the possibility that worry over the costs of having babies might impair the male employees' ability to concentrate and function to the highest capacity." Respondent further states that "[t]his has recently been extended to cover deliveries for female employees. . . ." | There is not a scintilla of evidence to show that GE pays these costs for the attributed reasons. The GE Insurance Plan states (III App. 1062) that medical expenses are provided to help "you and your dependents;" hospital and medical expenses of both males and *females* are paid. Moreover, the Plan specifically pays maternity benefits—i.e., hospital and doctor expenses, etc.—for female employees as well as for dependent wives (III App. 1063, 1066). GE began paying such benefits in 1950, and since 1966 has provided full hospital and medical expense coverage for pregnancies of female employees and spouses of male employees. |
| Pp. | 22, 21, 37-39 | States that maternity expenses are covered by GE's Insurance Plan, "thus accepting delivery as a sickness or accident for the purposes of the hospital and medicare [sic] provisions of the plan." | This is an incorrect statement. Plaintiffs' Exh. 6 (reproduced in part at III App. 1060-1072), containing GE's "Comprehensive Medical Expense Insurance Plan," demonstrates that under the Medical Expense provisions GE pays for medical and hospital expenses incurred as a result of pregnancy (pp. 5, 7, 19-20, not reproduced in the Appendix). However, pregnancy or resulting childbirth or complications in connection therewith are specifically excluded from S and A coverage. III App. 1066. |

| Statements in Respondents' Brief | Comment |
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| Pp. 24, 29, 36, 40, 88, 99, 144 Referring to a February 1972 GE memorandum re employee Thomas (III App. 10, 14), the brief states that rules in effect at GE's Tyler, Texas plant at that time "were similar to rules theretofore in effect in all GE plants" and required pregnant employees to leave work at the end of the sixth month of pregnancy. At pp. 29, 36, 40, 88, 99, and 144, the brief insinuates that GE presently is maintaining a six or seven months rule. | In July 1964, GE issued a Health Bulletin to all GE plants providing that women can work beyond the sixth month of pregnancy when the pregnancy is uncomplicated (II App. 601-602, II App. 867-870). In November 1971, another Health Bulletin made it clear that pregnant employees could continue to work beyond the sixth month of pregnancy with the approval of their attending physicians (II App. 722-725). A third Health Bulletin, issued May 1972, reaffirmed the latter policy (II App. 726-729). The district court expressly noted that GE's mandatory leave policy existed "prior to late 1971" (Jt. Pet. 22a). (Moreover, as Respondents' brief notes, p. 25, employee Thomas was in fact permitted to work up to the day before her baby was born in April 1972.) |
| P. 27 In footnote 6, Respondents state that Dr. Wilbanks and Dr. Hellegers testified "that *most* women by two weeks after childbirth are back doing all the same work as pre-pregnancy" [emphasis added]. | Respondents have overstated the testimony of both doctors. See II App. 466-467, 687. |
| Pp. 29, 58 Respondents state that the average male received total temporary disability benefits from GE of $592.23 in 1970 and $623.95 in 1971. | Respondents have ignored the fact the average cost per insured employee of S and A benefits paid by GE were $45.76 for males and $82.57 for females in 1970, and $62.08 for males and $112.91 for females in 1971. See, I App. 198, 227, 260, 278-286. |



| Statements in Respondents' Brief | Comment |
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| P. 45 States that "a large proportion of the males who draw sickness and accident benefits are never hospitalized." | This statement is completely unsupported by the record. |
| P. 48 Brief purports to quote the GE Employee Benefits Manager as saying with reference to wages in the steel industry: "[T]hey don't have women; therefore, our average wage is lower." | The full quote is: "Steel isn't comparable. Their work is different and they don't have women; therefore our average wage is lower. They also aren't mechanized like us" (III App. 1037). Moreover, the brief does not show that the statement was made in 1960 (III App. 1034). |
| Pp. 48, 73-74, 88 Refers to "GE job evaluation manual which expressly provided that women were to be paid one-third less than men for the same work." | Brief fails to point out that this job manual had reference only to GE's Erie Works and was dated May 10, *1937* (III App. 1002). |
| P. 52 States that "GE is a competitor in the glass industry." | The statement is unsupported. GE glass factories make glass only for GE bulbs and lamps. |
| P. 53 States that "many of GE's competitors pay benefits for pregnancy disability for six or eight weeks," supporting the statement by reference to Appendix A of its brief. | The statement is unsupported. Of the employers listed in such Appendix A, only two, GM and RCA, are GE competitors (II App. 622-627). |
| P. 56 States that during 1969 bargaining negotiations with the IUE, GE "negotiated 'only level of benefits, not costs.'" | This statement is controverted by the testimony of Mr. Hilbert, GE's Labor Relations Counsel (II App. 645-647). |

| Statements in Respondents' Brief | | Comment |
|---|---|---|
| Pp. | 73-74 | States that "during the 1940's . . . many employers paid disability benefits for pregnancy-related disabilities usually limited to six weeks duration and justified their low female wages as in part due to the cost of disability benefits for maternity." | There is no record support for this statement. |
| Pp. | 86, 41 | States that "[w]here a *male* employee is partially disabled GE assigns him temporarily to another job" (Jt. Pet. 14a) [emphasis added]. | The district court found that "GE has on occasion temporarily assigned to other suitable work an employee who is disabled temporarily from performing his *or her* regular job but is not disabled from performing other available work" (Jt. Pet. 14a) [emphasis added]. |
| P. | 88 | Cites "tables in evidence" to support proposition that GE pay scales show discrimination against all GE female employees, and current female wage rates are less than 75% of male rates. | The "tables in evidence" relate only to employees represented by the IUE (III App. 883-953). Moreover, at page 63 of Respondents' brief, it is stated that "women's rates of pay nationwide are only 60% of those of males." Therefore, if GE's female employees receive wage rates that are approximately 75% of male rates, they would be doing far better than female employees nationwide. |



| Statements in Respondents' Brief | | Comment |
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| Pp. | 89, 90 | States that "To the extent that GE has based the wage rates it paid women on rates paid by other companies, where the rates of a substantial number of companies were low, in part, because they, in addition, paid temporary disability benefits for pregnancy-related disabilities, GE is trying in effect to have its cake and eat it too." Also states that "[f]or GE to pay the same low wages as other employers in the community . . . ." | There is absolutely no record support for the statement that GE's wage rates are based on what other employers pay. |
| P. | 89 | Refers to "[t]he prevalent practice of paying 6 weeks of maternity benefits . . . ." | The record demonstrates there is no such prevalent practice. Only 40% of the work force in the United States is covered by disability insurance and of that 40% covered only 40% of the plans provide a maternity benefit (III App. 846; II App. 529). Therefore, only 16% of the workforce is covered by disability insurance which includes maternity (II App. 529). |
| P. | 92 | States that "GE has a 40% turnover rate for all employees (I App. 294). Thus even if 40% do not return from pregnancy, this is only the same number as would quit if not pregnant." | However, the record shows that "approximately half of the female employees who have children do not return to work" whereas generally 100% of those employees who recover from short term disabilities return to work (II App. 532). |

| Statements in Respondents' Brief | | Comment |
|---|---|---|
| P. 93 | States that "all pregnancies of wives of male employees . . . are paid in full." | This statement is misleading because only the hospital and medical expenses of pregnancies are paid. Moreover, these expenses are not only paid for wives of male employees, but also for female employees. |
| P. 96 | Refers to GE's "persuading American industry" to adopt fringe benefits programs. | There is nothing in the record to support this. |
| P. 96 | Lists objectives achieved by GE in adopting fringe benefits plan. | The record does not support the statement, which is based solely on the wirting of one commentator, Donna Allen. |
| P. 97 | States that "GE's strong opposition to a national social security system has for all practical purposes prevailed." | This statement is unsupported by the record. Moreover, it is blatantly erroneous as the United States Social Security System applies to GE employees as well as employees of other companies. |
| P. 97 | States that "GE's private social security system provides for its employees the kind of social security provided by the government in all industrial nations, except that GE does not cover the risk of loss of income by pregnancy and childbirth which is an integral part of the social security system of all the European countries . . . ." | First, GE is not a European government nor an industrialized nation. Second, GE is not the government of the United States. Third, even the United States Social Security System does not provide S and A for pregnancy. |



| Statements in Respondents' Brief | | Comment |
|---|---|---|
| P. 99 | Brief quotes from a paragraph summarizing a Prentice-Hall survey purportedly showing a sizable return rate for female employees after pregnancy "when such return to work is facilitated by the employer's extending to them the benefits enjoyed by male employees." | (1) The survey does not correlate female return rates with male benefits (IV App. 1135-1138); (2) the brief fails to note that not all the companies in the survey had statistics available on female return rate (IV App. 1138); and (3) brief deletes the last sentence of the quoted Prentice-Hall paragraph: "On the other hand, some companies reported that only a fraction of employees actually returned after their babies were born . . ." (IV App. 1138). |
| P. 105 | States that on the basis of cited arbitration decisions, "it is apparent that the term sickness is generally accepted in the industrial world as embracing the condition of a woman disabled by childbirth or a complication of pregnancy." | This statement not only lacks support but ignores the contrary record evidence. See, e.g., II App. 529. |
| P. 107 | States that during 1971 the EEOC made a careful study of the medical issues involved in employment of women before and after childbirth. | This is a gratuitous statement, having no record support whatever. |

| Statements in Respondents' Brief | | Comment |
|---|---|---|
| Pp. 107-108, 84 | States that the EEOC consulted Drs. Barter and Hellegers "and utilized their services as expert witnesses in proceedings instituted by EEOC before the Federal Communications Commission against AT&T . . . ." | Again the statement is unsupported by the record: (1) there is no record showing that the EEOC "consulted" these doctors; (2) the record does not show that Dr. Hellegers was called as witness by the EEOC; (3) both Doctors Barter and Hellegers testified before the FCC only concerning the ability of pregnant females to remain at work prior to delivery (III App. 180-190, IV App. 1294-1308). |
| P. 108 | States that before testifying before the FCC Dr. Hellegers cooperated with FCC in preparing key words to be placed in Medlars Computer retrieval system at the National Institutes of Health. Moreover, purports to summarize what was shown by the "medical literature retrieved by the Medlars Computer" at National Institute of Health. | As shown by footnote 35 of Respondents' brief, this is another gratuitous statement, having no record support whatever. Similarly, there is nothing in the record as to what, if anything, was retrieved by the Medlars Computer. See also, Brief *Amicus Curiae* filed in this case on behalf of Alaska Airlines, Inc., *et al.*, pp. 25, 26, 3a-6a, indicating that no medical studies were made by the EEOC prior to the issuance of the 1972 guideline on pregnancy. |
| P. 112 | After citing various articles on sports and bicycling, Respondents' brief states that "[t]he EEOC *thus* had before it all the best available medical data when it issued its Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.10, April 2, 1971 . . ." [emphasis supplied]. | This statement is illogical, unsupported by the record, and gratuitous. |



| Statements in Respondents' Brief | | Comment |
|---|---|---|
| Pp. 138-139 | Refers to the "defeated . . . Ervin Amendment which would have allowed legal distinctions between men and women based on physiological and functional differences." | The Ervin Amendment which is set forth at 118 Cong. Rec. 9317 states as follows: "This article will not impair, however, the validity of any laws of the United States or any State which exempts women from compulsory military service." This proposed amendment was defeated on March 21, 1972, at 118 Cong. Rec. 9336-9337. |
| P. 139 | States that the actuary who testified at trial "rested his expertise on the fact that he had had twelve secretaries who became pregnant" (II App. 563). | This is a gross distortion of Actuary Jackson's testimony and demeans his expertise. See II App. 563. See also, Actuary Jackson's Curriculum Vitae at II App. 522-523 and App. 850-855. |
| P. 146 | States that "GE supplied no figures as to claims paid for occupational injury." | GE was never asked by Respondents to do so. |
| P. 146 | States that "[i]ndustrial studies uniformly show that the *rate* of absenteeism and disability claims decreases in inverse proportion to the increase in wage rates . . ." [emphasis supplied]. | This statement is completely unsupported by the record. Respondents (Br. 148-149) cite in this connection a study dealing with the *duration* of claims. |
| P. 151 | States that "[t]he cost of life insurance is substantially less for men." | This statement is supported neither by the record nor the sources expressly cited by Respondents. Indeed, it is clearly wrong. |

| Statements in Respondents' Brief | | Comment |
|---|---|---|
| Pp. 1a-3a | Sets forth for the years 1954, 1971 and 1974 a list entitled "Plans of 'Leading Firms in a Variety of Industries' which Pay Temporary Disability Benefits for Disability Arising Out of Pregnancy." For each of the three years the number of weeks covered for maternity are listed along with the page cite in that particular year's U.S. Dept. of Labor, Bureau of Labor Statistics digest. | The companies listed in Appendix A are only a carefully selected portion of the actual lists contained in the cited digests. Moreover, the list in Appendix A contains numerous errors. For example, under the column headed "1974," the following errors appear: the Brewers' Bd. of Trade is listed as providing 26 weeks of S and A for maternity whereas, in fact, the 26 weeks of coverage expressly *exclude* maternity; IBM is listed as paying 52 weeks of temporary disability benefits for maternity whereas it, in fact, provides only 52 weeks of paid sick leave with the BLS digest providing no specification as to whether maternity cases are or are not included; Pacific Maritime Ass'n. is listed as providing 6 weeks of S and A maternity benefits whereas, in fact, it provides 26 weeks of coverage for "non-occupational and occupational" cases with no specific reference to a 6 weeks maternity S and A benefit; RCA is listed as providing 8 weeks of S and A maternity coverage whereas, in fact, it provides 26 weeks of coverage for nonoccupational S and A but expressly excludes maternity; the Retail Trade Ind. is listed as providing 20 weeks of maternity S and A coverage whereas, in fact, it provides no S and A coverage at all. |



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Nos. 74-1589 and 74-1590

# Supreme Court of the United States

October Term 1975

GENERAL ELECTRIC COMPANY,
*Petitioner,*
v.
MARTHA V. GILBERT
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, ET AL.,
*Respondents.*

MARTHA V. GILBERT,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, ET AL.,
*Petitioners,*
v.
GENERAL ELECTRIC COMPANY,
*Respondent.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION UAW AS AMICI CURIAE

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# Supreme Court of the United States

**October Term 1975**

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**No. 74-1589**

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GENERAL ELECTRIC COMPANY,
*Petitioner,*

v.

MARTHA V. GILBERT
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, ET AL.,
*Respondents.*

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**No. 74-1590**

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INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, ET AL.,
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This brief *amici curiae* is filed in support of the position of the respondents by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the International Union UAW with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

## INTEREST OF THE AMICI CURIAE

The AFL-CIO is a federation of 111 national and international labor organizations, having a total membership of approximately 14 million. As such it is the majority spokesman for the trade union movement. The International Union UAW is the largest independent industrial union in this country, having a membership of approximately 1,500,000. Women comprise a substantial portion of the membership of both organizations.

All of the women members of the *amici curiae* who are of child-bearing age are directly affected by the issues in this case. Unless the decision below is affirmed they may become disabled from work by pregnancy and nonetheless be without income protection during the period of such disability. Thus, one of the first priorities of the AFL-CIO and its affiliates and of the UAW has been reform of the features of the income disability programs that discriminate against women during pregnancy. It is for this reason that the *amici curiae* have determined to take this opportunity to present their views to this court.

The AFL-CIO and UAW filed a brief *amicus curiae* in *Liberty Mutual Insurance Co., Inc.* v. *Wetzel* ("*Liberty* Brief"), No. 74-1245. The present brief does not repeat in detail the legal analysis presented in the *Liberty Mutual* brief; rather, it demonstrates that precisely the same analysis applies to this case and requires affirming the decision of the Court of Appeals.

## ARGUMENT

1. In their brief in *Liberty Mutual, supra,* the present *amici* presented the following argument: The basic issue



is whether a private employer violates Title VII of the Civil Rights Act of 1964 if it excludes from a broad income protection program disabilities which in their medical effect upon an employee's ability to work are indistinguishable from those covered but which are due to pregnancy or complications resulting directly from pregnancy. While employers have relied on *Geduldig* v. *Aiello,* 417 U.S. 484, for the proposition that Title VII does not reach this classification because it is not based on "gender as such" (*id* at 496), §703(a)(2) of the Act (42 U.S. §2000e-2(a)(2)), reaches *any* classification which "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's • • • sex," even if the line is not drawn on a gender basis. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971)[1] and *Phillips* v. *Martin Marietta Co.,* 400 U.S. 549 (1971), as well as the legislative history of the 1972 amendments to the Act (*Liberty* Brief at 8-9) make clear that Title VII is violated if a distinction adversely affects the status as employees of a large group of women but no men, unless the rationale for the distinction rises to the level of a "business necessity." The exclusion of pregnancy from a broad disability program which is a form of compensation

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[1] General Electric suggests (Brief for Petitioner at 34, n. 25) that *Griggs* is inapposite because it is a "race" case. But the language of the Act is precisely the same with regard to race and to sex classifications, and Congress in 1972 expressly disclaimed any intent to differentiate between the two types of discrimination (*Liberty* Brief, at 9). Nor is this Court's "[reluctance] to treat sex as a suspect classification" (Brief for Petitioners at 34, n. 25) in constitutional cases of any relevance in parsing a statute which in language and intent treats race and sex distinctions as equally disallowed.

to employees adopted to promote security, productivity, and loyalty has precisely the prohibited effects: like other distinctions based on pregnancy, it relegates most women to a special, second-class status with regard to career advancement and continuity of employment. (*Liberty* Brief, at 18-19.) This sort of discriminatory impact is at the heart of §703(a)(2) and, therefore, cost considerations *alone* cannot justify it. At any rate the record in that case demonstrates that Liberty Mutual did not arrive at the decision to exclude pregnancy on the basis of actuarial considerations; rather, the distinction was the last of many special policies relating to pregnancy, some of which are conceded to be violative of Title VII, and was retained only because it was the one of these distinctions the company believed it could legally maintain.

2. Precisely the same analysis applies to this case. As in *Liberty Mutual,* the income maintenance program is a form of compensation to employees. Here, in fact, the program is funded entirely by the company, with no employee contributions, and is paid by the company itself rather than through an insurance program (Pet. App. 8a). The income maintenance program is even broader in coverage than that in *Liberty Mutual;* the *only* exclusion is for pregnancy-related disabilities (Pet. App. 13a-14a, 28a) (see *Liberty* Brief, at 21-22 n. 18). And, not only is it clear here that abnormal complications of pregnancy are not covered (see *Liberty* Brief, at 3, n. 1), but disabilities entirely *unrelated* to pregnancy but beginning while an employee is on pregnancy leave are similarly excluded (Pet. App. 11a).[2]

Thus, in this case the *only* employees unable to work for

[2] The exclusion of complications of pregnancy and of unrelated disabilities, and the inclusion of truly self-induced disabilities such as cosmetic surgery and suicide attempts, together refute Petitioner's attempt (Brief for Petitioner, at 55, 63) to justify the pregnancy exclusion as consistent with a supposed purpose of the sickness and accident program, "to soften the blow to employees of an *unintended* and *unexpected* sickness or accident" (*id.* at 63, emphasis supplied). In fact, the program does pay for intended, expected disabilities, and does not pay for complications of pregnancy or disabilities unrelated to pregnancy but beginning while the employee is on pregnancy leave, though these are neither expected nor intended.



medical reasons refused income maintenance benefits for a class of disabilities are women; and women are in some instances refused benefits for the *same* ailments which a man can suffer and for which he would receive benefits. Whether the classification which creates this effect is based upon "gender as such" or upon another criteria is irrelevant for purposes of §703(a)(2).

Moreover, since this program, like the one in *Liberty Mutual,* is a private, employer-funded form of compensation created for purposes related to the efficient operation of a particular business, the only pertinent analysis is whether exclusion of pregnancy-related disabilities "adversely affect[s] [women's] status as *employees,*" §703(a)(2) (emphasis supplied). The focus must therefore be upon the effect upon their careers of depriving a large group of women of benefits instituted to enhance career development prospects, an analysis entirely different from that developed outside the employment relationship context in *Geduldig, supra.*

3. Like Liberty Mutual, General Electric has had a history of treating pregnant women specially in ways which impede their job opportunities and status as employees.

In particular, General Electric had, until 1971, a policy of mandatory maternity leaves (Pet. App. 9a, 22a, 36a-37a; see *Liberty* Brief at 14-16) and even after this mandatory leave policy was abandoned, no pregnant women were hired (II App. 723; see *Liberty* Brief at 14). General Electric, like Liberty Mutual, appears to recognize that these sorts of policies based on pregnancy are sex-discrimination, for it abandoned both during the course of this litigation.

Yet, the interrelationship between such policies and that Petitioner is defending in this case is made clear by the very statistics upon which the company relies to buttress its argument that pregnancy related disabilities are *sui generis*. Thus, GE presents figures for the average duration of pregnancy absences (Brief for Petitioner at 9, n. 10) derived from a period when mandatory absences were still in effect; obviously, these figures tell us nothing about what the average periods would be if only ability to work determined pregnancy absences. Similarly, the figures for the percentage of women who do not return to work after pregnancy leave are to an indeterminate degree infected by the Company's policy of automatic termination eight weeks after delivery if the employee has not by then returned (Pet. App. 23a). Thus, GE is attempting to buttress its present discrimination based on pregnancy with statistics influenced by other distinctions which helped to create a situation in which a large group of women are treated as temporary rather than career employees.

As developed in the *Liberty* Brief, at 15-19, all of the purposes for which income maintenance programs are developed by employers apply to pregnancy-related disabilities at least as much as they apply to other disabilities. The reasons GE gives to the contrary, Brief for Petitioner



at 55-57, all are based not upon a showing of inapplicability, but upon factors unrelated to the basic disability income program. For example, if indeed women expecting children would leave work before they are themselves medically unable to work, or return long after their health has been restored, or resign after collecting benefits, the fault would be with the administration of the program, not with the basic congruence between the purposes of providing disability benefits and the situation of a woman disabled for reasons relating to pregnancy or child-birth. By requiring for all disability benefit recipients company-supervised medical examinations, or by linking benefits to return to work, GE could curb *abuses* of the program. The need to prevent abuses cannot justify the complete exclusion of pregnancy-related disabilities, when the result is that a large group composed entirely of women are rendered insecure in their jobs, made less productive because of monetary worries, induced to choose less attractive employment to assure steady income,[3] and made aware that their employer is not concerned with retaining her loyalty or with developing her career (*Liberty* Brief 16-18).

4. Finally, as in *Liberty Mutual,* Petitioner has shown no "business necessity" for its pregnancy exclusion. Indeed, it has expressly declined to rely on this defense (Pet. App. 30a; Brief for Petitioner, at 60, n. 67).

Petitioner does maintain that "business considerations"

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[3] In particular, the record in this case with regard to Ms. O'Steen demonstrates the financial hardship caused by the exclusion (Pet. App. 29a, n. 10), which could both decrease an employee's devotion to her job in the future and induce her to seek a less attractive job in which she would be spared such hardships should she become pregnant again.

justify the exclusion. Aside from the fact that this is an attempt to smuggle in by another name a defense GE orginally declined to make, most of the reasons given, as discussed above, either would justify only a more careful administration of the program rather than complete exclusion or do not stand up to analysis—e.g., the "voluntary" distinction. Thus, as the district court found, the only justifications which merit more than passing consideration are those related to cost (Pet. App. 23a-24a). But, as that court also found, not only is cost alone an inadequate justification when unrelated, as it was in *Geduldig, supra,* to policy considerations (Pet. App. 30a; *Liberty* Brief, at 20-21), but it is impossible from the evidence offered to derive any realistic estimate of the cost to GE of eliminating the pregnancy distinction (Pet. App. 23a, 31a).

Indeed, the record and findings in this case illustrate graphically both the propensity to infect cost estimates with sexual sterotypes (*Liberty* Brief, at 20, n. 16), and the reasons why the cost, even if high, of adding pregnancy-disability coverage cannot in itself rise to the level of a business necessity. For, as explained above, GE's cost arguments are based upon periods during which other pregnancy-based distinctions were influencing the length of pregnancy leave, and also upon the same assumption about a special female tendency to malinger found in *Liberty Mutual* (see *Liberty* Brief, at 20, n. 16, Pet. App. 23a).[4] Moreover, as the district court noted, there has been

[4] Also, while the district court found that the average period of medical disability due to pregnancy is six to eight weeks (Pet. App. 20a), the nationwide cost estimates GE relies upon, which in any event are not relevant to the justification for *GE's* exclusion, are based on much longer periods (Brief for Petitioner, at 8).



no attempt to factor out other disabilities which may similarly have high costs and are largely, if not exclusively, suffered by men (Pet. App. 32a). In particular, it seems telling that although it relies here upon the fact that pregnancy is "voluntary," the company has not seen fit to exclude pregnancy from its medical benefits, despite the high cost of such coverage (I App. 181; III App. 1063), so that male employees' *are* covered for the cost of their wives' deliveries.

## CONCLUSION

For the reasons stated above, and in our brief *amicus curiae* in *Liberty Mutual Life Insurance Co.* v. *Wetzel,* the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER GENERAL ELECTRIC COMPANY

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# BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER GENERAL ELECTRIC COMPANY

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## INTEREST OF AMICUS CURIAE*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of

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* Consents of all parties for participation of the amicus have been filed with this Court.

over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court; *e.g.; Geduldig* v. *Aiello, et al.,* 417 U.S. 484 (1974); *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971); *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.,* No. 73-1256; *Boy's Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970); *H.K. Porter Co.* v. *N.L.R.B.,* 397 U.S. 99 (1970); *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419,* 397 U.S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al.,* 416 US 115 (1974). The Chamber has participated as an *amicus* in the court below.

There are issues in this case that are of major importance to the Chamber's members: whether an employer may exclude pregnancy and related conditions from his disability program without being guilty of illegal sex discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e to 2000e-15), and what deference is due to the Equal Employment Opportunity Commission's new pregnancy guidelines. These issues are matters of national concern because



most employers have benefit policies, and most employers come within the provisions of Title VII of the Civil Rights Act. Further, the collective bargaining agreements of a substantial number of these employers contain provisions concerning the payment of fringe benefits. The Chamber is, thus, vitally concerned that these questions be properly resolved. Because of its broad representation of employers, the Chamber is in a position to present arguments to this Court which might not otherwise be advanced by the parties.

Indeed, as stated, the Chamber participated as an *amicus curiae* in *Geduldig* v. *Aiello, supra,* and it appears from reading the Court's *Aiello* opinion that the Chamber's arguments were carefully and favorably considered.

## SUMMARY OF ARGUMENT

The crucial issue here is whether an employer may exclude pregnancy and related conditions from his disability program without being guilty of illegal sex discrimination under Title VII. This issue has been propelled into national prominence not only by the expanded coverage of Title VII and the fact that most employers have illness or benefit plans, but also due to this Court's recent decision in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974).

The Court in *Aiello* recognized explicitly there can be no prohibited sex discrimination unless men and women, otherwise similarly situated, are unequally treated solely because of sex. That is, unequal treatment between different categories of the same sex is not proscribed discrimination because of sex. It necessarily follows, as the *Aiello* Court held, that excluding pregnancy from a benefit plan is not interdicted sex

discrimination inasmuch as this exclusion does not affect women in an area where they are similarly circumstanced with men.

The *Aiello* analysis is apposite to and dispositive of the issues here presented. Since both the Fourteenth Amendment and Title VII represent interdictions against discrimination, the test to determine whether these equivalent proscriptions have been violated should be identical absent an explicit expression from this Court manifesting a contrary intent. Such an enunication is absent here. Indeed, whether the validity of a pregnancy exclusion is contested under Title VII or the Fourteenth Amendment, the facts are identical: an insurer's [1] rules concerning benefits related to pregnancy do not affect women in an area where they are similarly situated with men; the exclusion of pregnancy is merely the removal of one physical condition from the list of compensable disabilities; whatever unequal treatment existed because of this exclusion occurred between different categories of the same sex; under a plan excluding pregnancy there is no risk from which men are protected and women are not. Accordingly, the exclusion of pregnancy disability from a list of compensable disabilities should no more support a finding of proscribed sex discrimination under Title VII than under Amendment Fourteen.

Furthermore, the Court observed in *Aiello* that where the inclusion of pregnancy benefits will result in increased premiums or decreased benefit payments for other covered disabilities, the exclusion of these benefits is legitimate and reasonable. Inasmuch as the

[1] As used herein the word "insurer" means employers who either pay maternity benefits as self-insurers or as purchasers of such coverage from the independent insurance companies.



objective of both state and private insurers is to construct a comprehensive benefit program at a minimal cost, it follows that the test of legitimacy also should be equivalent whether the Fourteenth Amendment or Title VII is involved. To read *Aiello* as not applying to private insurers would produce the anomaly where a state, possessing manifold resources from which to obtain funds, nevertheless would be permitted to exclude pregnancy from its benefit program as too costly, while a private insurer lacking such resorts could be required to endure the exorbitant cost of coverage or to terminate utterly his benefit program.

In addition to the foregoing, this case presents an issue that permeates many Title VII cases: under what circumstances should courts defer to the Equal Employment Opportunity Commission's guidelines. There is need for the Court to again address the issue since many courts have failed to adhere to the teachings of *Griggs* and *Espinoza* [2] that the Commission's guidelines are entitled to weight only if the conclusion is inescapable that they comport with the Congressional intent. When this standard is applied, the guideline involved in the instant cause (Section 1604.10, adopted 1972), is entitled to no weight, and therefore the court below erred in deferring to the Commission's view of Title VII.

[2] *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973).

## ARGUMENT

### THE EXCLUSION OF PREGNANCY BENEFITS FROM AN INSURANCE PROGRAM DOES NOT INHERENTLY CONSTITUTE PROSCRIBED SEX DISCRIMINATION

The Chamber contends that an employer should not be required by Title VII to provide benefits for pregnancy on the same terms as he provides benefits for illness or injury. Furthermore, the Chamber urges that the EEOC's guideline containing this requirement is invalid and entitled to no weight by this Court.

The *amicus* draws cogent support for his position from the Court's decision in *Geduldig* v. *Aiello, supra.* There the Court held that a state disability insurance program may exclude from coverage disability caused by normal pregnancy and childbirth without violating the Equal Protection Clause of the Fourteenth Amendment. The Chamber asserts that the *Aiello* Court's analysis is apposite to and dispositive of similar issues arising under Title VII.

#### A. The Exclusion of Pregnancy Benefits Does Not Affect Women in an Area Where They Are Similarly Situated With Men.

As the Court in *Aiello* recognized explicitly, there can be no prohibited sex discrimination unless men and women, otherwise similarly situated, are unequally treated solely because of sex. That is, unequal treatment between different categories of the same sex is not proscribed discrimination because of sex. It necessarily follows, as the *Aiello* Court held, that excluding pregnancy from a benefit plan is not interdicted sex discrimination inasmuch as this exclusion does not affect women in an area where they are similarly circumstanced with men. In reaching this conclusion, the



Court expressly rejected the position urged by the dissenters in *Aiello*. Thus, fundamental to the dissenters' position was the premise that the exclusion of a sex-related disability, such as pregnancy, *per se* amounted to proscribed sex discrimination.[3] In repudiating this view, the *Aiello* Court held instead that California's benefit plan did not constitute prohibited sex discrimination, though pregnancy was excluded, since under the plan "... there is no risk from which men are protected and women are not." 417 U.S. at 496-497.

There is nothing in *Aiello* that suggests that the Court's analysis of what may in fact constitute prohibited sex discrimination is inapplicable when Title VII, rather than the Fourteenth Amendment, is involved. Moreover, it is apparent that the conclusions concerning the legitimacy of California's insurance program reasonably apply with equal vitality in Title VII cases, when private benefit programs which exclude only pregnancy from compensable disabilities are examined to determine whether or not prohibited sex discrimination exists. Thus, since both the Fourteenth Amendment and Title VII represent interdictions against discrimination, the test to determine whether these equivalent proscriptions have been violated should be identical absent an explicit expression from this Court manifesting a contrary intent.[4] Moreover,

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[3] The dissenters stated " . . . dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." 417 U.S. at 501.

[4] In *United States* v. *Chesterfield County School District, S. C.*, 484 F.2d 70, 73 (CA 4, 1973), the court held: "the test of validity under Title VII is not different from the test of validity under the fourteenth amendment."

whether the validity of a pregnancy exclusion is contested under Title VII or the Fourteenth Amendment, the facts of the situation are identical: an insurer's rules concerning benefits relating to pregnancy do not affect women in an area where they are similarly circumstanced with men. That is, deprivation of pregnancy benefits does not in fact constitute dissimilar treatment for men and women since there is no risk from which men are protected and women are not, whether Title VII or the Fourteenth Amendment is involved. Accordingly, the exclusion of pregnancy disability from a list of compensable disabilities should no more support a finding of proscribed discrimination under Title VII than under Amendment Fourteen.

The Chamber's contentions here are endorsed by a comparison of *Aiello* with *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971). These decisions demonstrate that the variables employed to determine whether proscribed sex discrimination exists are identical whether Amendment Fourteen or Title VII is involved. As stated, *Aiello* recognized that there can be no prohibited sex discrimination unless men and women, otherwise similarly situated, are unequally treated solely because of sex. Similarly, *Martin* held that under Title VII there can be no proscribed sex discrimination unless men and women, who are otherwise equally qualified for the same job are treated unequally solely because of sex. "Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex." 400 U.S. at 544.[5]

[5] In 1972 Congress amended the definition of "religion" set forth in Section 701(j) to broadly include "all aspects of religious observance and practice, as well as belief . . ." in order to require



Consequently, the attempt by the court below to distinguish *Aiello because* that case did not involve private insurance plans and Title VII must fail. There has been no showing of proscribed sex discrimination whether Title VII or the equal protection clause is involved.

**B. Pregnancy, Just as Any Other Physical Disability, May Be Excluded from Insurance Coverage on Any Reasonable Basis.**

In addition to holding the California plan valid for reasons set forth in part A of this brief, the Court in *Aiello* recognized that the insurer has a reasonable and legitimate interest in utilizing available benefit funds effectively and in maintaining contribution rates at a level that will not burden those who require insurance coverage.[6] Thus, the Court observed that where

employers to fully adjust their work schedules to accommodate religious practices. As the sponsor of this amendment stated, his purpose was to resolve any uncertainty as to the scope of religious protection resulting from this court's ruling in *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971). Legis. Hist. of Equal Employment Opportunity Act of 1972 (GPO November 1972) p. 713 (remarks of Senator Randolph). Congress' failure to also broaden the scope of sex discrimination protection must be taken as demonstrating Congress' approval of this Court's *Martin* rationale, and this legislative history is further support for the position advanced by the Chamber herein.

[6] The Court stated in *Aiello:*

> "The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance." 417 U.S. at 496.

the inclusion of pregnancy benefits will result in increased premiums or decreased benefit payments for other covered disabilities, the exclusion of pregnancy is legitimate and reasonable. *Aiello* at 493-494.

The Chamber believes that this aspect of *Aiello,* like that discussed in part A, *supra,* is equally apposite to the similar issues arising under Title VII in this case. In *Aiello,* the Court upheld the exclusion of pregnancy since this exclusion was rationally related to the State's legitimate cost saving interests in maintaining an efficient insurance program. There is no logical reason to subject private insurers to a more stringent test when the legality of an exclusion of pregnancy related disabilities is at issue.[7] Rather, as stated, since both the Fourteenth Amendment and Title VII represent interdictions against discrimination, the test to determine whether these proscriptions have been violated should be identical absent an explicit expression from this Court manifesting a contrary intent.

Furthermore, inasmuch as the objective of both state and private insurers is to construct a comprehensive benefit program at a minimal cost, it follows that the test of legitimacy also should be equivalent whether the Fourteenth Amendment or Title VII is involved.[8]

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[7] In California, it appears that approximately 10% of the disability insurance there written is administered by private employers. These employers are required by California law to provide benefits identical to or greater than those provided by the state. Unless *Aiello* applies to private insurers, the state will be permitted to exclude pregnancy from its plan while a private insurer who models his plan after the state's may be denied this right. Such a result would be grossly inequitable.

[8] There can be no doubt that the development of the equal employment opportunity law under Title VII of the Civil Rights Act of 1964 has been significantly affected by concepts first enunciated in equal protection cases involving education, voting or other civil rights. See, *e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971) (citing *Gatson County* v. *United States,* 395 U.S. 285 (1969) (re. educational disadvantage and voting standards); *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159 (CA 3), *cert. denied,* 402 U.S. 944 (1971), and *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (CA 2, 1968) (re. the appropriateness of color conscious remedial action in public school employment and in public housing matters); *Jones* v. *Lee Way Motor Freight, Inc.,* 431 F.2d 245 (CA 10, 1970), *cert. denied,* 401 U.S. 954 (1971) (citing *Alabama* v. *United States,* 304 F.2d 583 (CA 5), *aff'd. mem.,* 371 U.S. 37 (1962) (re. the significance of statistical evidence showing that blacks had not served on juries in areas in which blacks constituted a substantial part of the population); *Papermakers Local 189* v. *United States,* 416 F.2d 980 (CA 5, 1969), *cert. denied,* 397 U.S. 919 (1970) (citing *Louisiana* v. *United States,* 380 U.S. 145 (1965) and other cases) (re. facially neutral standards in voting registration as perpetuating past discrimination). Thus, the constitutional and statutory precedents have been basically merged. Now that Title VII has been made applicable to the employment practices of state and local governments by the Equal Employment Opportunity Act of 1972, the need for consistency in the principles applicable to public and private employers is even more apparent. See *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 638 n.8 (1974).



To read *Aiello* as not applying to private insurers would produce the anomaly where a state, possessing manifold resources from which to obtain funds, nevertheless would be permitted to exclude pregnancy from its benefit program as too costly, while a private insurer lacking such resorts could be required to endure the exorbitant cost of coverage or to terminate utterly his benefit program.[9]

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[9] The *amicus* has provided relevant examples of the cost factor in Appendix A of this brief It is beyond dispute that inclusion of pregnancy disability in private insurance plans will increase the cost of coverage. Consequently, an individual employer should not be required to demonstrate the extent of this increase to him before being able to lawfully exclude pregnancy from his benefit program.

The *Aiello* rationale is in harmony with previous decisions of this Court. That is, on analysis, *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), while frequently cited by plaintiffs in Title VII proceedings, is in accord with the *Aiello* decision and with the positions herein asserted. In *Griggs* the employer required as a condition of employment that applicants have a high school education or that they pass a standardized general intelligence test. These requirements operated to disqualify Blacks at a substantially higher rate than white applicants. Because these requirements were not shown to be related to the successful performance of the job for which the applicants were being considered, the Court held that the employer violated Title VII by maintaining these requirements, even though the employer did not intend to discriminate against Blacks. This Court stated: "If an employer practice which operates to exclude Blacks cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431.

While the Court in *Griggs* found that the requirements *were unrelated to measuring job performance, and, therefore, discriminatory,* the Court stated that nothing in the Act prevents an employer from using tests which relate to job performance, and employers may require applicants to be fit for the job. In *Jefferson* v. *Hackney,* 406 U.S. 535 (1972),[10] the Court

[10] *Jefferson* involved a state's determination to allocate a fixed pool of welfare money by paying AFDC benefits at 75% of need while paying other insurance programs at a higher percentage, e.g., old age assistance at 100% of need and aid to blind at 95% of need. AFDC recipients challenged this determination by alleging racial discrimination, since the proportion of AFDC recipients who were black or Mexican-American was higher than the proportion of aged, blind or disabled welfare recipients who fell within these minority groups. The Court found no invidious discrimination under the Fourteenth Amendment and said racial discrimination was not proven. The Court did not substitute its judgment for the State's determination on how best to allocate the welfare money, even though different policy judgments were possible, because the State's conclusion that the aged and infirm were less able to bear the hardships of an inadequate living standard than were the young AFDC recipients was reasonable.



amplified and interpreted this aspect of *Griggs.* The Court stated (406 U.S. at 549):

> We have, however, upheld the findings of nondiscriminatory purpose in the percentage reductions used by Texas, and have concluded that the variation in percentages is *rationally related* to the purpose of the separate welfare programs. The Court's decision in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), is therefore inapposite. In *Griggs,* the employment tests having racially discriminatory effects were found not to be job related, and *for that reason were impermissible under the specific language of Title VII of the Civil Rights Act.* Since the Texas procedure challenged here *is related* to the purposes of the welfare program, it *is not* proscribed by Title VI simply because of the variances in the racial composition of different categorical programs. (Emphasis supplied).

In both *Griggs* and *Jefferson* the challenged procedures had racially discriminatory effects. The job testing procedure in *Griggs* violated Title VII because it was not related to job performance. In *Jefferson* the differences in benefit payments did not violate Title VI because it could be reasonably said that these differences in payment were related to the legitimate pur-

poses of the welfare program.[11] *Griggs, Jefferson,* and *Aiello* have an apparent consistency: when conduct challenged as discriminatory has a relationship to legitimate goals, it will not automatically be found to have violated the Constitution or equal opportunity statutes.

Here, just as in *Aiello,* the pregnancy exclusion is reasonably related to the legitimate design of the insurance program. Thus, it must be kept in mind that when an employer has only a finite amount of money to expend on coverage for employees of both sexes, he must be accorded the right to determine how to utilize those funds most effectively for the benefit of all.[12]

Furthermore, while *Griggs* required that employers justify their challenged conduct by showing business necessity, that standard should not be applied in this case. In the first place, *Griggs* involved discrimination

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[11] In *Jefferson,* a Title VI case, the Court utilized a test virtually identical to that employed in *Griggs* involving Title VII to determine the legitimacy of challenged conduct. The logic of this consistency is evident, since whether challenged conduct is related to legitimate objectives is a question of fact, and therefore it is reasonable to employ the identical criteria to resolve this question whether Title VI or VII is involved. Similarly, the question of whether employer conduct amounts to proscribed sex discrimination is first one of fact. Accordingly, it is logically sound to find that prohibited sex discrimination under Title VII can occur only in those circumstances where it would arise under Amendment Fourteen.

[12] *Local 189 United Paper Makers and Paper Workers* v. *United States,* 416 F.2d 980, 992 (CA 5, 1969) quoted in *Newman* v. *Delta Air Lines,* 374 F. Supp. 238, 7 F.E.P. Cases 26 (N.D. Ga., 1973). "[W]hen the defendant's conduct evidences an economic purpose there is no discrimination under Title VII . . ." See also *Hodgson* v. *Behrens Drug Co.,* 475 F.2d 1041 (5th Cir.) *cert. denied,* 414 U.S. 822 (1973), holding that economic benefits to an employer can justify a wage differential between men and women under the FLSA (Section 6(d)(1)).



between *different* races; in the area of pregnancy fringe benefits the sexes are not similarly situated and, as *Aiello* held, and part A of this brief contends, a policy excluding pregnancy benefits does not, therefore, constitute illegal sex discrimination. Second, the effect of the employment requirements in *Griggs* was to deny a large segment of the population of a North Carolina county employment opportunities. These requirements caused discrimination and had a pervasive effect against virtually the entire black population of that county because they did not have the educational background to meet the employer's requirements. Here, just as in *Aiello,* the exclusion from benefit programs of pregnancy benefits adversely affects only a portion of one sex some of the time while at the same time having a salutary effect on members of that sex generally as well as on all other employees. Just as in *Aiello* and unlike *Griggs,* the exclusion here will result in reducing the plan's cost and therefore afford other benefits to both women and men which would be otherwise unavailable.[13]

### C. The EEOC's Sex Discrimination Guidelines Are Invalid and Are Entitled to No Weight.

#### 1. Aiello Repudiated These Guidelines.

The *Aiello* opinion indicates that EEOC guidelines that mechanically equate differential treatment of pregnancy with statutorily proscribed sex discrimination are invalid.[14] Thus, the *Aiello* dissent expressly relied upon these guidelines to support *its* contention that the mere exclusion of disabilities inextricably linked to one sex inevitably constitutes sex discrimina-

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[13] See Appendix A to this brief.

[14] Section 1604.10, effective April 5, 1972.

tion. As stated, the majority rejected this argument and instead found that the exclusion of pregnancy does not constitute proscribed sex discrimination, since this exclusion does not affect women in an area where they are similarly circumstanced with men. This finding, applicable to cases arising under Title VII as well as those under the Fourteenth Amendment, in and of itself demonstrates that this Court has repudiated the EEOC's pregnancy guidelines.

Furthermore, the *Aiello* Court observed that the exclusion of pregnancy fostered the State's legitimate interest in establishing a benefit program that would function in accordance with insurance concepts and in maintaining the fiscal integrity of this program. It is transparent from reading the EEOC's guidelines relevant to this case, that *they* do not permit an evaluation of cost considerations in determining whether the exclusion of pregnancy from a disability plan is legitimate. Thus, in finding that distinctions involving pregnancy do not constitute proscribed sex discrimination and that cost considerations are relevant in determining the legality of a pregnancy benefit exclusion, *Aiello* has unequivocally repudiated these guidelines.[15]

**2. Independent Considerations Demonstrate These Guidelines Are Invalid.**

There are additional reasons wholly apart from those considered by the *Aiello* court that establish the invalidity of the pregnancy guidelines. Thus, the guidelines

[15] As urged, there is nothing in *Aiello* to suggest that cost considerations for excluding pregnancy will be evaluated *only* when a *governmental* benefit plan is involved. Rather, the Court's reference to "insurance concepts" signifies that this Court will consider such matters when a similar exclusion in private plans is involved.



are inconsistent with prior opinions, were not issued when Title VII was enacted, and demonstrate none of the thoughtfullness commonly associated with agency expertise.[16]

**a. The Commission's sex discrimination guidelines do not constitute a contemporaneous construction of Title VII.**

A brief odyssey through the Commission's pronouncements on fringe benefits and pregnancy is necessary to fully appreciate the explicit inconsistency of the Commission's position.

Between 1966, shortly after Title VII became effective,[17] and 1969 the Commission issued a number of opinions announcing how it would apply Title VII when encountering the issue of fringe benefits and pregnancy. These opinions reveal a consistency of approach to this issue and generally informed employers that *they were not required to provide the same fringe benefits for pregnancy as they provided for illness or injury.*

For example, in an opinion letter, dated November 15, 1966, sixteen months after Title VII became law, the Commission's General Counsel stated:

> Gentlemen:
>
> You state that under your collective bargaining agreement *male and female employees are granted sick leave with pay. Female employees, however,*

[16] These factors commonly have been examined by courts in evaluating the weight to be given to administrative guidelines. *Espinoza* v. *Farah Manufacturing Co., supra; Skidmore, et al.* v. *Swift and Co.*, 323 U.S. 134 (1944); Davis, *Administrative Law Text*, Section 5.03 (1959).

[17] Title VII of the Civil Rights Act of 1964 was enacted on July 2, 1964, with an effective date of July 2, 1965.

*are granted maternity leaves without pay;* although their services are not terminated. You inquire whether this policy is in compliance with Title VII of the Civil Rights Act of 1964.

*The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity,* since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. Accordingly, we believe that to provide substantial equality of employment opportunity for both sexes, there must be special recognition for absence due to pregnancy, and for this reason have stated that, generally speaking, a leave of absence should be granted for pregnancy whether or not it is granted for illness. On the other hand, we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness, and, consequently, it is our view that the policy you describe is not in violation of Title VII.

Sincerely yours,

/s/ CHARLES T. DUNCAN
Charles T. Duncan
*General Counsel*
(November 15, 1966)
(emphasis supplied) [18]

Within sixteen months after the enactment of Title VII, then, the Commission had advised employers that they need not "provide the same fringe benefits for pregnancy as [they provided] for illness . . ." and that the Commission did not require comparable treatment for illness and pregnancy.

[18] The General Counsel promulgated virtually identical statements in November and December, 1966. See, e.g., CCH Employment Practices 12-21-66, paragraph 17,304.43.



The Commission, still demonstrating consistency, maintained this position through 1969. On June 19, 1969, a representative of the Commission announced that the Commission "views pregnancy as a temporary disability, and has not to date equated it with sickness." The Commission then ruled that an employer *may grant maternity leave without pay even though it provided pay for sick leaves.*[19]

The Commission's consistency came to an abrupt halt on April 5, 1972. Then for the first time the Commission declared in an opinion guideline that pregnancy and illness were the same after all for the purposes of an employer's disability policy.[20] The 1972 opinion, of

[19] CCH, New Developments Paragraph 8804, EEOC Attorney Discusses Sex Discrimination and Fringe Benefits Under Title VII, 1964 Civil Rights Act.

[20] Whether expressed in a guideline, letter or reported investigation of a specific charge, the Commission's statements and views are merely its *opinions* concerning *inter alia* whether particular conduct violated Title VII. Any so called "EEOC decisions" which may concern the subject in question are not, therefore, decisions at all, but merely reported investigations following a charge, and the report contains the investigators' or prosecutors' opinion that "reasonable cause" does or does not exist to believe Title VII has been violated. Moreover, the so called "decisions" have been of even less value than the guidelines. While a guideline is the expression of a current opinion by the administrator on the meaning of the statute, a reported investigation states merely that based on the *facts then present* in that case there is or is not *reasonable cause* to believe that the Act has been violated. Arguments or reasons advanced as the case progresses can alter the opinion, and it is of little guidance unless a subsequent case is factually "on all fours". *Robinson* v. *Lorillard Corporation,* 444 F.2d 791, 801 (CA 4, 1971). Thus, while the arguments in this brief are directed primarily against the Commission's 1972 guideline opinion, these arguments, here and elsewhere, may apply equally to any investigation reports that may represent a change in direction by the Commission.

course, has not been consistently applied for a long period of time because it is only the most recent Commission view on the subject, and because it is totally and remarkably inconsistent with prior opinions issued over the last several years. Moreover, it is these prior opinions, rather than 1972 opinion, that are contemporaneous constructions of Title VII.[21] What weight then can be given to this 1972 opinion? Applying the criteria of consistent application and contemporaneous construction, the answer is, "none". Moreover, the answer does not change when other relevant criteria are applied.

**b. The pregnancy guidelines were not issued with the evident thoughtfulness that marks agency expertise.**

There is no evidence that the 1972 guidelines were formulated with consideration for alternatives or ramifications.[22] Moreover, when the Commission, after sev-

[21] Since the opinion letters referred to in the test represent contemporaneous interpretations of Title VII and are consistent with each other, it is these letters, rather than the guideline in question that are entitled to judicial deference. *Williams* v. *New Orleans Steamship Assn.*, 341 F. Supp. 613 (E.D. La., 1972); *N.L.R.B.* v. *Boeing Co.*, 412 U.S. 61 (1973).

[22] The pregnancy guidelines are distinguishable from those considered in *Albemarle Paper Co.* v. *Moody*, — U.S. —, 95 S.Ct. 2362 (1975). The guidelines considered in *Albemarle* were found to have drawn upon the professional standards of test validation established by the American Psychological Association.

Here, by contrast, the guidelines at issue were promulgated without expert advice or outside testimony. Thus, the Commission did not hold public hearings concerning the impact of the new guidelines on the business community. See Deposition of Ms. Sonia P. Fuentes, Chief of the Legislative Counsel Division of the Commission when the new guidelines were published. An abstract



eral years of consistently applying the Act, abruptly changed its interpretation and consequent application of the Act, it must prove clearly and convincingly that its new interpretation is justified by a change in Congressional policy or by new facts not previously in existence.[23] Only if it meets this explicit proof burden is its new opinion entitled to any judicial consideraton. The Commission has offered no such proof here. Indeed, its astonishing and erratic shift belies its obvious claim of expertise.

This much, then, is now clear. In evaluating the weight to give an agency's opinion as to the meaning of a statute, the courts commonly consider a variety of factors. When the Commission's 1972 guidelines concerning fringe benefits and pregnancy are viewed in light of these factors, it is clear that these guidelines are entitled to neither weight nor deference.

After promulgating the challenged guidelines, the Commission apparently hoped to rely upon *Griggs* to

of this deposition appears in the Brief for Delta Air Lines at 25, 26 in *Cohen* v. *Chesterfield County School Board*, 414 U.S. 632 (1974).

Public hearings appear to be mandated by the APA, § 4, 5 U.S.C. § 553 (1970), where, as here, a governmental agency substantially changes its position, even though the Commission in what appears to be an effort to escape such hearings, characterized its guidelines as "interpretative" rather than substantive rules. *Columbia Broadcasting Sys., Inc.* v. *U.S.*, 316 U.S. 407, 416 (1942). Since the Commission exceeded its power by promulgating these guidelines without public hearing, this Court should disregard them.

[23] *Newman* v. *Delta Air Lines, Inc., supra.* There, the court held that the guideline here in question was not binding on the court because there appeared to be no factual basis upon which the guideline was drawn. The court also found that the denial of employment benefits to employees on maternity leave did not violate Title VII.

secure prompt judicial approval. However, *Griggs* is distinguishable and, indeed, supports the view that the guidelines in question are entitled to no weight. In the first place, the statement by the Court in *Griggs* that agency guidelines were entitled to "great deference" (401 U.S. at 433-34) must not be overvalued, but rather should be confined to the facts of that case. As the Sixth Circuit observed in *Espinoza* v. *Farah Mfg. Co.*, 462 F.2d 1331, 1334 (1972):

> In Griggs, the Court found that "(s)ince the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress." 401 U.S. at 434. Moreover, in that case the Court made an independent analysis of the pertinent legislative history and decided that "the conclusion is inescapable that the EEOC's construction.... comports with Congressional intent." 401 U.S. at 436

*Espinoza* adopted the logic of this statement.

Here, unlike *Griggs* and contrary to the court below, there is no evidence whatever that Congress intended an employer to provide fringe benefits for pregnancy on the same terms as he provides benefits for illness or to treat these distinct conditions in the same manner.[24]

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[24] There was little or no legislative history on sex discrimination. *Newman* v. *Delta Air Lines, Inc.*, *supra*. However, Congress had ample precedent had it desired to require an employer to treat pregnancy and illness in the same manner. In 1968, considering the Railroad Unemployment Insurance Act of 1946, Congress amended the definition of a day of sickness in that Act to include with respect to "a female employee, a calendar day on which because of pregnancy, miscarriage, or the birth of a child (i) she is unable to work or (ii) working would be injurious to her health." (45 U.S.C. 351(k)(z)).

It is apparent, therefore, that had Congress desired to amend the Civil Rights Act in 1972 or at any time to require employers to treat pregnancy and illness in a similar manner when formulating or implementing benefit programs, Congress would have enacted such an amendment. See footnote 4, *supra*.

Indeed, inasmuch as the legislative history of subsequent legislation is accorded weight in determining intendment of earlier legislation involving the same subject (*Glidden Company* v. *Zdanok*, 370 U.S. 530, 541 (1962)), Congressional commentaries encompassing the ERA are relevant here. These commentaries demonstrate that in fashioning the ERA, Congress did not intend to preclude regulations based upon the unique physical characteristics of one sex. (H.R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971), S. Rep. No. 92-689, 92nd Cong., 1st Sess. 12 (1972), 117 Cong. Rec. H 9368 (daily ed. Oct. 12, 1971). Accordingly, it may be presumed that Congress does not intend to foreclose the regulation of pregnancy benefits by employers or brand exclusion of these benefits from insurance plans as unlawful sex discrimination.



In addition, when *Griggs* was decided the Commission did not have prosecutorial powers. These powers were accorded to the Commission on March 24, 1972. Yet while giving these new prosecutorial powers to the Commission, Congress did not accord to the Commission the power to make substantive law. The relevant legislative history leaves room for no reasonable doubt, since in Section 713(a) of Title VII (42 U.S.C. 2000e-2000e-12(a)), the word "procedural" was inserted by amendment on the floor of the House to make clear that the Commission did not have the power to make substantive regulations. 110 Cong. Rec. 2575.

The Commission was rather required to prosecute its cases in a federal district court, and it is the courts that are to interpret the Civil Rights Act and apply the law. There is no doubt that Congress can bestow upon an agency the power to make substantive law. The National Labor Relations Board is an example of an agency to which Congress has given the power to make such law. See 29 U.S.C. § 151 *et seq.* Within the statutory framework of the National Labor Rela-

tions Act, the General Counsel and the Board itself have the power to create a substantial body of labor law and courts have justifiably deferred to the Board's expertise.[25] Because the Commission has not been given the power to create substantive law, its guidelines may now inform the public of what the prosecutor considers illegal, but there is no reason for a court to accord the prosecutor's views a special sanctity or to view them as a body of law having binding force. The Commission's opinions are just that—its view of what constitutes illegal conduct—and a court should treat them as nothing else. The Commission, like the Justice Department, has been accorded only prosecutorial functions, and like the Justice Department cannot fashion the law it elects to present. This is the fundamental distinction between agencies given only prosecutorial roles and those, such as the National Labor Relations Board, to which Congress has given adjudicative and regulatory functions as well as prosecutorial duties. When dealing with the Commission in its new prosecutorial function, the court has the ultimate responsibility to determine the law and it must not abdicate this responsibility to the prosecutor by deference to his guidelines.

[25] The Board's rules concerning what constitutes an effective contract bar to a representation election are one example.



## CONCLUSION

For all the foregoing reasons, the *amicus* urges that the Court reverse the decision of the court below.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

The Chamber has learned of the following facts and presents them to this court for its consideration.

The Health Insurance Association of America and the American Life Insurance Association, representing approximately 500 life and health insurance companies and accounting for approximately 90% of the total private health and life insurance programs in force in the United States, have stated:

> Under a typical disability income plan with an average group of employees [assuming 38% to 40% are women], the addition of a disability income benefit to cover maternity absences would result in an additional cost to the employer of about 40 to 50 percent of his current costs for the plan. (Joint comments filed in response to a proposal by the Office of Federal Contract Compliance to require that federal contractors provide disability benefits for workers absent from work due to pregnancy, 38 Fed. Reg. 35336-35338 (December 27, 1973); Comment at 9 (February 11, 1974) (Reply brief for Appellant, page 18, *Geduldig* v. *Aiello, supra.*

The experience of one major employer, American Telephone and Telegraph Company, confirms the validity of the foregoing statement. Based upon its calculations, considering the average salary and seniority of eligible women, costs for disability benefits would have been increased by $15,762,663 in 1970-71 and $19,037,330 in 1971-72 if pregnancy had been covered. These estimates include only basic disability costs and exclude such wage related costs as social security, pension, health insurance, etc. The estimate assumes an average pregnancy disability of eight weeks. Costs would have increased respectively to $32,739,007 and $39,539,070 if payment for the full average maternity leave period of five and one-half months had occurred.

Moreover, if pregnancy had been included in the survey years, 21% of the total days for which disability payments

were made would have been attributable to 5% of the eligible women or 2.5% of the employer's working force. No other disability group, even considering both sexes, could generate such a great number of disability days for which benefits would be paid. (Page 11 in Brief of American Telephone and Telegraph Company as *amicus curiae* in *Geduldig* v. *Aiello, supra.*)

The State of California's experience under its unemployment insurance code is consistent with the foregoing. Women presently receive $1.27 in benefits for each $1.00 contributed while men receive $.80. The addition of benefits for normal pregnancy, assuming that contributions did not increase nor benefits decrease, would cause the female benefit rate to increase to $2.33 while the male rate would remain at $.80. (According to the State, in order to preserve the fiscal integrity of its program, contributions would have to increase or benefits decrease; in either event the benefit ratio between men and women would remain the same.) The experience of the State of Hawaii is similar. Coverage of pregnancy under the State's disability program has caused disability premiums for females to increase from $4.00 per month to $8.76 per month. (Reply brief for the Appellant, pages 17-21 in *Geduldig* v. *Aiello, supra.*)

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1589

GENERAL ELECTRIC COMPANY,

*Petitioner,*

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

*Respondents.*

No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

*Petitioners,*

v.

GENERAL ELECTRIC COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-RESPONDENT GENERAL ELECTRIC COMPANY

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1589

GENERAL ELECTRIC COMPANY,

*Petitioner,*

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

*Respondents.*

No. 74-1590

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## BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-RESPONDENT GENERAL ELECTRIC COMPANY

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Petitioner-Respondent, General Electric Company.

## INTEREST OF THE *AMICUS CURIAE*

The National Association of Manufacturers ("NAM") is a non-profit voluntary business association, organized as a membership corporation under the laws of the State of New York. Its members comprise manufacturing and related concerns of all sizes located throughout the United States. The NAM, therefore, represents a substantial number of the nation's industrial employers. Many of its members have sickness and accident benefit plans and, therefore, may be directly affected by the Court's decision in this case.

Additionally, if the decision below is affirmed, labor-management relations will be affected. Since numerous NAM members have collective bargaining agreements providing for payment of health and disability benefits, in future negotiations members may choose either to limit or to not offer any such benefits rather than comply with the decision of the court below. Fundamental labor-management relations and policies, therefore, will be affected by this Court's decision.

Accordingly, the NAM has a proper interest in the resolution of the issues before the Court in this case.

## SUMMARY OF ARGUMENT

The Civil Rights Act of 1964 was enacted to implement and secure certain rights guaranteed by the Constitution. H.R. Rep. No. 88-914, 88th Cong., 2d Sess. (1963). The phrase "sex discrimination", as used in but undefined by the Act, can have only one meaning: the meaning that is compelled by the Constitution. This Court has already determined the constitutional definition in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). The "sex discrimination" prohibited by the Act must be the same as the "sex discrimination" prohibited by the equal protection clause. Since *Aiello* held that a plan identical to General Electric's in all material



respects did not violate the equal protection clause, it follows that General Electric's sickness and accident benefit plan does not violate Title VII of the Act.

The EEOC Guideline relating to pregnancy, 29 CFR § 1604.10, is not entitled to the judicial deference normally accorded an administrative agency's action. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The legislative history concerning Title VII's sex discrimination provision and the social context which generated the 1964 Civil Rights Act clearly demonstrate that the Guideline is inconsistent with the intent of Congress. In addition the Guideline reflects a public policy which requires that women be given preferential treatment with respect to employment benefits. Congress did not expressly adopt such a policy in either the original Title VII or the 1972 Amendments. The Guideline, therefore, is to be accorded no judicial deference. *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

Moreover, during the years 1966 through 1972, the EEOC maintained a policy that plans similar to General Electric's did not violate Title VII. Congress approved this policy by amending Title VII without altering that policy. Therefore, the EEOC Guideline, 29 CFR § 1604.10, is inconsistent with the intent of Congress.

## THE ARGUMENT

### I. The Phrase "Sex Discrimination" as Used in Title VII of the Civil Rights Act of 1964 Can Have Only One Meaning: The Meaning That Is Compelled by The Constitution as Formulated in *Geduldig* v. *Aiello*.

The Civil Rights Act of 1964 was enacted to implement and secure certain rights guaranteed by the Constitution.[1]

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[1] "A number of provisions of the Constitution of the United States clearly supply the means 'to secure these rights' ['considered the birthright of all citizens']" . . . and this Act "resting upon this authority is designed as a step toward eradicating significant areas of discrimination on a nationwide basis." H.R. Rep. No. 88-914, 88th Cong., 2d Sess. 18 (1963).

H.R. Rep. No. 88-914, 88th Cong., 2d Sess. (1963). The phrase "sex discrimination", as used in, and undefined by the Act, can have only one meaning: the meaning that is compelled by the Constitution. Therefore, the "sex discrimination" prohibited by the Act must be the same as the "sex discrimination" proscribed by the equal protection clause.

This Court has already formulated the constitutional meaning of "sex discrimination" in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). That case held that an income protection program which excludes pregnancy from its list of compensable disabilities does not involve "discrimination based upon gender as such;" it does not violate the Constitution. *Geduldig* v. *Aiello, supra,* at 496-97 n. 20. Since the plan now being reviewed by this Court is similar in all material respects to the plan in *Aiello,* General Electric's plan clearly does not violate Title VII of the Act.

The Court below incorrectly concluded that *Aiello* is not dispositive of the issue now before this Court, because, the court maintained, *Aiello* involved interpretation of the Constitution, not the statute and administrative guideline involved in this case. *Gilbert* v. *General Electric Company*, 519 F.2d 661, 667 (4th Cir. 1975). But it would seem apparent, if not axiomatic, that decisions that interpret the Constitution provide "valuable aid in determining the *legitimate boundaries of statutory meaning.*" *2A Sutherland on Statutory Construction* § 56.04 (Emphasis supplied). Title VII must be construed "so as to comport with constitutional limitations." *Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548, 571 (1973). These rules of statutory construction avoid a clearly absurd result; otherwise a statute implementing a provision of the Constitution could be interpreted to prohibit conduct which the courts had determined permissible under that very constitutional provision. *Chance* v. *Board of Examiners,* 458 F.2d 1167, 1176 (2nd Cir. 1972).



In *State ex. rel. Chobot* v. *Circuit Court for Milwaukee County,* 61 Wisc. 2d 354, 212 N.W. 2d 690 (1973), the court was required to construe the undefined term "obscenity" as it appears in the state's obscenity statute. The court supplied the definition formulated in the first amendment case, *Miller* v. *California,* 413 U.S. 15 (1973).

> [When] words which carry constitutional implications . . . [are] used without an express definition in the statute, the legislature must intend the courts to furnish its [*sic*] meaning from time to time as the constitutional concept of [the] words var[y].

*Chobot* v. *Circuit Court for Milwaukee County, supra,* at 696.

This court definitively stated in *Aiello* that an insurance plan's exclusion of pregnancy-related disabilities from compensable disabilities is not discriminatory on the basis of sex and, therefore, does not violate the Constitution. That holding supplies the constitutional definition of "sex discrimination". This Court must apply the constitutional definition of "sex discrimination" to that term's usage in Title VII; the constitutional definition is the statutory definition.

The statement of the court below that

> [t]here is a well-recognized difference of approach in applying constitutional standards under the Equal Protection Clause as in *Aiello* and in the statutory construction of the "sex blind" mandate of Title VII[2]

is not supported by the case law.

The case law demonstrates that there is only one definition of "sex discrimination"; opinions deciding Title VII cases freely adopt the definition of "sex discrimination" developed in the line of cases decided on equal protection

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[2] *Gilbert* v. *General Electric Company, supra,* at 667.

clause grounds. Comment, *Geduldig* v. *Aiello*: *Pregnancy Classifications & the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 467 (1975). Even the district court opinion in the case before this Court cites a case decided under the equal protection clause in support of its Title VII construction.[3] *Gilbert* v. *General Electric Company*, 375 F. Supp. 367, 386 (E.D. Va. 1974). In *United States* v. *Chesterfield County School Dist., S.C.*, 484 F.2d 70 (4th Cir. 1973), the court held that "the test of validity [of the employer's allegedly sexually discriminatory employment practices] under Title VII is not different from the test of validity under the fourteenth amendment." *Id.*, at 73. (Citations omitted). The same logic is evident in *Rafford* v. *Randle Eastern Ambulance Serv., Inc.*, 348 F. Supp. 316 (S.D. Fla. 1972), which held an employer's dismissals of employees for violation of the company's no-beard rule did not violate Title VII because the dismissals would not violate the Constitution. *See also, Cohen* v. *Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973) (Winter, J. dissenting), *rev'd.* 414 U.S. 632 (1974). The EEOC, itself, has tacitly conceded that there is but one definition of "sex discrimination";

> the standards the Court should apply in determining the constitutionality of § 2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII. . . .[4]

Similarly the definition of "sex discrimination" developed in Title VII cases has been used in opinions deciding sex discrimination cases brought on constitutional grounds. In *Scott* v. *Opelika City Schools*, 63 FRD 144 (M.D. Ala.

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[3] *Cohen* v. *Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973), *rev'd.* 414 U.S. 632 (1974).

[4] Brief for the EEOC as *Amicus Curiae* in *Aiello* v. *Hansen*, 359 F. Supp. 792 (N.D. Cal. 1973), *rev'd. sub nom. Geduldig* v. *Aiello*, 417 U.S. 484 (1974), at 1.



1974), a teacher challenged the school board's policy of dismissing pregnant teachers. The district court said, in pertinent part,

> [i]f this case were being litigated under Title VII, defendants' maternity leave treatment would be unable to stand . . . . [T]his [same] result is equally called for under [the Constitution].

*Id.*, at 149.

By applying the constitutionally mandated definition of "sex discrimination", as determined in *Aiello*, it follows clearly that General Electric's sickness and accident benefit plan would not violate the equal protection clause if that applied directly. It is equally clear for the reasons stated above that the sex discrimination prohibited in Title VII does not—and cannot—prohibit more than that prohibited by the Constitution. By this standard, therefore, General Electric's sickness and accident benefit plan does not violate Title VII.

**II. The EEOC Guideline Is Not Entitled to Judicial Deference.**

The EEOC Guideline relating to pregnancy, 29 CFR § 1604.10, is not entitled to the judicial deference normally accorded an administrative agency's action. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The legislative history concerning Title VII's "sex discrimination" provision and the social context which generated the 1964 Civil Rights Act clearly demonstrate that the Guideline is inconsistent with the intent of Congress. It, therefore, is to be accorded no judicial deference. *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

The opinion in a recent Title VII decision stated that the legislative history regarding "sex discrimination" permits the negative inference that "Congress in all probability did not intend for its proscriptions of sexual discrimination to have significant and sweeping implications." *Wil-*

*lingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (*en banc*). Congresswoman Green, in remarks made during the 1964 debate, stated that "because of biological differences between men and women, there are different problems [for business managers and industrial concerns] which will arise in regard to employment". 110 Cong. Rec. 2584 (1964). Congresswoman Green stated, moreover, that none of these problems could have been understood, as there were no hearings on the implications of a "sex discrimination" provision. 110 Cong. Rec. 2720 (1964).

Consideration was also given to the fact that the scope of the sex discrimination problem made it an unsuitable topic for inclusion in the Act. Representative Emmanuel Celler read into the record a letter from the Secretary of Labor on that topic. The Secretary believed that the inclusion of sex discrimination would not be wise; the President's Commission on the Status of Women had previously concluded that "discrimination based on sex . . . involves problems sufficiently different from discrimination based on . . . other factors . . . to make separate treatment preferable." 110 Cong. Rec. 2485 (1964).

The Secretary's recommendation was rejected; sex discrimination is proscribed by the Act. This Court is required to decide what type of employer behavior is an act of "sex discrimination" and, therefore, intended by Congress to be proscribed. This Court must consider the political, economic, and social context in which Title VII was passed, as well as its textual context. *Argosy Limited* v. *Hennigan*, 404 F.2d 14 (5th Cir. 1968). A particular portion of a statute must be construed "in conformity with its [the statute as a whole] dominating general purpose. . . ." *Carter* v. *Panama Canal Company*, 463 F.2d 1289, 1300 (D.C. Cir. 1972).

The Civil Rights Act of 1964 was written during a period



of intensifying racial frustration and unrest. It was the expression of the American people's attempt to rectify decades of unconscionable treatment of blacks.[5] "The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs* v. *Duke Power Co., supra*, at 429-30. The Act, therefore, was intended to outlaw employment practices which express an employer's stereotypical beliefs concerning blacks. The employer could no longer prefer to recruit, hire, fire, place, or promote an employee solely because of that employee's race.

The phrase "sex discrimination" must be interpreted in conformity with this general non-preferential legislative intent. Congress intended the Act, as enforced in part by the EEOC, to prohibit employers from "keeping the woman in her place." The male employee could no longer be preferred by an employer in the hiring and promotion process. H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4 (1971). Title VII focuses on preferential employment practices: "discrimination based upon gender, [race, religion, and national origin] as such." *Geduldig* v. *Aiello, supra*, at 496-97 n. 20.

That type of employer action is not present in this case.

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[5] I STATUTORY HISTORY OF THE UNITED STATES (Chelsea House Publishers, 1970); President Kennedy stated that the Act was needed to meet "a rising tide of discontent that threatens the public safety." 109 Cong. Rec. 11,174 (1963); Congresswoman Green stated that the major objective of the Act was "to have the Federal Government exercise its power in ending discrimination against Negroes." 110 Cong. Rec. 2721 (1964); a student commentator in the HARVARD LAW REVIEW said that a major motive behind the passage of Title VII was "a desire to enhance the relative social and economic position of the American black community." Note, *Developments in the Law—Employment Discrimination & Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113 (1971).

"There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Geduldig* v. *Aiello, supra,* at 496-97. The purpose of the Act is to equalize opportunity, not establish advantages for either men, women, blacks, or whites. If the decision below is affirmed, an advantage that was not contemplated by Congress would be created. Pregnant women would be improperly afforded preferential treatment because women hold a "biologically more burdensome place in the scheme of human existence." *Gilbert* v. *General Electric Company,* 375 F. Supp. at 383. Moreover, even the Constitution does not presently require such preferential treatment. *Geduldig* v. *Aiello, supra.*

Congress had the opportunity to require this preferential treatment during its consideration of the 1972 Amendments to Title VII. At that time the EEOC maintained a long standing policy that sickness and accident benefit plans which excluded pregnancy-related disabilities did not violate Title VII. CCH Empl. Prac. Guide ¶17,304.43 (December 21, 1966). If this Court is to affirm the decision of the court below, it will necessarily have to conclude that Congress authorized the change in the EEOC position concerning the policy question of preferential treatment for females. In order to do this, the Court must determine that Congress authorized the change either by specifically so stating in the Amendments or by otherwise clearly manifesting an intention to permit the policy change. *Toilet Goods Association* v. *Finch,* 419 F.2d 21, 27 (2nd Cir. 1969). Neither the substance of nor the debate on the 1972 Amendments indicates congressional desire to alter the established public policy that Title VII does not require preferential treatment of females.

The EEOC totally reversed its policy concerning pregnancy exclusions in sickness and accident benefit plans after the Congress approved its prior policy. This change



clearly was neither anticipated nor found necessary by Congress. The Guideline reflects a public policy which is not premised upon any congressional intent; it is not entitled to judicial deference. *Espinoza* v. *Farah Mfg. Co., supra.*

### III. Since the Coverage Exclusions in the Plan in *Aiello* and General Electric's Plan Are Identical, General Electric's Plan Must be Found To Be Not Discriminatory.

General Electric's sickness and accident benefit plan is no different from the plan that was subject to this Court's review in *Aiello.* Since the plans are the same, they must receive equal treatment. General Electric must be permitted to maintain its plan's pregnancy exclusion, in order for this Court's rulings to remain consistent.

There is authority dating back to 1892 for the proposition that persons and institutions that behave alike should be treated alike. In *Gandolfo* v. *Hartman,* 49 F. 181 (C.C.S.D. Cal. 1892), a racially restrictive covenant was held to be non-enforceable. Even though the equal protection clause was not applicable to the transaction (there was no state action), the court, in effect, applied an equal protection standard to the parties to the contract; "[a]ny result inhibited by the [C]onstitution can no more be accomplished by contract of individual citizens than by legislation." *Id.,* at 182.

Similarly, in *Bolling* v. *Sharpe,* 347 U.S. 497 (1954), the Court found the District of Columbia operating a segregated public school system like that found in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), to have violated the equal protection clause. The Court refused to allow the D.C. system to continue even though the equal protection violation argument was inapplicable.

> [I]n view of our decision [in *Brown*] that the Constitution prohibits the states from maintaining racially

> segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.

*Bolling* v. *Sharpe, supra,* at 500. See also, *Hurd* v. *Hodge,* 334 U.S. 24 (1948). With this principle in mind, it is absurd to suggest that the State of California can validly maintain a benefits plan containing a pregnancy exclusion while General Electric cannot. Constitutionally permissible conduct in the case of a state cannot be statutorily prohibited conduct in the case of a private concern.

## CONCLUSION

It is respectfully submitted that the phrase "discriminate . . . because of . . . sex," as it is used in Title VII of the Civil Rights Act of 1964, must have the same meaning as the constitutional meaning of the phrase. Since General Electric's sickness and accident benefit plan does not violate the Constitution, it does not violate Title VII. The decision of the court below must be reversed.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF AMICI CURIAE of OWENS-ILLINOIS, INC. and THE SHERWIN-WILLIAMS COMPANY

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By consent of the petitioner and the respondent as evidenced by the letters of consent appended hereto, Owens-Illinois, Inc. and The Sherwin-Williams Company file this joint brief as *amici curiae*.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

**No. 74-1589**

GENERAL ELECTRIC COMPANY,

*Petitioner,*

*v.*

MARTHA V. GILBERT,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, *et al.*,

*Respondents.*

**No. 74-1590**

MARTHA V. GILBERT,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

*Petitioners,*

*v.*

GENERAL ELECTRIC COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF AMICI CURIAE**
**of**
**OWENS-ILLINOIS, INC. and**
**THE SHERWIN-WILLIAMS COMPANY**

## INTEREST OF THE AMICI CURIAE

OWENS-ILLINOIS, INC. ("Owens-Illinois") and The Sherwin-Williams Company ("Sherwin-Williams"), major national manufacturers of container and paint products, respectively, employ throughout the United States a substantial number of female employees. Of these female employees, many fall within the "affected group" alleged to be discriminated against because of sex as a result of the failure of *Amici Curiae* to comply with maternity benefit standards promulgated by the Equal Employment Opportunity Com-

mission ("EEOC") in Section 1604.10 of its April 5, 1972, "Sex Discrimination Guidelines," 29 C.F.R. 1604.10,[1] which reversed the agency's prior interpretation of Title VII of the Civil Rights Act of 1964, as amended ("the Act"), 42 U.S.C. Sec. 2000e-2.

While their respective plans take varying forms,[2] Owens-Illinois and Sherwin-Williams — like most employers throughout the Nation — do not provide medical and disability benefits for normal pregnancy and childbirth "on the same terms and conditions as they are applied to other temporary disabilities," Guidelines, Section 1604.10(b), *viz.*, on the same bases as medical and disability benefits provided male and female employees who sustain non-occupational illnesses or injuries. As a result, Owens-

[1] Section 1604.10 (hereinafter referred to as "Guidelines") provides, *inter alia*:

> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority, and other benefits and privileges, reinstatement, and payments under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

[2] Amici Curiae plans include those unilaterally adopted and those negotiated in good faith with collective bargaining representatives of appropriate units of their employees pursuant to obligations arising under the National Labor Relations Act ("NLRA"), 29 U.S.C. Secs. 158(a)(5) and 158(d). The obligation to bargain collectively in good faith cannot be easily avoided by invocation of Title VII or Executive Order 11246, *see Williams Enterprises, Inc.*, 212 NLRB No. 132 (1974). *Cf. W. W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949) (employee benefit plans are mandatory subject of collective bargaining). Negotiated plans also raise the question of joint labor-management backpay liability exposure. *Cf. Albermarle Paper Co. v. Moody*, 95 S.Ct. 2362 (1975); *Herrera v. Yellow Freight Systems, Inc.*, 505 F.2d 66 (5th Cir. 1974); *Burwell v. Eastern Air Lines, Inc.*, 9 EPD Para. 10,234 (E. D. Va. 1975).



Illinois is a respondent to an administrative proceeding in which the EEOC has made a "Determination" that there exists "reasonable cause to believe that respondent's maternity leave policy and benefits are not in compliance with the Commission's Guidelines on Discrimination Because of Sex, and are in violation of Title VII." EEOC Charge No. TSL4-2387 (May 17, 1975). Similarly, Sherwin-Williams is a defendant in both a public and a private action alleging violation of Title VII as a result of a maternity benefits policy which does not comply with the same EEOC Sex Discrimination Guidelines. *EEOC v. Sherwin-Williams Company*, N.D. Ohio, C.A. No. C75-423, filed May 14, 1975; and *Stansell, et al. v. Sherwin-Williams Company*, N.D. Ga., C.A. No. C75-379A, filed February 28, 1975.

Owens-Illinois and Sherwin-Williams have more than an academic interest in the outcome of this *General Electric* litigation: if the decision of the United States Court of Appeals for the Fourth Circuit is allowed to stand, its principles will in all likelihood control the above-cited administrative and judicial proceedings and will require either an extremely costly expansion of non-occupational disability benefit coverage to include pregnancy and childbirth[3] or it will require a substantial reduction in benefit amounts to be paid in the future for non-occupational disabilities arising out of illness or injury in order to provide the same cover-

[3] In Appendix A to its Amicus Curiae Brief in support of the grant of the petition for writ of certiorari in *Liberty Mutual Insurance Co. v. Wetzel*, No. 74-1245, the U.S. Chamber of Commerce quoted the typical disability plan percentage cost increase which the insurance industry estimated if the Guidelines, Section 1604.10(b) are judicially approved: "the addition of a disability income benefit to cover maternity absences would result in an additional cost to the employer of about 40 to 50 percent of his current costs for the plan." *Cf.* GE Ex. 13 (A. 737-38).

According to Actuary Paul Jackson, who testified in *Gilbert v. General Electric Co.*, "the annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States would be $1,353,000,000." (A. 537, 846-55).

age for maternity and yet maintain the same disability benefit plan costs.[4]

## SUMMARY OF ARGUMENT

The issue of vital interest to Owens-Illinois and Sherwin-Williams is whether they may continue to exclude maternity and related conditions from the coverage of their non-occupational disability benefit programs without violating the "sex" discrimination prohibitions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e, *et seq*. Collaterally, *Amici Curiae* urge this Court to refuse to defer to Section 1604.10(b) of the EEOC's "Sex Discrimination Guidelines" issued April 5, 1972.

The *Amici Curiae* submit that differentiation "for [a] reason other than discrimination on account of . . . sex," Section 706(g) of the Act, 42 U.S.C. Sec. 2000e-5(g), in the provision of benefits between "pregnant women and non-pregnant persons" who are disabled as the result of non-occupational illnesses or injuries is not "sex" discrimination within the meaning of Section 703 of the Act, 42 U.S.C. Sec. 2000e-2, and believe that this Court has so suggested in its prior decisions in *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971) and *Geduldig v. Aiello*, 417 U.S. 484 (1974).

Furthermore, *Amici Curiae* contend that EEOC Guidelines, Section 1604.10(b), is not entitled to deferral because: (1) that section was adopted arbitrarily and capriciously without compliance with procedural safeguards and without consideration of either its medical or fiscal implications; (2) that section was not adopted con-

[4] A corresponding 40-50 percent reduction in benefits available to male and female employees who suffer non-occupational disabilities caused by illness or injury could be necessary in order to avoid the tremendous cost increase Section 1604.10(b) otherwise would require. (A. 537-38).



temporaneously with the Act and is not consistent with prior EEOC interpretations of the Act indicating that exclusion of maternity from disability coverage did not violate the Act; and (3) neither the Act, nor its 1964 or 1972 legislative history support deferral to such an interpretation of the Act.

Finally, *Amici Curiae* strongly believe that matters such as herein involved, which effect major alterations in social philosophy and insurance industry practices, as well as the cost thereof, dictate that the obligations such as provided in Section 1604.10(b) should be imposed, if at all (and they should not be), only by Congress after careful deliberation through the legislative hearing and debate process, rather than by administrative agency fiat or judicial decision.

All of the foregoing arguments support reversal by this Court of the decision of the United States Court of Appeals for the Fourth Circuit, accompanied by a declaration by this Court that differentiation in the provision of disability benefits on the basis of pregnancy, not sex, does not violate Title VII and Federal court deferral to EEOC Guidelines, Section 1604.10(b), is unwarranted.

## ARGUMENT

### I.

### The Failure to Provide the Same Disability Benefits to "Pregnant Women and Nonpregnant Persons" Is Not Discrimination Because of Sex Prohibited by Title VII.

Congress provided in the Act that "[n]o order of the court shall require . . . the payment . . . of any back pay . . . if [the personnel action complained of was taken] for any reason other than discrimination on account of . . . sex . . .", Section 706(g) of the Act, 42 U.S.C. Sec. 2000e-5(g). As

the United States Court of Appeals for the Fifth Circuit so carefully reasoned:

> Quite obviously, a great host of arbitrary and discriminatory employment practices, far too numerous to mention, remain unchecked and unhampered by the Act. . . . Though the general policy of the Act doubtless was to halt arbitrary employment practices, through the unmistakable words of the Act's actual text Congress has offered its conception of the *specific spheres* in which this general policy is to operate, and thereby has necessarily limited the policy's outreach. *See Moragne v. United States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). (Emphasis added.)

*Espinoza v. Farah Mfg. Co., Inc.*, 462 F.2d 1331, 1334 (1972), aff'd 414 U.S. 811 (1973). Section 703 of the Act, 42 U.S.C. Sec 2000e-2, established but five "specific spheres" or bases of prohibited employment practices: race, color, religion, sex, or national origin. It is for Congress, not the EEOC, to expand *legislatively* these statutory "spheres." U.S. Constitution, Article I, Section 1 and Section 8, Clause 18.

In a recent decision, this Court defined "sex discrimination" as it perceived Congress' intent in enacting Section 703 of the Act, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); and it suggested that the exclusion of pregnancy from disability benefit coverage was not "sex discrimination" in *Geduldig v. Aiello*, 417 U.S. 484 (1974). In *Phillips*, this Court held:

> Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men — each having pre-school age children.



400 U.S. at 544. Subsequently, in *Aiello*, a majority of this Court expressly rejected the theory (which is the major premise of the Fourth Circuit's decision now before this Court for review, as well as the similar decisions rendered by the Courts of Appeal for the Second, Third, Sixth and Ninth Circuits)[5] that "dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex inevitably constitutes sex discrimination," 417 U.S. at 501 (dissent). In so doing, the majority suggested what should also become the correct application of the Act to the maternity benefit issue now before the Court:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, 404 U.S. 71, and *Frontiero v. Richardson*, 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra*, and *Frontiero, supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the

[5] *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199 (3d Cir. 1975); *Communications Workers of America v. American Telephone and Telegraph Co.*, 513 F.2d 1024 (2d Cir. 1975); *Gilbert v. General Electric Co.*, ___ F.2d ___, 10 EPD Para. 10,269 (4th Cir. 1975). *See also Satty v. Nashville Gas Co.*, ___ F.2d ___, 10 EPD Para. 10,359 (6th Cir. 1975); *Hutchinson v. Lake Oswego Sch. Dist. No. 7*, ___ F.2d ___, 10 EPD Para. 10,325 (9th Cir. 1975). *Contra: Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973). Although the *Wetzel* and *Gilbert* decisions are particularly critical of the "voluntariness" argument, *viz.*, that with today's contraceptive methods pregnancy can largely be avoided, Owens-Illinois and Sherwin-Williams find it socially and morally questionable to require employers to underwrite the cost of family planning, rather than the individual whose pregnancy — while not wholly, at least substantially, through her own voluntary action — prevents her from being able to work, the normal *quid pro quo* for receiving compensation.

members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

417 U.S. at 496-97, n. 20.

As Judge Haynsworth recognized[6] in *Cohen v. Chesterfield County School Board*, 474 F.2d 395, 397-398 (4th Cir. 1973), rev'd 414 U.S. 632 (1974):

> Only women become pregnant; only women become mothers. But Mrs. Cohen's leap from those physical facts to the conclusion that any regulation of pregnancy and maternity is an invidious classification of sex is merely simplistic. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. No man-made law or regulation excludes males

[6] While such reasoning may not pass constitutional muster to justify mandatory commencement of maternity leave at an arbitrary date when the pregnant female is nevertheless as physically capable as her male counterpart to perform her job, it certainly should support a constitutionally and statutorily defensible differentiation in benefits afforded a female on maternity leave as opposed to men and women alike disabled by non-occupational illness or injury. *Compare Cohen v. Chesterfield County School Board* and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (companion cases), *with Geduldig v. Aiello*, 417 U.S. 484 (1974). In *Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973), Judge Henderson condemned as sexually discriminatory under the Act the mandatory maternity leave commencement policy, but recognized that fringe benefit differentiation, notwithstanding the EEOC's Guidelines to the contrary, did not violate the Act.



> from those experiences, and no such laws or regulations relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood . . . Pregnancy and maternity are *sui generis*, and a governmental employer's notice of them is not an invidious classification by sex.

Owens-Illinois and Sherwin-Williams, like the State of California and most employers in the Nation, maintain separate benefit programs for two distinct groups of employees, classified in the words of this Court in *Aiello*: "pregnant women and nonpregnant persons." 417 U.S. at 497, n. 20. The former is a unique classification of physiologically *normal*[7] pregnant women who are unable to work for an individually determinable[8] pre- and postpartem period; the latter is the only classification in which benefits can and do accrue to male and female employees alike for non-occupational disability resulting from physiologically *abnormal* conditions: illness or injury.

It is simply not "sex discrimination," within the meaning of Section 703 of the Act, to differentiate "for any reason other than discrimination on account of . . . sex," Section 706(g), 42 U.S.C. Sec. 2000e-5(g), *i.e.*, pregnancy, not sex, in the provision of benefits between the foregoing groups. As two Federal circuit courts have eliminated the "haircut cases" from the scope of the sex discrimination

[7] *See Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973). *See* footnote 14 and accompanying text, *infra*, reflecting that the author of Section 1604.10(b) had no EEOC study or other medical facts on which she based the guideline.

[8] (A. 456, 465-67). According to the expert medical testimony of Dr. Vincent Tricome, Chief of Gynecology for one of New York City's largest hospitals, before the New York State Human Rights Division in *Grimmer v. Eastern Air Lines, Inc.*, Case No. CSF-29861-73, on January 30, 1974, a "normal" pregnancy might be expected to require for most job classifications maternity leave commencing from two to three weeks before and lasting no more than six weeks after delivery. *Compare Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238, 240 (N.D. Ga. 1973) (physician approved return to work six weeks after delivery).

prohibitions of the Act,[9] this Court should remove the maternity benefit issue from the ambit of the Act by refusing to defer to Guidelines, Section 1604.10(b).

## II.

## Guideline Section 1604.10(b) Is Not Entitled to Judicial Deference.

In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639 n. 8 (1974), this Court recognized that Section 1604.10 and related Guidelines "will affect like suits in the future" and "express[ed] no opinion as to the validity of any of these regulations." The validity of Section 1604.10 is now at issue.

### A. Guideline, Section 1604.10(b), was arbitrarily and capriciously adopted without proper procedural safeguards and without consideration of either its medical or fiscal implications.

Owens-Illinois and Sherwin-Williams entertain serious reservations whether the EEOC has been authorized by Congress to issue *any* "Guidelines" such as those promulgated April 5, 1972, out of which the instant litigation arises. Section 713(a) of the Act, 42 U.S.C. Sec. 2000e-12(a), authorizes the EEOC "to issue, amend, or rescind suitable *procedural* regulations to carry out the provisions of this title" (emphasis added). EEOC was granted only *procedural, not substantive*, rulemaking authority, a clear indication of Congress' intent to allow EEOC substantially less rulemaking authority than most other administrative

[9] *See Willingham v. Macon Telegraph Publishing Co.*, ___ F.2d ___, 9 EPD Para. 9957 (5th Cir. 1975) (*en banc*); *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973); *Dodge v. Giant Foods, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973).



agencies, such as the National Labor Relations Board ("NLRB").[10]

And even if EEOC had rulemaking authority comparable to the NLRB, it should be compelled, when engaging in substantive rulemaking, to follow the procedural safeguards provided by the Administrative Procedure Act ("APA"), 5 U.S.C. Sec. 553.[11]

Yet EEOC claimed in its prefatory statement accompanying its April 5, 1972, "Sex Discrimination Guidelines" which, it should be noted, were published in the *Federal Register* section entitled "Rules and Regulations":

> Because the material herein is interpretative in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in the effective date are inapplicable.

37 F.R. 6835, 6836 (April 5, 1972), citing as "authority" for publication Section 713(b) of the Act, 42 U.S.C. Sec. 2000e-12(b).

[10] *Compare* 29 U.S.C. Sec. 156, NLRB rulemaking authority is not limited by a "procedural" qualifier such as is contained in Section 713(a) of the Act, 42 U.S.C. Sec. 2000e-12(a).

[11] This Court last year summarized the APA safeguards:

> [P]ublication in the *Federal Register* of notice of the proposed rulemaking and hearing; an opportunity for interested persons to participate; a statement of the basis and purpose of the proposed rule; and publication in the *Federal Register* of the rule as adopted.

*NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 291 n. 21 (1974).

*Compare* 40 F.R. 13311 wherein the United States Department of Labor proposed certain additions to its Revised Order No. 14, 41 C.F.R. 60-60 with respect to how the Office of Federal Contract Compliance proposes to proceed to ascertain what constitutes an "affected class" and how to compute "backpay relief" in its administration and enforcement of Executive Orders 11246 and 11375. *Query* why EEOC views its rulemaking authority to be unrestrained by the procedural safeguards imposed upon other agencies by the APA? Section 713(b) of the Act, 42 U.S.C. Sec. 2000e-12(b), certainly provides no such license.

In fact, pretrial discovery in *Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973), revealed that "the 1972 [sex discrimination] guidelines were composed by one person (Mrs. Fuentes)[12] who had no expertise in the field of medicine, economics, or labor relations, and who was assisted in her work by only four other people, including two law students employed as law clerks.[13]

Mrs. Fuentes further testified that EEOC conducted no medical or financial studies on the basis of which it predicated the maternity benefit guidelines contained in Section 1604.10(b).[14] No public notice or public participation occurred even though EEOC intended to reverse, with the adoption of Section 1604.10(b), the prior written interpretations of its General Counsel, the Commission's concurrence therein reflected in its own report to Congress,[15] and the silence with respect to maternity benefits of the Guidelines prior to April 5, 1972.[16]

Judge Henderson quite correctly observed in refusing to defer to Guidelines, Section 1604.10(b), that "there appears to be no factual basis upon which these regulations were drawn." *Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238, 245 (N.D. Ga. 1973).

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[12] Mrs. Sonia P. Fuentes, then Chief of the Legislative Counsel Division of the EEOC, who testified on deposition taken May 31, 1973, that she was responsible for drafting the Sex Discrimination Guidelines. Amicus Curiae Brief filed by Delta Air Lines, Inc. in *Cohen v. Chesterfield County Board of Education* and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), pp. 25-26.

[13] *Id.* at 25.

[14] *Id.* at 25 and Appendix F thereto, pp. A-46 and 47.

[15] *See* footnote 19 and accompanying text, *infra*.

[16] The EEOC originally issued its "Sex Discrimination Guidelines" on November 22, 1965, (30 F.R. 14926) reaffirmed them on February 21, 1968 (33 F.R. 3344), amended them on August 19, 1969 (34 F.R. 13367) and last amended and reissued them March 30, 1972, effective April 5, 1972 (37 F.R. 6835). 1 CCH Emp. Prac. Guide Para. 3950.



Unrestricted administrative agency "legislation," such as occurred with the EEOC's April 5, 1972, promulgation of its new "Sex Guidelines," without compliance with APA rulemaking safeguards is far more disconcerting to the Nation's employers than the "adjudicatory" vs. "rulemaking" controversy which has long raged with respect to what type of "hearing" the NLRB should employ to change its substantive interpretations of the law. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

The lack of statutory authority for EEOC to promulgate *substantive* regulations and the agency's failure to comply with the procedural safeguards of the APA in issuing the April 5, 1972, "Sex Discrimination Guidelines" warrant this Court refusing to defer to Guidelines, Section 1604.10(b).

### B. Guidelines, Section 1604.10(b) was not adopted contemporaneously with enactment of the Act's sex discrimination prohibitions and is not consistent with prior agency interpretations of the Act with respect thereto.

This Court has held that a *contemporaneous* and *consistent* construction of a statute by the administrative agency charged with its enforcement is entitled to great deference by the Federal courts. *NLRB v. Boeing Co.*, 412 U.S. 67, 75 (1973). But, "[w]hile acknowledging deference is due, blind adherence is not." *Espinoza v. Farah Mfg. Co.*, 462 F.2d 1331, 1334 (5th Cir. 1972), aff'd 414 U.S. 811 (1973).[17]

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[17] Each of the circuit court decisions rendered to date, Owens-Illinois and Sherwin-Williams submit, failed to follow this admonition. In addition to the Fourth Circuit's decision presently before this Court, four other circuit courts have followed the reasoning of the maternity benefit Guidelines. *See* footnote 5, *supra*.

Guidelines, Section 1604.10 was not adopted contemporaneously with the Act and is not consistent with prior agency interpretations of the Act.

The Act's Section 703 sex discrimination prohibitions, 42 U.S.C. Sec. 2000e-2, became law on July 2, 1964, and were effective one year later on July 2, 1965. Section 716(a) of the Act, 42 U.S.C. Sec. 2000e-15(a). Section 1604.10 of the Guidelines was published in the *Federal Register* and became effective on April 5, 1972, almost eight years after enactment and seven years after the effective date of the anti-discrimination provisions of the Act.

The earlier "Sex Discrimination Guidelines" expressed no view as to how disabilities caused by pregnancy and childbirth would be treated by EEOC.[18] Between 1966 and 1971, every public pronouncement by EEOC rejected the interpretation of the Act now set forth in Guidelines, Section 1604.10(b).

In a letter released November 10, 1966, EEOC General Counsel Charles Duncan declared: "[A]n insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory." Between December 21, 1966, and May, 1971, CCH Employment Practices Guide continued to report the contents of an opinion letter issued by Mr. Duncan on October 17, 1966, and released by EEOC on December 9, 1966, which read:

> You have requested our opinion whether the above exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.

[18] *See* footnote 16, *supra*.



> In a recent opinion letter regarding pregnancy, we have stated, "The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees." Therefore, it is our opinion that according to the facts stated above, a company's group insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.

In another letter dated November 15, 1966, Mr. Duncan wrote: "we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness."

The foregoing EEOC policy was also reflected in the agency's First Annual Report[19] which stated at page 40:

> The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely. . . .

Mr. Duncan, in testimony at trial in *Gilbert v. General Electric Co.*, 375 F.Supp. 367 (E.D. Va. 1974), aff'd 44 U.S.L.W. 2013 (4th Cir. June 27, 1975) (No. 74-1557), reaffirmed in detail the EEOC's reasoning underlying the foregoing interpretation of the Act.[20]

[19] This report covered the fiscal year ending June 30, 1966, and was sent to Congress on March 1, 1967. 42 U.S.C. Sec. 2000e-4(e).

[20] (A. 732-36, GE Ex. 12).

Until April 5, 1972, the official "interpretations" of the Act as reflected in EEOC General Counsel's opinion letters and in the silence of the Guidelines prior thereto *consistently sanctioned,* rather than condemned, differentiation in the provision of benefits for maternity and non-occupational illness and injury disabilities.[21]

In *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944), this Court observed:

> The weight of such a judgment [i.e., an administrative agency interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control.

Where agency interpretations are neither contemporaneously adopted with the enactment of a law, nor consistent with prior interpretations, they are not entitled to judicial deferral. The non-deferral principle was succinctly articulated in *FTC v. Jantzen, Inc.,* 356 F.2d 253, 254 n. 4 (9th Cir. 1966), rev'd on other grounds, 386 U.S. 228 (1967):

> . . . [W]e owe little, if any, deference to the Commission's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect.

[21] On March 19, 1971, EEOC Decision No. 71-1474, CCH Decisions Para. 6221, was released, reflecting that there existed "reasonable cause to believe" that denial of salary continuation benefits where such benefits were granted for *all* other non-occupational disabilities, without reference to prior inconsistent interpretation of the Act in the opinions of General Counsel and the EEOC's reports to Congress. This decision was in conflict with a prior one released on December 16, 1969, EEOC Decision No. 70-360, CCH EEOC Decisions Para. 6084, which cited with approval the General Counsel's November 15, 1966, opinion letter hereinbefore quoted. Owens-Illinois and Sherwin-Williams submit that this one 1971 EEOC decision could not be interpreted as repudiating five years' of official interpretation of the Act otherwise. *Cf. Smith v. Universal Services, Inc.,* 4 EPD Para. 7617 (5th Cir. 1972).



> But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body. If we owe any deference to the Commission's views, it is to those that were contemporaneous with the enactment of the statute. . . .

Section 1604.10 of the "Sex Discrimination Guidelines" simply does not meet this Court's "consistent and contemporaneous construction" standard, *NLRB v. Boeing Co.,* 412 U.S. 67, 75 (1973) and, therefore, warrants no deferral.

### C. Neither the Act nor its 1964 and 1972 Legislative History support deferral to Guidelines, Section 1604.10(b).

Where an Act and its legislative history support an EEOC interpretation, good reason may exist for treating a corresponding agency "guideline" as expressing the will of Congress. *Griggs v. Duke Power Co.,* 401 U.S. 424, 434 (1971). On the other hand, this Court has more recently refused to defer to an EEOC Guideline where there existed "compelling indications that it is wrong." *Espinoza v. Farah Mfg. Co.,* 414 U.S. 86, 94-95 (1973), citing *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969).

When the bill that ultimately became the Act was reported out of the Rules Committee of the House of Representatives on January 30, 1964 – one day before its passage – "sex" discrimination was nowhere therein proscribed; rather, the word "sex" was inserted by Congressman Smith as a last minute amendment during floor debate. 110 Cong Rec. 2577 (1964). *See Diaz v. Pan American World Airways, Inc.,* 442 F.2d 385, 386 (5th Cir. 1971), cert. denied 404 U.S. 950 (1971).[22]

[22] Because every male Congressman who supported the "sex" amendment voted against passage of the Act, 110 Cong. Rec. 2577-84, 2804 (1964), it has been surmised that the actual purpose of the amendment was to help defeat the Act's passage. *See, e.g., Rosen v. Public Service Electric & Gas Co.,*

Congressman Cellar, floor manager for the administration, argued against the Smith amendment and urged Congress to "wait until mature studies have been made before passing anti-discrimination laws applying to sex." 110 Cong. Rec. 2578 (1964). The *only* expression of Congressional purpose underlying the "sex" amendment appears to be that it was designed to prohibit denial of employment itself in certain occupations to one sex or the other solely because of sex. 110 Cong. Rec. 2577-2584 (1964). Congresswoman Green warned prophetically: "[F]ull and careful consideration was not given to the amendment . . . , there were no hearings by any Committee of the House; not a single word of testimony was taken; and the full implications could not have been understood." 110 Cong. Rec. 2720 (1964).

Similarly, there is nothing in the legislative history of the 1972 amendments to the Act, which involved changes, largely procedural rather than substantive in nature,[23] to support EEOC's switch in interpretation with respect to maternity benefit obligations, while there are several indications in that legislative history which support the view that Congress was neither asked to review the concept of whether maternity benefits should be brought within the ambit of the Act's *substantive* "sex" discrimination prohibitions, nor was Congress aware that EEOC intended to change its Guidelines or interpretations with respect thereto.

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328 F.Supp. 454, 463 n. 4 (D.N.J. 1971). Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1167 (1971).

[23] The principal concern of Congress was whether EEOC should be granted NLRB-style "cease-and-desist" authority with judicial review confined to the "substantial evidence" standard established in this Court's decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), or whether it should be authorized enforcement powers only through direct access to the Federal trial courts. *See* 2 U.S. Code Cong. & Admin. News 2137 (1972); and Hearings before Senate and House Subcommittees, *infra.*, footnote 24. *See generally*, Pope & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824 (1972).



EEOC Chairman William H. Brown, III, testified *without mentioning* the subject of maternity benefits or indicating that any changes were forthcoming to the agency's 1969 Sex Discrimination Guidelines then in force, in each of the hearings before the House and Senate Labor subcommittees considering amendment of the Act.[24] A review of the entire legislative history of the 1972 amendments to the Act reflects, with respect to remarks concerning "sex" discrimination only:

(1) A solitary reference to denial of maternity benefits to teachers[25]; and

(2) Several references to unequal employment *opportunities* for women, *viz.*, "[s]urveys indicate that women are deliberately placed in less challenging, less responsible, and less remunerative positions on the basis of sex alone."[26]

From the foregoing review of legislative history, Congress can only be assumed to have believed that the Sex Discrimination Guidelines, as amended August 19, 1969, 34 F.R.

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[24] *See* Hearings on S.2453 before Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 38 (1969); Hearings on H.R. 6228 and 13517 before the House General Subcommittee on Labor of the Committee on Education and Labor, 91st Cong., 1st and 2d Sess. 32 (1969-1970); Hearings on H.R. 1746 before the House General Subcommittee on Labor of the Committee on Education and Labor, 92d Cong., 1st Sess. 79 (1971); Hearings on S.2515, S.2617 and H.R. 1746 before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 48 (1971).

[25] May 7, 1971, letter authored by Ms. Mary Jean Collins-Robson, President, Chicago Chapter of the National Organization for Women, Hearings on S.2515, S.2617, and H.R. 1746 before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 434 (1971).

[26] Statement of Mrs. Lucille H. Shriver, Director, National Federation of Business and Professional Women's Clubs, Inc., on October 6, 1971, during Hearings on S.2515, S.2617, and H.R. 1746 before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 272 (1971); H. Rpt. No. 92-238 on H.R. 1746, 92d Cong., 1st Sess. 3-5 (1971); *see also* 117 Cong. Rec. 31960, 31975 (1971); 118 Cong. Rec. 295, 1383, 3383 (1972).

13367, remained the official EEOC interpretation because those Sex Discrimination Guidelines were the ones inserted, together with EEOC's "Guidelines" on each prohibited type of discrimination, into the record during floor debate on a proposed amendment to define substantively the term "religion" as it is used in the Act. 118 Cong. Rec. 705, 723 (1972). The combination of this insertion into the record of the 1969 "Guidelines" in their entirety and EEOC Chairman Brown's silence on any intent to amend or issue additional "Guidelines" can only be construed to mean that Congress was as wholly unaware as the Nation's employers that the EEOC was about to promulgate new "maternity benefit" Guidelines contained in 29 C.F.R. 1604.10(b).

In fact, the April 5, 1972, "Sex Discrimination Guidelines," including Section 1604.10, were not released until six days *after* enactment of the 1972 amendments and were not published in the *Federal Register* and made effective until 12 days after enactment.

On the other hand, the legislative history of the 1972 amendments to the Act illustrates two instances where Congress did expressly consider particular EEOC "Guidelines" and indicated Congressional support for the EEOC's interpretation of the Act in each of those instances:

(1) A floor amendment was offered to H.R. 1746 – though not enacted – which "alters the language of Title VII [Section 703(h) of the Act, 42 U.S.C. Sec. 2000e-2(h)] to better reflect the congressional intent [with respect to "job relatedness" of employment testing] as interpreted by the Court in the Griggs case," 117 Cong. Rec. 31961 (1971); and

(2) A floor amendment was offered – and ultimately enacted as Section 701(j) of the Act, 42 U.S.C. Sec. 2000e-(j) – to define the term "religion" as used in the Act. 118 Cong. Rec. 705, *et seq*.



Floor debate shows that, in adopting Senator Randolph's "religion" amendment, Congress *expressly* endorsed the EEOC's "Religious Discrimination Guidelines" and *expressly* rejected the circuit court decision in *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Supreme Court 402 U.S. 689 (1971).

Owens-Illinois and Sherwin-Williams submit that, in the absence of legislative history such as that expressly endorsing EEOC Guidelines on "testing" and "religion," there simply exists no basis upon which to conclude that Congress has ever intended to expand the ambit of the word "sex" in the original 1964 Act to require employer provision of the same disability benefits for pregnant women as are provided for nonpregnant persons who sustain nonoccupational illnesses or injuries.

Since the EEOC had adopted contemporaneously with enactment of the 1964 Act and had consistently thereafter followed an interpretation of the Act contrary to what the agency intended to promulgate after congressional enactment of the 1972 amendments, and since EEOC knew that its 1969 "Sex Discrimination Guidelines" which were silent as to maternity benefits were considered by Congress, EEOC – and those who wish to rely thereon – simply cannot claim Congressional approval of the new maternity benefit guidelines contained in Section 1604.10(b). Had EEOC and the proponents of reversal of the agency's "contemporaneous and consistent" interpretation that exclusion of pregnancy from disability benefits was not "sex" discrimination really wanted Congressional approval of Section 1604.10(b), those new "Guidelines" should have been submitted to Congress in a form permitting statutory redefinition of the term "sex" such as occurred with enactment of Section 701(j), 42 U.S.C. Sec. 2000e-(j), defining "religion" under the Act. U. S. Constitution, Article I, Section 1 and Section 8, Clause 18.

After consideration of EEOC's "contemporaneous and consistent" interpretation of the Act as sanctioning exclusion of pregnancy from non-occupational disability plan coverage and upon realizing that Congress – like the Nation's employers – was kept in the dark until after enactment of the 1972 amendments that EEOC intended to issue Guidelines, Section 1604.10(b), reversing its 1966-1971 interpretation of the Act, Owens-Illinois and Sherwin-Williams believe that there exist "compelling indications that it is wrong" to defer to Guidelines, Section 1604.10(b). *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); and *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973).

In *Willingham v. Macon Telegraph Publishing Co.*, ___ F. 2d ___, 9 EPD Para. 9957 at 7014 (1975) (*en banc*), the Fifth Circuit Court of Appeals rejected the theory that male hair style preferences were protected by the Act's "sex" discrimination prohibition on the same rationale Owens-Illinois and Sherwin-Williams believe this Court should apply to the maternity benefits issue and Section 1604.10(b):

> We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.
>
> We perceive the intent of Congress to have been the guarantee of equal job opportunity for males and females. Providing such opportunity is where the emphasis rightly lies.

Mr. Justice Harlan's dissent in *Arizona v. California*, 373 U.S. 546, 626 (1963), has particular application to EEOC's Guidelines, Section 1604.10(b):



> The delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts. The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. . . . First, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. Second, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

Congress, not the EEOC, should "legislate" so radical a revision of social policy and insurance industry practice as Guidelines, Section 1604.10(b) would require.[27]

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[27] Professor Kenneth Culp Davis has noted in discussing Congressional "delegation of power":

> The legislative process is especially qualified and the administrative process is especially unfit for the determination of major policies that depend more upon emotional bent and political instincts than upon investigation, hearing, and analysis.

Administrative Law-Casebook 42 (1965 ed.). Of course, in promulgating Guidelines, Section 1604.10, EEOC made no investigation, held no hearing, and attempted no analysis of the implications of its maternity benefit guidelines, reenforcing the agency's particular unfitness to determine the major social policy changes it did on April 5, 1972.

## CONCLUSION

For the foregoing reasons, Amici Curiae urge that this Court reverse the decision of the United States Court of Appeals for the Fourth Circuit, declaring that differentiation in the provision of benefits between "pregnant women and nonpregnant persons" does not violate the Act and refusing to defer to Guidelines, Section 1604.10(b), to the contrary.

Respectfully submitted,

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## PROOF OF SERVICE

I hereby certify that, in accordance with Rule 33(1) of this Court's Rules, I have served three copies of this Amici Curiae Brief of Owens-Illinois, Inc. and The Sherwin-Williams Company on each party separately represented in this matter by depositing the same in a United States post office, first-class air mail, postage prepaid, addressed to the below-listed counsel of record:

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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

**Nos. 74-1589, 74-1590**

GENERAL ELECTRIC COMPANY,

*Petitioner,*

—v.—

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*

*Respondents.*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

*Petitioners,*

—v.—

GENERAL ELECTRIC COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF AMICUS CURIAE OF AMERICAN LIFE INSURANCE ASSOCIATION, HEALTH INSURANCE ASSOCIATION OF AMERICA, AND AMERICAN INSURANCE ASSOCIATION ON BEHALF OF PETITIONER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

**Nos. 74-1589, 74-1590**

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GENERAL ELECTRIC COMPANY,

*Petitioner,*

—v.—

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

*Respondents.*

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MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

*Petitioners,*

—v.—

GENERAL ELECTRIC COMPANY,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## BRIEF AMICUS CURIAE OF AMERICAN LIFE INSURANCE ASSOCIATION, HEALTH INSURANCE ASSOCIATION OF AMERICA, AND AMERICAN INSURANCE ASSOCIATION ON BEHALF OF PETITIONER

## Interest of the Amici

The American Life Insurance Association and the Health Insurance Association of America are associations whose membership comprise most of the major life and health insurers in the United States. Together they number among their members approximately 500 insurance companies, which are responsible for approximately 92% of the total life insurance in force in the United States and 90% of the total health insurance written by insurance companies. The American Insurance Association is comprised of approximately 140 members who, collectively, write approximately one-third of the property, casualty and surety coverage in the United States. The members of each of the amici are major employers with aggregate work forces of over 1,000,000 persons. As the nation's leading underwriters of temporary disability insurance, and as substantial employers, members of amici share a two-fold interest in the outcome of this litigation.

Because of the nature and extent of the business of their members the amici are particularly qualified to present to this Court data regarding the purposes for which disability benefits are provided, and the consequences of mandating such coverage on account of normal pregnancy. They employ on their staffs highly qualified actuaries experienced in the health insurance and disability insurance areas, who are familiar with actuarial data relevant to this case which might not otherwise be brought to the attention of the Court.



## The Decision Below

In a 2-1 decision, handed down on June 27, 1975, the Fourth Circuit affirmed the determination of the trial court which, after a full hearing, held that the practice of the General Electric Company ("petitioner") with respect to the denial of disability income benefits on account of pregnancy violated Title VII of the Civil Rights Act of 1964.[1] Under petitioner's Sickness and Accident plan,[2] weekly benefits equal to 60% of an employee's weekly wage (up to a maximum of $150 per week) are paid to employees unable to work by reason of disability caused by non-occupational accident or sickness, for a period of up to 26 weeks.[3] Pregnancy is the only cause of disability excluded from coverage under petitioner's plan.

The court of appeals viewed this case as one of statutory construction.[4] It undertook, however, no review of the legislative history relating to the introduction of "sex" as a protected classification under Title VII. Rather, it spoke in general terms of the "obvious meaning and purpose" of Title VII to "prohibit any disparity of treatment

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[1] 78 Stat. 253, *as amended by* the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§2000e *et seq.*

[2] While petitioner's plan is denominated a sickness and accident plan, the plan benefits are in the nature of a salary continuation payment of a type commonly referred to as a temporary or short-term disability benefit, as contrasted with a benefit providing for reimbursement of medical or hospital expense. Benefits paid under petitioner's sickness and accident plan will be referred to herein as disability benefits.

[3] *Gilbert* v. *General Electric Company*, 375 F. Supp. 367, 368 (E.D. Va. 1974), *aff'd* 519 F.2d 661 (4th Cir. 1975).

[4] 519 F.2d at 667.

in . . . conditions of employment between men and women . . . ," [5] and of the "remedial purpose" of the Act.[6]

The court below accorded great weight to two Equal Employment Opportunity Commission sex discrimination Guidelines adopted eight years after the enactment of Title VII.[7] Citing this Court's decisions in previous Title VII cases dealing with the persuasiveness of other EEOC Guidelines, the court of appeals deferred to the Commission's interpretation of the statute, though noting the prior contrary position of that agency. The court characterized the present Guidelines as "merely expressive of . . . the obvious meaning and purpose of the Act."

The court of appeals rejected the argument raised by petitioner, that the "voluntary" nature of pregnancy distinguished disability on account of pregnancy from disability on account of sickness, and justified exclusion of the former from a sickness disability plan.[8]

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[5] *Id.* at 665 n.12.

[6] *Id.* at 663.

[7] 29 C.F.R. §§1604.9, 1604.10, 37 Fed. Reg. 6835, 6837 (April 5, 1972).

[8] Certain other issues raised by the parties in the Joint Petition of All Parties for a Writ of Certiorari, at 3-4 nn., such as the propriety of certifying this action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, and whether certain evidence was properly admitted into or excluded from the record, are not discussed by the amici herein.

References to pages of the Appendix on this appeal shall be designated "(A. ....)".



## Summary of Argument

In *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), this Court upheld the exclusion of benefits on account of normal pregnancy from a state temporary disability insurance plan. In so ruling, this Court characterized the exclusion as a classification founded upon cause of disability—not one founded upon gender. Such characterization is determinative in a Title VII case as well as in a 14th amendment case, since in either context the distinction is risk-based and does not constitute discrimination on account of sex. Additionally the absence of two similarly situated groups who are treated differently precludes a finding of discrimination.

To confine the applicability of this Court's decision in *Geduldig* to state disability plans for privately employed workers would create artificial and anomalous distinctions based upon whether or not disability benefit coverage is obtained under a state plan. This could have the unfortunate effect of discouraging private coverage more extensive than state plan coverage.

The court of appeals' acceptance of the EEOC's 1972 pregnancy disability Guideline was erroneous. The available legislative history of Title VII, the almost universal practice at the time of Title VII's enactment to treat pregnancy differently from other causes of disability, and the contemporaneous interpretation of Title VII by the EEOC,[9] compel the conclusion that Congress did not intend to im-

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[9] As we show *infra* at 14-27, the present Guidelines relied on by the court of appeals in this action were adopted by the EEOC *eight years* after the enactment of Title VII. They are not only inconsistent with the original, and long-held interpretation of the statute by the EEOC and other agencies; but they were adopted

pose on the nation's employers a pregnancy disability program costing, at a minimum, hundreds of millions of dollars annually.[10]

Nor is such a burden required on the basis of an allegedly disparate effect on women resulting from the exclusion of pregnancy benefits. Even without such benefits, women receive more than their proportionate share of temporary disability benefits under existing plans. Consequently, no disparate effect within the meaning of this Court's ruling in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), can result from the exclusion of this one cause of disability.

The purposes for which temporary disability coverage is provided are not served by requiring the payment of disability benefits for normal pregnancy. The element of providing protection against an unanticipated loss of income is missing; pregnant women know of their impending "disability" in ample time to budget or plan for the future loss of earnings. Further, since so many women who leave employment by reason of pregnancy do not return to work,[11]

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without public hearing, and without any investigation or in-depth consideration of the issues raised by them; and are thus entitled to no deference by the courts. While these factors were discounted by the court of appeals, 519 F.2d at 664-65 n.12, because it believed the Guidelines to be in accordance with the intent of Congress, we submit that this conclusion is refuted by application of ordinary principles of statutory construction.

[10] In *Geduldig* v. *Aiello*, 417 U.S. at 494 n.18 estimates were submitted to this Court indicating that the additional cost of providing pregnancy disability benefits in the State of California, alone, would be between $48.9 million and $131 million annually.

[11] Experience has shown that, while over 95% of employees who receive disability benefits return to employment, as many as 50% of employees who leave work on account of pregnancy do not return. *See* discussion *infra* at 33-34.



disability benefits for pregnancy often do not serve the purpose of protecting the income of employees until they can return to the employer's work force; rather, such benefits become a form of severance pay.

Yet, if benefits on account of pregnancy were required by law, pregnancy would constitute the largest single cause of disability for which benefits are paid; absent additional contributions 22% of the average temporary disability benefit fund would have to be diverted to provide benefits for this single cause of disability. The result could well be to discourage the introduction of new or different coverages which could be of benefit to all employees, to require longer "waiting periods" or the imposition of other restrictions on eligibility for benefits, to increase the contributions required from employees, or to compel a decrease in benefits for other causes of disability.

## ARGUMENT

### Omission of Disability Benefits on Account of Pregnancy Does Not Constitute Discrimination on Account of Sex

Coverage for disability on account of pregnancy is not afforded under private temporary disability plans for the same reasons that such coverage is excluded under the California Disability Benefits Law, upheld by this Court in *Geduldig* v. *Aiello*.[12] Whether such exclusion constitutes sex discrimination under the 14th amendment as claimed in *Geduldig*, or under Title VII as claimed here, the threshold issue is the same:[13] does the classification or distinction arising from the exclusion of benefits on account of pregnancy constitute a classification or distinction on the basis of sex? The holding of this Court in *Geduldig*—that the exclusion of coverage for pregnancy involved a classification based on risk, not one based on sex—is, therefore, dispositive here.

The court below rejected the applicability of this Court's decision in *Geduldig* to a Title VII case. It viewed *Geduldig* as merely involving the question of whether the pregnancy exclusion sufficiently served the State's interest to satisfy the relevant 14th amendment standard.[14] This, we believe,

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[12] 417 U.S. 484 (1974).

[13] *See Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86, 95 (1973); *Willingham* v. *Macon Tel. Publishing Co.*, 507 F.2d 1084, 1088 (5th Cir. 1975) (en banc); *Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dep't*, 379 F. Supp. 679, 682 (S.D.N.Y. 1974), *rev'd*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601); *see also* Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. Rev. 617, 691 & n.276 (1974).

[14] *Gilbert* v. *General Elec. Co.*, 519 F.2d 661, 665-67 (4th Cir. 1975).



is a misreading of this Court's decision. While *Geduldig* dealt with a 14th amendment claim, the language of that decision went far beyond the equal protection analysis necessary to sustain the statute under the 14th amendment. This Court could have upheld the statute without definitively characterizing the nature of the classification involved.[15] Similarly, it could have expressly reserved for later decision any intention to speak to Title VII issues.[16]

Instead, the Court did deal with the nature of the classification and concluded that the exclusion of pregnancy benefits did not discriminate on the basis of sex:[17]

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[15] *See, e.g., Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 653 n.2 (1974) (Powell, J. concurring).

[16] *Id.* at 638-40 n.8; 656 n.6 (Powell, J. concurring).
It is notable that Mr. Justice Brennan, in his dissenting opinion in *Geduldig*, placed great emphasis on the EEOC's Guidelines under Title VII, despite the 14th amendment setting of that case, and expressly referred to the pregnancy disability Guideline at issue here. 417 U.S. at 501-02. Further, the EEOC, the *Geduldig* plaintiff, and various amici urged on the Court the importance of that case to Title VII litigation. *See, e.g.*, Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae at 2, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).
Nevertheless, this Court did not expressly limit the applicability of its language and reasoning to the facts there before it, as it had done previously.

[17] 417 U.S. at 496-97 n.20 (emphasis added).
*Accord, Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dep't*, 379 F. Supp. 679 (S.D.N.Y. 1974), *rev'd*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601); *cf. Kohr* v. *Weinberger*, 378 F. Supp. 1299, 1304 (E.D. Pa. 1974).
The impact upon Title VII of this Court's decision in *Geduldig* has been recognized even by commentators hostile to the result reached. *See* Johnston, *supra* note 8, at 691 & n.276; Comment, *Geduldig* v. *Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Colum. L. Rev. 441, 456 (1975).

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. *While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics.*

• • •

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. *The program divides potential recipients into two groups—pregnant women and nonpregnant persons.* While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

This Court analyzed the *Geduldig* case as involving a risk-based, rather than a sex-based distinction:

> There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.
>
> The appellee simply contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she encountered a risk that was outside the program's protection.[18]

[18] 417 U.S. at 496-97.



This analysis goes to the heart of the issue presented here. As Judge Widener stated in his dissenting opinion below, *Gilbert* v. *General Electric Co.*, 519 F.2d 661, 668-69:

> Absent a showing of sex discrimination, Title VII, even if its reach were broader than the equal protection clause, would not render unlawful a pregnancy exclusion such as that involved here. Since the Supreme Court has held, for precisely the same exclusion, there is a "lack of identity between the excluded disability and gender as such," the exclusion should no more support a finding of discrimination under Title VII than under the equal protection clause.[19]

The argument that *Geduldig* is not persuasive in a Title VII context because different standards are applied under that statute and the 14th amendment to justify otherwise discriminatory conduct, misses the point. Once it has been determined, as in *Geduldig,* that no prohibited discrimination exists, whether a higher standard must be met under Title VII to justify otherwise discriminatory conduct becomes irrelevant.

Further, should this Court confine its holding in *Geduldig* to cases arising under the 14th amendment and involving state benefit plans, an anomalous situation will be created in several states which, by statute, require that employers provide some measure of temporary disability coverage to their employees, but expressly exclude or limit coverage of maternity under the state plan. *Geduldig* establishes

[19] *See also Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dep't,* 379 F. Supp. 679, 682 (S.D.N.Y. 1974), *rev'd,* 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed,* 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601).

that such exclusion does not constitute sex discrimination within the meaning of the 14th amendment. Thus, an employer who provides coverage to his work force through the state plan would incur no liability for a failure to furnish maternity benefits. However, if *Geduldig* were so limited and the same employer were to depart in the slightest from the statutory plan coverage, even to provide more generous benefits, the exclusion of benefits on account of pregnancy would arguably run afoul of Title VII.[20] In this connection it should be noted that General Electric Company is a self-insurer of weekly sickness and accident coverage under the California State Insurance Plan.[21]

Since the level of benefits provided under the state plan is often lower than the coverage provided by a private employer, this interpretation would have the ironic result of penalizing the generous employer and encouraging a dependence on state plan benefits even where it may have been the state's intention to encourage more liberal non-state fund coverage.

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[20] Such an interpretation has been espoused by the New York State Division of Human Rights. In attempting to reconcile the New York State Human Rights Law, N.Y. EXEC. L. §§290 *et seq.* (McKinney 1972), which bans sex discrimination, with the New York State Disability Benefits Law, N.Y. WORKMEN'S COMP. L. §§200 *et seq.* (McKinney 1965), which contains an exclusion of benefits on account of maternity, the agency has conceded that employers providing the minimal level of benefits through the state fund would not be guilty of sex discrimination in connection with the exclusion of maternity benefits. *See,* Brief of Respondent State Division of Human Rights, at 19, *American Airlines, Inc.* v. *State Human Rights Appeal Board (Kurtzer),* (Case No. CS-20674-73) (appeal pending, N.Y. App. Div., 1st Dep't).

[21] *Gilbert* v. *General Electric Company,* 375 F. Supp. 367, 371 (E.D. Va. 1974), *aff'd* 519 F.2d 661 (4th Cir. 1975).



The anomaly is further compounded by the fact that, as noted by Judge Widener in his dissenting opinion below,[22] those states whose disability benefit plans for private employees were validated by this Court's decision in *Geduldig* would themselves be liable under Title VII for including a pregnancy exclusion in the plans which provide coverage for their own employees.

The court below proceeded to ground its finding of discrimination on the premise that an exclusion of pregnancy coverage, "is 'inextricably sex-linked' in consequences and result . . .",[23] with the consequences falling adversely upon the members of a protected class of persons.

The inappropriateness of applying such a "disparate effect" analysis to this case is discussed below. It is sufficient to say here that a risk-based classification which distinguishes between pregnant and nonpregnant persons does not involve sex discrimination. The concept of discrimination presupposes two similarly situated groups who are treated differently. There can be no "similarly situated" male and female employees with respect to disability benefits on account of pregnancy.[24]

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[22] *Gilbert* v. *General Electric Company,* 519 F.2d 661, 669 (4th Cir. 1975) (dissenting opinion). *See also* Larson, *Sex Discrimination as to Maternity Benefits,* 1975 DUKE L.J. 805, 814-15 (1975).

[23] 519 F.2d at 664.

[24] *See Cohen* v. *Chesterfield County School Bd.,* 474 F.2d 395, 397-98 (4th Cir. 1973), *rev'd on other grounds sub nom. Cleveland Bd. of Educ.* v. *LaFleur,* 414 U.S. 632 (1974); *Rafford* v. *Randle Eastern Ambulance Serv., Inc.,* 348 F. Supp. 316, 320 (S.D. Fla. 1972).

The EEOC itself acknowledged that it was inappropriate to consider pregnant women similarly situated with sick disabled persons. The Commission's 1ST ANNUAL REPORT stated:

The complaint here, as in *Geduldig,* is not that male employees receive a benefit denied to female employees. Rather, it is that females are not protected when they encounter this particular additional risk. We submit that whether this complaint is made in a case under the 14th amendment, as in *Geduldig,* or in a case under Title VII, as here, the result must be the same. In either context the complaint does not involve discrimination on account of sex.

## The EEOC Guidelines Here at Issue Should Be Rejected by This Court

In reaching its decision, the court below held that the EEOC's Guideline relating to pregnancy disability[25] reflected "the obvious meaning and purpose" of Title VII, and declared that courts were "directed to give 'great deference'" to such Guidelines in construing Title VII.[26]

The court below accorded deference to the Guidelines even though the EEOC did not arrive at its present inter-

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The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. *The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely.*

U.S. EEOC, 1ST ANNUAL REPORT, H.R. Doc. No. 86, 90th Cong., 1st Sess. 40 (1966) (emphasis added).

The same conclusion is reaffirmed in a series of opinion letters released by the EEOC General Counsel. *See* discussion *infra* at 16-18.

[25] 29 C.F.R. §1604.10(b), 37 Fed. Reg. 6835, 6837 (April 5, 1972).

[26] 519 F.2d at 664 & n.12.



pretation of the statute until 8 years after it was enacted. While noting that the EEOC's prior contrary interpretation subjected the Guidelines to the argument that they were "poor guides to a construction of [Title VII]," the court declared that this argument was adequately answered by the decision in *Wetzel* v. *Liberty Mutual Insurance Co.*[27] This deference to the EEOC Guidelines is undeserved and misplaced.

### A. *The Guidelines Lack Those Features Which Induce Courts to Accord Deference to Administrative Interpretations*

The principles followed by courts in determining the weight to be accorded interpretations by administrative agencies are well known. First, courts look to see whether the interpretation in question has been consistently followed over a long period of time.[28] Second, courts look to the interpretation which is closest in proximity to the time of the enactment pursuant to which it is issued.[29] Third, courts examine the available evidence of the care and consideration given by the agency to the policy contained in the interpretation.[30] This Court has described the process to be followed:

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[27] 511 F.2d 199 (3d Cir.), *cert. granted,* 421 U.S. 987 (1975).

[28] *See Morton* v. *Ruiz,* 415 U.S. 199, 231 (1974); *FTC* v. *Jantzen, Inc.,* 356 F.2d 253, 257 n.4 (9th Cir. 1966), *rev'd on other grounds,* 386 U.S. 228 (1967); *O'Neill* v. *United States,* 281 F. Supp. 359, 364 (N.D. Ohio 1968), *aff'd* 410 F.2d 888 (6th Cir. 1969).

[29] *See Brennan* v. *General Tel. Co.,* 488 F.2d 157, 160 (5th Cir. 1973); *Newmon* v. *Delta Air Lines, Inc.,* 374 F. Supp. 238, 245 (N.D. Ga.), *aff'd,* 475 F.2d 768 (5th Cir. 1973) (per curiam) [rejecting the same EEOC pregnancy disability Guideline at issue in this case].

[30] *See United Housing Foundation, Inc.* v. *Forman,* 95 S. Ct. 2051, 2063-64 n.24 (1975); *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944).

> [t]he weight of such [administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[31]

Judged by these standards, the Guidelines at issue merit no deference. The facts relating to their promulgation underscore this. Title VII was enacted in 1964. In December 1965, the EEOC issued its first sex discrimination Guidelines.[32] From that date until April 1972, despite periodic amendments to the Guidelines,[33] the practice challenged in this proceeding escaped official condemnation.

Furthermore, between 1966 and 1969, the EEOC, through its General Counsel, responded to inquiries regarding the appropriate treatment of pregnancy under medical expense, leave of absence, and temporary disability plans, and declared that pregnancy need not be equated with sickness or disability. For example, in EEOC Dec. No. 70-360,[34] the Commission quoted an opinion letter of its General Counsel dated November 15, 1966:

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex . . . .

[31] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

[32] 30 Fed. Reg. 14926 (Dec. 2, 1965).

[33] 33 Fed. Reg. 3344 (Feb. 24, 1968); 33 Fed. Reg. 11539 (Aug. 14, 1968); 34 Fed. Reg. 13367 (Aug. 19, 1969).

[34] 1973 CCH EEOC Decs. ¶6084 at 4130 (Dec. 16, 1969).



In an opinion letter addressed to the question of whether an employer could legally provide an unpaid maternity leave, where employees are entitled to paid sick leave, the EEOC General Counsel approved the practice, stating:

> [W]e do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness . . . .[35]

And in a letter responding to an inquiry regarding the legality of excluding from a salary continuation program benefits on account of pregnancy—the precise issue before this Court—the EEOC General Counsel set forth language identical to that contained in EEOC Dec. No. 70-360 quoted above, and added:

> [I]t is our opinion that according to the facts stated above, a company's group-insurance program which covers hospital and medical expense for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth *would not be in violation of Title VII.*[36]

Thus, from the outset, the EEOC's response to the problem posed here was that identical treatment of pregnancy and sickness or disability was *not* required.[37] It was not

[35] BNA F.E.P. Rep. 401:3032 (Nov. 15, 1966).

[36] BNA F.E.P. Rep. 401:3027 (Oct. 17, 1966) (emphasis added).

[37] Other EEOC General Counsel opinion letters emphasizing the propriety of treating maternity differently from sickness or injury include the following: BNA F.E.P. Rep. 401:3017 (Aug. 17, 1966) [requiring that maternity leave be given, even where other absences are grounds for separation from employment]; BNA F.E.P. Rep. 401:3030-31 (Nov. 10, 1966) [allowing exclusion

until April 1972, that the EEOC first generally published its current, contrary interpretation.

On what basis did the EEOC arrive at its new interpretation? It was not on the basis of public hearings. None were conducted.[38] It was not on the basis of studies or new information brought to the attention of the EEOC. The Chief of the Legislative Counsel Division of the EEOC at the time of the drafting of the Guidelines testified that she neither conducted nor was aware of any studies or data relating to similarities between pregnancy and other causes of disability.[39] There were no statutory developments which impelled or even suggested the conclusion that the existing EEOC position was incorrect.

One district court examined these circumstances and found the new EEOC position totally lacking in factual

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of pregnancy from disability benefit plan]; BNA F.E.P. REP. 401:3033-34 (Feb. 17, 1967) [maternity leave need not be granted on same terms as leave for sickness or disability].

[38] *See* 37 Fed. Reg. 6836 (April 5, 1972).

[39] *See* Brief of Alaska Airlines, Inc., et al., as Amici Curiae at 1a-6a, *Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dep't*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601).

The cursory consideration given to the implications of its new position should be contrasted with the attention devoted to this matter by the EEOC during the first years after enactment of Title VII. Charles Duncan, General Counsel of the EEOC between August 8, 1965 and October 31, 1966, testified at the trial in this case (A. 649-65) that the position now taken by the EEOC was considered by the Commissioners during his tenure in office in the course of an extensive consideration of the appropriate treatment of maternity, and that the Commission chose, instead, to adopt the approach embodied in the General Counsel's opinion letters quoted above.



support.[40] Thus, there is nothing to indicate the expertise or thoroughness of consideration which are hallmarks of an administrative interpretation entitled to deference by the judiciary.

The court in *Wetzel* noted that in 1972 Congress did not amend Title VII with respect to the proscription of sex discrimination, and inferred from that a congressional endorsement of an expansive interpretation of the provision. 511 F.2d at 204.[41] The fact is, however, that such "endorsement" could not have encompassed approval of the EEOC's current pregnancy disability Guideline, since Congress was first informed of the new interpretation after enactment of the 1972 amendments.[42]

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[40] *Newmon* v. *Delta Air Lines, Inc.*, 374 F. Supp. 238, 245 (N.D. Ga.), *aff'd*, 475 F.2d 768 (5th Cir. 1973) (per curiam).

[41] A more trenchant analysis of the congressional inaction was provided by the Fifth Circuit Court of Appeals, sitting en banc, in *Willingham* v. *Macon Tel. Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975):

> while it is argued that a lack of any change in this section in the 1972 amendments to the Act evidences Congressional agreement with the position of the E.E.O.C., it may be argued with equal force that the law was insufficiently developed at the time the amendments were considered to support any change. We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.

[42] While the first publication of the EEOC's current position with respect to pregnancy disability came in EEOC Dec. No. 71-1474, 1973 CCH EEOC DECS. ¶6221 (May 6, 1971), the first hint of any change in policy communicated to Congress came in the EEOC's SIXTH ANNUAL REPORT which was transmitted to Congress on March 30, 1972, six days after the enactment of the 1972 amendments on March 24, 1972. U.S. EEOC, SIXTH ANNUAL REPORT, H.R. Doc. No. 288, 92nd Cong., 2d Sess. 12 (1972).

This past term this Court declined to defer to an interpretation urged by the Securities and Exchange Commission stating:

> Traditionally the views of an agency charged with administering the governing statute would be entitled to considerable weight. . . . But in this case, the SEC's position flatly contradicts what appears to be a rather careful statement of the Commission's views in a recent release.
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> • • •
>
> In view of this unexplained contradiction in the Commission's position we accord no special weight to its views. See *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418, 426 (1972); *Blue Chip Stamps* v. *Manor Drug Stores* [43 U.S.L.W. 4707, 4714 n.10 (U.S. June 9, 1975)].[43]

Under the circumstances discussed above, the EEOC Guidelines at issue here are entitled to no better treatment.

### B. *The Guidelines Are Inconsistent With the Legislative History of Title VII and Other Indicators of Legislative Intent*

This Court had occasion to consider another unfounded EEOC interpretation in *Espinoza* v. *Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973). There, the EEOC had issued a Guideline declaring that discrimination on the basis of citizenship constituted discrimination on the basis of national origin within the meaning of Title VII. This Court looked to the interpretation first placed on the statute by the EEOC—again, through its General Counsel's opinion letters—and to subsequent inconsistent congressional enact-

[43] *United Housing Foundation, Inc.* v. *Forman*, 95 S. Ct. 2051, 2063-64 n.24 (1975).



ments, in reaching the conclusion that the EEOC interpretation was not authorized by the statute. The court of appeals in *Wetzel*, 511 F.2d at 205, distinguished *Espinoza*, declaring that it could find no "obvious" indications of contrary congressional intent such as this Court there found. We submit that the court below and the *Wetzel* court have ignored or disregarded abundant "compelling indications" that the EEOC's interpretations are incorrect.

#### 1. Legislative History

One such "compelling indication" is the complete lack of formal legislative history to support an interpretation having drastic and widespread consequences both in government and private industry. *See Willingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1090.[44] The absence of any meaningful formal legislative history pertaining to the Title VII proscription of sex discrimination has been widely recognized. The court of appeals in *Wetzel* referred to the available material as "meager", and noted that the provision was introduced into Title VII "in a tongue-in-cheek manner" in an effort to procure the defeat of the statute.[45]

Such fragments of legislative history as may be relevant suggest that Congress did not intend to mandate identical treatment of men and women with respect to fringe benefits

[44] Had Congress wished to insert into this anti-discrimination law the requirement that pregnancy benefits be provided under a disability benefit plan, it would have taken little effort to make such an intention plain. *See Ozawa* v. *United States*, 260 U.S. 178, 192-94 (1922); *Toilet Goods Ass'n* v. *Finch*, 419 F.2d 21, 27 (2d Cir. 1969); *Friedman* v. *United States*, 374 F.2d 363, 366-67 (8th Cir. 1967); *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931, 945 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892, 895 (E.D. Ark. 1972); *Zachary* v. *R.H. Macy & Co., Inc.*, 31 N.Y.2d 443, 460 (1972).

[45] 511 F.2d at 204.

For example, Congresswoman St. George, in discussing the "sex" amendment, declared that women neither sought nor needed "special privileges".[46] Congresswoman Green, in her statements, made clear that no consideration had been given in committee to problems which might arise by reason of biological differences between men and women.[47] Finally, the inclusion of the Bennett Amendment[48] in Title VII, in order to harmonize interpretations under that statute and the Equal Pay Act[49] is of significance. Coupled with the interpretations of the Wage-Hour Administrator which did not compel employers to provide identical benefits to men and women, and the paramountcy given to Department of Labor interpretations, it is difficult to contend that Congress intended to introduce a requirement that identical benefits be paid.[50]

[46] 110 CONG. REC. 2581 (1964).

[47] 110 CONG. REC. 2584 (1964).

[48] Civil Rights Act of 1964, Section 703(h), 42 U.S.C. §2000e-2(h).

[49] 29 U.S.C. §206. *See* EEOC Guidelines, 30 Fed. Reg. 14926 (Dec. 5, 1965) (superseded); Fuentes, *Federal Remedial Sanctions—Focus on Title VII*, 5 VALPARAISO U.L. REV. 387, 392-93 (1971).

[50] Until the amendment of the EEOC's Guidelines in 1972, the EEOC regarded as non-discriminatory fringe benefit plans which complied with either the "equal payments" test (*i.e.*, where an employer spends an equal amount for male and female employees to provide benefits, despite the fact that the benefits purchased are unequal) or the "equal benefits" test (*i.e.*, where the benefits provided male and female employees are identical). *See* EEOC General Counsel opinion letter, BNA F.E.P. REP. 401:3011-12 (July 28, 1966). *See also* opinion letter, described in U.S. EEOC, FIRST ANNUAL DIGEST OF LEGAL INTERPRETATIONS, July 2, 1965 through July 1, 1966 at 22-23; U.S. EEOC, 1ST ANNUAL REPORT, *supra* note 24, at 41-42.

The use of an "equal payments" test under the Equal Pay Act was endorsed by the Department of Labor prior to July 2, 1965, the effective date of the employment provisions of Title VII. *See* Civil Rights Act of 1964, Section 716(a), 78 Stat. 266; Wage-Hour Administrator opinion letter, CCH WAGES & HOURS ¶30,851 (May 27, 1964).

While the Equal Pay Act only applies to discrimination in wages, and the Wage-Hour Administrator has ruled that benefits on account of pregnancy do not constitute "remuneration for employment", *see* Guidelines, 29 C.F.R. §800.110 (1967), the alternative "equal payments"/"equal benefits" tests have been applied to other forms of insurance coverage provided as fringe benefits to male and female employees.



**2. Contemporaneous Practices and Interpretations**

Another such indication is the fact that, when Title VII was enacted, pregnancy was generally treated differently from sickness and injury, both in and outside of government.

Both the EEOC and Department of Labor, following the enactment of Title VII, viewed pregnancy as a condition requiring individualized and flexible treatment.[51]

Federal agencies promulgated leave of absence regulations which denied or restricted the use of "advance sick leave" for pregnancy while permitting its use in connection with other causes of disability.[52] Federal agencies entered

[51] *See* discussion *supra* at 16-18; *cf.* OFCC Guidelines, 41 C.F.R. §60-20.3(g) (1970).

[52] *See, e.g.*, U.S. CIVIL SERV. COMM'N, PERSONNEL MANUAL, subch. 4-4 at 630-10 (June 1967); U.S. CIVIL SERV. COMM'N, FEDERAL PERSONNEL MANUAL, subch. 13-4(f) at 630-29 (rev., July 1969); U.S. Dep't of Justice, "Leave Policies and Regulations", Memo. No. 344, §V(D) at 18 (March 8, 1963); U.S. EEOC, Memorandum—"Advanced Sick Leave" (Dec. 20, 1972); *id.* (Jan. 26, 1973):

> It has been brought to our attention that . . . maternity cases were singled out as the only example in our . . . Memorandum dated December 20, 1972 [of a situation where use of advanced sick leave was unavailable]. Our reason for indicating maternity cases as a specific example was that GSA Payroll has,

into collective bargaining agreements which accorded "disparate" treatment to pregnancy under medical expense and hospitalization plans.[53] Some agencies even imposed a mandatory period prior to the expected date of delivery for the commencement of maternity leaves of absence,[54] while no similar period of absence was required in advance of elective surgery or other anticipated periods of disability.

State and local governments, as well as private industry, similarly accorded different treatment to pregnancy than was accorded to other causes of absence, medical expense and disability.

One survey of coverages provided state employees under state health insurance plans in effect in January 1973, disclosed that in virtually every plan examined which provided pregnancy coverage, the coverage provided differed from the coverage accorded other causes of medical expense or hospitalization.[55]

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on a continuing basis, refused to honor our requests for advance sick leave for normal pregnancy purposes since it is in direct conflict with U.S. Civil Service Commission rules and regulations.

[53] *See, e.g.*, 1973 Nat'l Ass'n of Letter Carriers Health Benefit Plan (U.S. Civ. Serv. Comm'n, Bureau of Retirement, Insurance, and Occupational Health, Form 41-51, Jan. 1973) at 3, 10; 1973 American Fed'n of Gov't. Employees Health Benefit Plan (U.S. Civ. Serv. Comm'n, Bureau of Retirement, Insurance, and Occupational Health, Form 41-26, Jan. 1973) at 3, 8.

[54] *See, e.g.*, U.S. Dep't of Justice, "Leave Policies and Regulations", *supra* note 52, §IV(D) at 17; U.S. EEOC, MANUAL §911(V) (Nov. 15, 1968 and July 25, 1969).

[55] *State Employee Health Insurance Plans* (Martin E. Segal Company 1973).



The temporary disability insurance laws of New York, California, New Jersey, and Rhode Island—the only such laws in effect in 1964—all either totally excluded benefits on account of normal pregnancy, or accorded to pregnancy disability, treatment less favorable than was accorded to other causes of disability.[56]

Congress must be presumed to have been aware of the practices and policies in effect at the time of the enactment of a statute.[57] If Congress wished to work a change in those practices, certainly it would have made its intention plain.[58]

### 3. The Known Cost Magnitude and Congressional Silence

Just as Congress gave no indication of an intention to alter existing nationwide practices with respect to the treatment of maternity by government and private industry, the record is similarly barren of evidence that Congress

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[56] In California and New York no benefits were payable on account of normal pregnancy. CAL. UNEMPL. INS. CODE §2626 (West 1972), *as amended*, CAL. UNEMPL. INS. CODE §§2626 and 2626.02 (West Supp. 1974); N.Y. WORKMEN'S COMP. L. §205 (McKinney 1965); N.J. STAT. ANN. §43:21-29 (1962) [maximum period of benefits is 4 weeks before and 4 weeks following delivery]; 5 RHODE ISL. GEN'L LAWS §28-41-8(1) (Supp. 1974) [benefits limited]. *Cf.* LAWS OF P.R. ANN., T. 11, Ch. 9, §203 (g)(2) (Supp. 1974) [no benefits payable on account of normal pregnancy] (enacted 1968); HAWAII, L. 1969, Ch. 148 [no benefits payable on account of pregnancy] (repealed).

[57] *See, e.g., Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86, 90-91 (1973); *American Fed'n of Musicians* v. *Wittstein*, 379 U.S. 171 (1964); *Ranes* v. *Office Employees Int'l Union*, 317 F.2d 915, 917-18 (7th Cir. 1963). *See also Employers Mut. Liability Ins. Co.* v. *Arrien*, 244 F. Supp. 110, 114 (N.D.N.Y. 1965).

[58] *See Ranes* v. *Office Employees Int'l Union*, 317 F.2d 915, 917-18. *See also* cases cited *supra* at note 44.

intended to enact a new and hugely expensive piece of social welfare legislation.

Yet the potentially staggering cost of requiring coverage for maternity was well known. At the time of the enactment of Title VII, the experience under the Rhode Island Temporary Disability Law, where pregnancy claims threatened to exhaust the benefit fund, was widely publicized.[59] In New York, the express exclusion of pregnancy under the State Disability Benefits Law[60] was explained in terms of cost:

> To provide the protection deemed necessary to the workers of the State at reasonable cost, disabilities arising from pregnancy have been excluded.[61]

Title VII and its legislative history contain no hint that any legislator voting on the bill had the slightest inten-

[59] *See* Koontz, *Childbirth and Childbearing Leave: Job Related Benefits,* 17 N.Y.L.F. 480, 485 & n.36 (1971); Brief for Appellant at 10-12, *Geduldig* v. *Aiello,* 417 U.S. 484 (1974).

The Rhode Island statute was originally construed so as to treat pregnancy as fully compensable under the statute, regardless of whether or not the claimant was physically disabled. Because of the severe drain on the insurance fund which this interpretation imposed, the statute was amended in 1946 to restrict benefits for maternity to fifteen weeks; yet even then, pregnancy claims for the year 1949-50, comprised 23% of all claims and 30% of total benefits paid. BUREAU OF EMPLOYMENT SECURITY, U.S. DEP'T OF LABOR, RHODE ISLAND DISABILITY INSURANCE PROGRAM 42 (July 1954). The plan was subsequently further amended and presently provides a maximum $250.00 pregnancy benefit. 5 RHODE ISL. GEN'L LAWS §28-41-8(1) (Supp. 1974).

[60] N.Y. WORKMEN'S COMP. L. §205(3) (McKinney 1965).

[61] REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON INDUSTRIAL AND LABOR CONDITIONS FOR THE YEAR 1948, 11 NEW YORK LEGISLATIVE DOCUMENTS, 122nd Sess., Doc. No. 67, at 44 (1949).



tion to enact a multi-million dollar benefit program by the last minute addition to an anti-discrimination statute of a prohibition of sex discrimination. The failure of Congress to have considered the manifold problems raised by an interpretation of Title VII which would proscribe the exclusion of maternity disability benefits[62] provides convincing evidence that such an interpretation was not intended.

## The Challenged Practices Do Not Constitute Discrimination on Account of Sex Under the Rationale of *Griggs* v. *Duke Power Co.*

Citing this Court's holding in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), the court below proceeded on the assumption that the case before it involved a practice whose

[62] In promulgating a regulation prohibiting sex discrimination in the issuance, cancellation and renewal of insurance policies, the New York State Superintendent of Insurance specifically referred to the complexity of the policy issues involved:

> The proposed regulation does not mandate maternity benefits. While this issue is related to sex discrimination, it is essentially a different one: Do minimum health insurance requirements require the inclusion of maternity benefit insurance in basic health insurance contracts? Like the question of whether insurance coverage should be mandated for psychiatric care or alcoholism, a decision to mandate maternity benefits requires a balancing of the cost of providing such coverage and the importance and value of the social policy objective that the mandated coverage would realize. It also requires a determination of who should bear the cost of such insurance. . . . Such questions should be answered in proceedings specifically designed for this purpose. . . .

N.Y.S. Insurance Dep't, *In the Matter of Alleged Violations of Article IX-D of the Insurance Law,* OPINION AND REPORT PURSUANT TO SECTION 278 OF THE INSURANCE LAW at 4 n.5 (Jan. 28, 1975).

consequences worked a disparate effect on a protected class. To reach this conclusion the court relied on the premise that an exclusion of pregnancy coverage "is 'inextricably sex-linked' in consequences and result," since it "can result in a less comprehensive program of . . . benefits for women employees than for men employees." This "analysis" does no more than restate the truism that if one excludes coverage of a solely female cause of disability the effect will fall solely upon females.

By focusing merely on a single cause of disability, such an approach acquires superficial plausibility. However, "disparate effect" analysis is valid only where the exclusion affects similarly situated persons differently[63]—a result which is impossible when only benefits on account of pregnancy are considered. Male and female employees *are* similarly situated in the broader context of overall benefits on account of disability. However, when the scope of inquiry is so broadened, the disparate effect disappears.

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[63] This Court has made clear that the reach of Title VII extends to prohibit the use of even a neutral characteristic in such a manner as to have a disparate effect on the members of a protected class. Thus, in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), this Court struck down a company rule prohibiting the employment of women with pre-school-age children, since no such restriction was placed on the employment of males with pre-school-age children. Similarly, in *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied.* 404 U.S. 991 (1971), the court of appeals invalidated a rule forbidding the employment of married stewardesses, since no similar rule governing marital status was applied to male employees. These cases, however, involve neutral characteristics *which pertain to men and women.* It is only where both men and women are similarly situated, *i.e.*, share the capacity to be burdened or benefited by the allegedly discriminatory conduct, that an employer runs afoul of Title VII by failing to treat men and women alike.



As this Court found in *Geduldig,* women, even without maternity coverage, were receiving benefits identical in content (although superior in terms of cost and frequency of usage) to those provided male employees. These findings are consistent with nationwide experience under disability income plans.

It is recognized that, under typical disability income plans, women, as a group, receive benefits greater than are received by men, as a group, even where pregnancy benefits are excluded. Data published in United States Government publications, insurance and actuarial publications, and the experience of the members of our associations and of private employers throughout the country demonstrate that the relative costs of temporary disability benefits for women, *excluding* pregnancy benefits, is more than 1½ times the cost of benefits received by men under such plans.[64]

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[64] *See, e.g.,* TRANSACTIONS OF THE SOCIETY OF ACTUARIES: *1962 Reports of Mortality and Morbidity Experience,* Table 15 at 101 & text at 79; *1971 Reports of Mortality and Morbidity Experience,* Table 5 at 199-200 & text at 198; *1973 Reports of Mortality and Morbidity Experience,* Table 5 at 277 & text at 273.

This data is further supported by the experience of petitioner who found that in 1970 its average cost per insured employee of total benefits paid under its sickness and accident insurance plan was $82.57 for females and $45.76 for males; in 1971, the average cost of females was $112.91 and $62.08 for males (A. 198-99). Similarly, this Court noted in *Geduldig* that female employees, while providing 28% of total contributions to the California State Insurance Fund, were drawing 38% of the benefits paid out of the Fund. 417 U.S. at 497 n.21.

Comparisons of male and female frequencies of utilization of temporary disability benefits also leads to the conclusion that females receive a disproportionate share of such benefits. For data relating to petitioner's experience, *see* (A. 198-99). *See also* U.S. DEP'T OF HEW, VITAL AND HEALTH STATISTICS SERIES: *Time Lost from Work—1968* (Series 10, No. 71), Table 2; *Disability Days—United States—1971* (Series 10, No. 90), Table 5; *Current Estimates—1971* (Series 10, No. 79), Tables 2, 5, 6, 8; *Current Estimates—1972* (Series 10, No. 85), Tables 2, 5, 6, 8.

Indeed, it is estimated by our actuaries that by treating pregnancy identically with other causes of disability this disparity will be increased to the point where the cost of providing coverage for women will be almost 2½ times the cost of providing male benefits under disability plans.[65] Thus, from the perspective of overall coverage under disability benefit plans, women suffer no "disparate" effects.

Under these circumstances, penalizing an employer who excludes disability benefits on account of pregnancy is not only inequitable, it is illogical. The same employer would have no Title VII problem if, instead of providing disability benefit coverage, he distributed equally among his employees the amount of money he would have spent for such coverage. Yet under such circumstances, it is clear that the money so distributed, even if invested on a group insurance basis, could not provide female employees with disability benefits on account of pregnancy and also afford them coverage otherwise identical to that of male employees.

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[65] This estimate is predicated upon an average anticipated duration of pregnancy disability of 15 weeks under a typical plan offering 26 weeks of disability benefits, and a 21% increase in the number of female claims. The duration estimate approximates the actual experience in California prior to this Court's reversal of the lower court decision in *Geduldig*. *See* Affidavit of Carl M. Peterson, Deputy Chief of the Unemployment Insurance-Disability Insurance Section, and Supervisor of the Disability Insurance Group of the California Department of Human Resources Development, in support of the application of the State of California for a stay of judgment, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). In fact, this estimate may be overly conservative. *See* testimony of Paul H. Jackson at the trial of this case (A. 536-38), and G.E. Exhibit 42 (A. 846-48).



Furthermore, the "disparate effect" approach adopted by the court below could stimulate a veritable flood of additional litigation based upon claims of alleged discrimination. Carried to its logical conclusion, the courts could be called upon to examine any exclusion or limitation of coverage to discover whether it has a "discriminatory" impact on any protected group.[66]

Since no condition afflicts all protected groups identically,[67] the courts could be faced with the problem of evaluating whether disability plans containing any number of combinations of exclusions or limitations violate Title VII. This task of monitoring benefits provided in or excluded from benefit plans in order to create ideally balanced, "non-discriminatory" insurance, may well be an impossible one. The courts are neither equipped nor required[68] to perform such a task.

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[66] For example, as the district court noted in the *Wetzel* case, 372 F. Supp. 1146, 1162, gout is a condition which overwhelmingly afflicts males. Thus, any insurance policy which excludes or restricts the benefits available for this condition might be said to discriminate against men because the exclusion would have a disparate impact upon them.

[67] This is illustrated by the actual experience of a member of amici, in a study of non-maternity claims under certain group temporary disability income plans. This major stock life insurance company found that, for example, while hernias were responsible for 5.3% of total male days of disability in 1972, they only accounted for 1.6% of female days of disability during that period; on the other hand, disorders of the sex organs accounted for 10.1% of female days of disability, but only 2.0% of male days of disability in 1972.

[68] This is not to say that an employer would be free to manipulate his disability benefit plan by using a pretext to accomplish an invidious discrimination. For example, refusing coverage for sickle cell anemia might well constitute illegal discrimination against Black employees. To provide such coverage would not cause the gross distortion of benefit dollars which would be occasioned by

**Payment of Disability Benefits on Account of Normal Pregnancy Does Not Further the Purposes of Temporary Disability Coverage**

The decisions below are, at root, predicated upon an incomplete, and therefore distorted, view of the purpose of disability coverage. The district court focused solely upon the fact that, while benefit plans such as petitioner's are "purportedly designed to relieve the economic burden of physical incapacity," pregnant women undergo "undisputed" disability and attendant economic loss. 375 F. Supp. at 381. This description overlooks a number of other highly relevant considerations which distinguish pregnancy from other causes of disability for purposes of disability benefit coverage.

First, the major task of disability coverage is to provide protection for *unforeseen* and *unforeseeable* income loss occasioned by disability. While people may, indeed, engage in activities which carry with them some statistical risk of disability, people do not engage in such activities with the foreknowledge that they will become disabled. The nature of the risk is contingent, and the loss of income occasioned thereby generally cannot be budgeted for. In the case of pregnancy, however, some period of disability and resultant expense are not unforeseen. Couples know months in advance of the impending birth of their child and are in a

coverage of pregnancy disability. Where the cost of coverage is relatively minimal, and no valid reasons can be adduced to justify the exclusion, then the courts, as this Court made clear in *Geduldig*, 417 U.S. at 496-97 n.20, will be able to strike down pretextual invidious discrimination.



position to make provision for the loss in income which the wife may suffer.[69] Further, family planning is now widespread; as a result, a woman today has a great deal of control over whether or when she will become pregnant and whether she will bear a child.

Second, one of the most important reasons why employers offer temporary disability benefits to their workers is to provide a means of assisting them during periods of financial hardship until their return to the work force. In this manner employers generate loyalty among their workers and safeguard the investment in their training and experience. While available statistics indicate that virtually all employees who receive temporary disability benefits return to the work force, in the case of pregnancy, experience has shown that a substantial portion of pregnant employees will never return to work with the same employer.[70]

[69] The fact that a similar opportunity to plan for a period of disability may be possible in connection with certain other causes of disability must be viewed together with a recognition of the fact that the period and frequency of such disability and the expense involved are often minimal. *See* note 71, *infra*.

[70] Liberty Mutual Ins. Co. submitted an affidavit in *Wetzel* indicating that 80% of female employees who leave work on account of maternity fail to return to active service and similar data is available relating to other employers. The Illinois Bell Telephone Company, for example, found that while approximately 3% of employees absent by reason of sickness or accident did not return to active employment, more than 48% of those employees who went on maternity leave failed to return. Brief of American Telephone and Telegraph Co. as Amicus Curiae at 10a and n.10, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). The experience of the General Electric Company was that 40% of employees who leave for reason of maternity do not return (A. 600-01). Recently published data relating to the Xerox Corporation's disability benefit plan, where disability on account of pregnancy is treated identically with disability caused by sickness or accident, showed that in 1973 almost 54% of employees disabled on account of pregnancy did not return to work. Wall St. J., Nov. 11, 1975, at 1, col. 5.

Thus, for the woman who leaves employment to have her baby and who fails to return to service, payment of disability benefits constitutes a bonus—a form of severance pay. This, we suggest, is not the appropriate function of disability plans.

Third, employers, in establishing benefit plans, seek to provide those coverages most beneficial to their respective work forces as a whole. Often benefits to be offered are the subject of collective bargaining, and represent the joint efforts of management and labor to maximize the benefits derived from the funds available. As was discussed *supra* at 29-30, the introduction of mandatory pregnancy disability benefits will grossly distort the allocation of benefits under existing disability plans.[71]

The cost of requiring such coverage is too great to be ignored, and will have to be met either in the form of additional premium payments required of the employer or employee, or it will come at the expense of the work force in the form of a reduction of the existing level of benefits or deferral of additional coverage.[72] Whether, as a matter of

[71] It is this element of distortion of benefits which highlights the fallacy of the argument, suggested by the court below, that an employer who provides benefits for some causes of disability which are "voluntary" in nature (*e.g.*, elective surgery, cosmetic surgery, abortions, vasectomies, etc.), is required to provide such benefits for maternity. This argument loses sight of the relatively small dollar cost of such benefits. The decision to pay for these conditions has a positive effect on employee morale without distorting the allocation of benefits otherwise payable under the plan. There is no basis in sound employment practice, economics, or common sense for equating pregnancy coverage with coverage of other "voluntary" causes of disability. *See* Larson, *supra* note 22, at 820-21.

[72] The impact of requiring pregnancy coverage cannot be overstated. In the *Geduldig* case, this Court was presented with evi-



social policy, it is desirable to mandate pregnancy coverage with its attendant burdens is a legislative judgment which, it is submitted, Congress did not make when it enacted Title VII.

## CONCLUSION

In *Geduldig* v. *Aiello,* this Court confronted the issue of whether the exclusion of disability benefits on account of pregnancy was a sex-based distinction and concluded that it was not. This characterization transcends the equal protection context of *Geduldig* and is dispositive of this case, requiring a reversal of the decision below.

Viewing the case as one of statutory construction, as did the court below, yields the same result. The EEOC's first efforts to define sex discrimination in connection with fringe benefits recognized as much by expressing as EEOC's original goal, to "seek an equitable balance between the needs of the employer and employee. . . ."[73]

Where an employer procures for his work force a disability benefit plan designed to meet the needs of the entire work force in an equitable manner, he should be deemed to have complied with Title VII. Absent a finding that the exclusion at issue is "a mere pretext" used for a discriminatory purpose, the statute should not be construed

dence that, to avoid increasing contributions to the State Fund, it would be necessary to significantly reduce benefits to avoid insolvency. The examples offered were to reduce the maximum benefit by almost 50%, or to increase the waiting period before benefits are payable from 7 to 46 days. Peterson Affidavit, *supra*, note 65.

[73] EEOC General Counsel, opinion letter (Feb. 20, 1967) [summarized in CCH EMPL. PRAC. GUIDE ¶17,304.59].

to authorize or compel the federal courts to rearrange the disability benefit coverages offered by employers.

There is nothing to suggest that Congress by enacting Title VII—a generally worded anti-discrimination statute —intended to prohibit the practices here at issue. What Congress would have enacted with respect to maternity benefits, had it considered them, or indeed what action Congress may in the future take in other contexts with respect to that subject, is irrelevant. This Court should reject an interpretation which would create new social insurance legislation on the basis of a statute never intended to accomplish such a purpose.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-1589 and 1590

GENERAL ELECTRIC COMPANY, *Petitioner*

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*, *Respondents*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*, *Petitioners*

v.

GENERAL ELECTRIC COMPANY, *Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AS AMICUS CURIAE

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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Nos. 74-1589 and 1590

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GENERAL ELECTRIC COMPANY, *Petitioner*

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al., Respondents*

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MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al., Petitioners*

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## BRIEF OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AS AMICUS CURIAE

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### INTEREST OF THE AMICUS CURIAE[1]

The American Telephone and Telegraph Company, together with the Associated Bell Companies (herein-

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[1] This brief is filed pursuant to Supreme Court Rule 42(2). Written consent of Petitioner and Respondents has been obtained and filed with the Clerk of the Court.

after, Bell System Companies), is the largest private employer in the nation, and almost 50 percent of its employees are women. In connection with employment, Bell System Companies maintain disability programs which provide wage continuation benefits for employees disabled to work because of sickness or accident. All these plans, unlike the General Electric Company's plan, provide benefits for disability absences resulting from pregnancy complications and abnormal pregnancies, but, like the General Electric Company's plan, none provides wage continuation benefits for absences attributable to normal pregnancy and childbirth.[2]

Suits have been brought against six Bell System Companies,[3] alleging that the failure to provide sickness and accident benefits for normal pregnancy violates Title VII. In one of these cases, the Company has a petition for *certiorari* pending before the Court.[4] The resolution of the present case will have a substantial, and quite possibly a dispositive, effect on the cases pending against the Bell System Companies.

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[2] Each Bell System Company provides periods of uncompensated leave for pregnancy and childbearing whose length is determined on a case-by-case basis. The time of beginning and ending maternity leave is basically determined by the individual employee on the advice of her doctor.

[3] *CWA* v. *AT&T, Long Lines Department, petition for cert.* filed, 43 U.S.L.W. 3684 (U.S. June 24, 1975) (No. 1601); *CWA* v. *Illinois Bell Tel. Co.*, No. 73-C-959 (N.D. Ill., filed April 13, 1973); *CWA* v. *Southern Bell Tel. & Tel.*, No. 18328 (N.D. Ga., filed May 17, 1973); *CWA* v. *New York Tel. Co.*, C.A. No. 73-3352 (S.D.N.Y., filed July 31, 1973); *CWA* v. *The Pacific Tel. & Tel. Co.*, C.A. No. C-73-1739 RFP (N.D. Cal., filed Sept. 28, 1973); and *CWA* v. *South Central Bell Tel. Co.*, C.A. No. 73-1771 Section A (E.D. La., filed July 5, 1973).

[4] *CWA* v. *AT&T, Long Lines Dept., supra*, n. 3.



## SUMMARY OF ARGUMENT

1. The statistics submitted based on the operation of the Bell System Companies' sickness and accident benefit programs demonstrate that the provision of benefits for normal pregnancy would increase cost dramatically and would augment the disproportionate advantage women presently enjoy in disability plan benefits. Further, the data regarding the rate of return of employees following maternity leave and following disability absence, show that the two conditions are significantly different for employment-related purposes. By covering the same disabilities on the same terms and conditions for all employees, regardless of sex, an employer affords equal risk protection from its disability benefits plan to males and females alike. Title VII should not be construed to require more.

2. The decision below conflicts in principle with this Court's decision in *Geduldig* v. *Aiello*.[5] The Court there held that the Equal Protection Clause of the Fourteenth Amendment did not require California to cover absences due to normal pregnancy under a state-administered disability benefits plan. In reaching this conclusion, the Court explicitly stated that the exclusion of pregnancy did not constitute discrimination on the basis of sex, observing that "[t]here is no risk from which men are protected and women are not."[6] The decision in *Aiello* cannot be dismissed—as the court below would dismiss it—as simply one in which this Court found discrimination based on sex, but held that the discrimination passed constitutional

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[5] 417 U.S. 484 (1974).

[6] 417 U.S. 484 at 496-497 (1974).

muster because it was justifiable under traditional Fourteenth Amendment standards. The Court went further than that in *Aiello*. It concluded in unmistakable terms that the exclusion of normal pregnancy from a disability benefits plan does not constitute sex-based discrimination—a conclusion which is as valid under Title VII as under the Fourteenth Amendment.

## ARGUMENT

### I. STATISTICS DEMONSTRATE THAT THE OPERATION OF A DISABILITY BENEFITS PLAN WHICH EXCLUDES NORMAL PREGNANCY DOES NOT DISCRIMINATE AGAINST WOMEN

The Bell System Companies have been concerned with the question before the Court since the promulgation of the revised EEOC Guidelines on Sex Discrimination in 1972.[7] Their concern was sharpened by the filing of the six lawsuits challenging their sickness and accident disability programs, and by the December, 1973 proposal by the Office of Federal Contract Compliance to revise its Sex Discrimination Guidelines.[8] As a result of these developments, the Bell System Companies undertook to review the operation of these programs and to collect and collate extensive data regarding the present treatment of men and women under such programs; the cost and benefit impact of adding coverage of normal pregnancy; and

[7] 29 C.F.R. § 1604.10(b).

[8] 38 Fed. Reg. 35336-35338. Among the changes under consideration is a provision which would require federal contractors to provide sickness and accident disability benefits for absences from work due to normal pregnancy. This would constitute a reversal of OFCC's present position that, "There is no requirement that an employee be paid during absence [for maternity leave]." Memorandum of John L. Wilks, Director, OFCC, to Agency Heads (Nov. 12, 1970) at 5.



the comparative, employment-related characteristics of maternity leaves and disability absences. The Bell System Companies responded to OFCC's request for public comments on the proposed revisions to its Sex Discrimination Guidelines by submitting a summary of pertinent data regarding the operation of their sickness and accident disability programs. These public comments, which form the basis of the following discussion, are attached as an appendix to this brief.

#### A. Women Receive a Disproportionate Advantage under Existing Disability Plans Even Where Benefits for Normal Pregnancy Are Not Provided

The distribution of benefits between men and women under the sickness and accident disability plans of the Bell System Companies confirms that, even without considering absences relating to normal pregnancy, women have a greater frequency rate (number of disabilities), and severity rate (duration of disabilities) than men. In fiscal years 1970-1971 and 1971-1972, women had a higher frequency of disabilities and lost more total days from work in sixteen of the seventeen disability group classifications.[9] In 1970-1971, women accounted for 64.65 percent of the total days for which benefits were paid, even though they were only 48.57 percent of the total work force eligible for benefits. Similarly, in 1971-1972, women received compensation for 63.45 percent of the total benefit days though representing only 48.29 percent of employees eligible for benefits.

[9] The one exception in both years is "Diseases of circulatory system" (Group 7), which includes heart attacks and other cardiac problems.

The seventeen disability group classifications, with the exceptions of "Complications of pregnancy, childbirth and puerperium" (Group 11), and "Perinatal morbidity and mortality" (Group 15), contain comparable conditions, including some conditions which are unique to one sex. Thus, while prostate trouble may be unique to males, when considered with other "Diseases of the genitourinary system" (Group 10), women have a considerably higher frequency rate and a dramatically greater number of total days lost.[10]

**B. Pregnancy Is Unique in Its Cost Impact upon Benefits Programs**

Calculations based on data collected by the Bell System Companies also confirm that coverage of normal pregnancy would generate a significantly greater number of total disability days than any other category of sickness or injury for men and women combined.

Based on a substantial survey, it was determined that female Bell System employees experienced approximately 21,700 pregnancies in fiscal year 1970-1971, and approximately 23,000 pregnancies in fiscal year 1971-1972. It is impossible to fix precisely the average term for which benefits would have been provided if normal pregnancy had been covered, since estimates of the period of actual disability connected with normal pregnancy range from less than six weeks to six months.[11] However, assuming an average duration of eight weeks, normal pregnancy would have accounted for 1,215,200 disability days in 1970-1971 and 1,288,000 disability days in 1971-1972. Had normal pregnancy been compensated, women, who represented 49 percent of the System's work force in 1970-1971, would have received benefits for 72 percent of the total disability days. In 1971-1972 women would have accounted for 71 percent of all benefit days though constituting only 48 percent of total employees eligible for benefits.

Based on these calculations, together with the average salary and seniority of eligible women, system-wide costs for disability benefits would have been increased by $15,762,663 in 1970-1971 and $19,037,330 in 1971-1972.[12] However, the impact on the present distribution of sickness and accident disability benefits would be even more dramatic. If pregnancy had been covered in both of the survey years, 5 percent of eligible women, or approximately 2.5 percent of the Companies' work force, would have accounted for approximately 21 percent of the total days for which disability benefit payments were made. No other single disability group—even including both sexes—could generate so large a number of disability days for which benefits would be paid.

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[10] In both 1970-71 and 1971-72, women accounted for almost six times as many lost days as men in this classification:

| | Women | Men |
|---|---|---|
| 1970-71 | 374,707 | 66,982 |
| 1971-72 | 391,224 | 71,290 |

[11] *See* Appendix at 6a-7a. The Court has recognized the "plethora of conflicting medical testimony," on the duration of any inability to work connected with pregnancy. *Cleveland Bd. of Educ.* v. *La Fleur*, 414 U.S. 632 (1974).

[12] Pregnancy alone would have accounted for 14.47% and 13.90% of all benefits paid in the respective survey years. These estimates reflect only basic disability costs, and do not include wage-related costs such as Social Security, pensions, health insurance, etc. Moreover, the estimate is based on the assumption of an average disability period of eight weeks. Payment for the full average maternity leave period of 5½ months would have increased these costs to $32,739,007 and $39,539,070 respectively.

### C. The Low Return Rate Makes Maternity Leaves Unlike Sickness and Accident Disabilities for Job-Related Purposes

Title VII does not require private employers to provide any sick leave or disability benefits, and the Bell System Companies submit that the decision to provide some form of protection against illness and injury should not obligate an employer to provide benefits for another condition which cannot properly be classified as either an illness or an injury. The Bell System Companies also submit that absences from work for pregnancy and childbirth are substantially different from absences caused by sickness or accident disabilities. Perhaps the most significant distinction for private employers, who consider disability benefits as part of an overall compensation package, is the difference in return rates for the workers in each category.

A survey of maternity leaves and absences caused by sickness and accident disabilities conducted by Illinois Bell in 1972 showed that only about 3%[13] of those who had been disabled failed to return to work while over 48 percent of employees who took maternity leave did not return following their leave. Using these figures to project costs to the System as a whole, 6.6 and 9.1 million dollars of the estimated costs of providing maternity benefits in the respective survey years, would have been paid to claimants who never returned to work. These payments would have been inconsistent with the disability programs' basic purpose of providing a bridge between periods of employment and would have constituted a unique form of severance pay.

[13] The vast majority (almost 90%) of those who did not return to work following a covered disability had either died or become eligible for a company pension.



## II. THIS COURT HAS DECIDED THAT THE EXCLUSION OF NORMAL PREGNANCY FROM COVERAGE UNDER A DISABILITY BENEFITS PLAN DOES NOT CONSTITUTE DISCRIMINATION ON THE BASIS OF SEX

In *Aiello,* the Court held that the Equal Protection Clause of the Fourteenth Amendment does not require California to cover absences due to normal pregnancy under a state-administered disability benefits plan. In the course of determining that the California program did not discriminate against *any* definable group or class, the Court explicitly held that the exclusion of pregnancy does not constitute discrimination on the basis of sex, noting that "[t]here is no risk from which men are protected and women are not."[14] As the Court further stated:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed,* 404 U.S. 71, and *Frontiero* v. *Richardson,* 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes *one physical condition*—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, *it does not follow that every legislative classification concerning pregnancy is a sex-based classification* like those considered in *Reed, supra,* and *Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics.*
>
> * * * *
>
> The lack of identity between the excluded disability and gender as such under this insurance pro-

[14] 417 U.S. at 496-497. This holding follows the Court's previous approach that there can be no denial of equal protection unless a state has acted differently with respect to individuals or groups "similarly circumstanced." *Reed* v. *Reed,* 404 U.S. 71, 75-76 (1971).

gram becomes clear upon the most cursory analysis. *The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.*[15]

The Court in footnote 20 thus expressly held that the exclusion of pregnancy from coverage under a disability program does not constitute sex discrimination.

### A. The Court's Decision in Aiello Is Fully Applicable to Employer Disability Benefits Plans under Title VII

The logic of the Court's decision in *Aiello* is fully applicable to cases involving employer disability benefits plans under Title VII. The threshold question in evaluating the exclusion of normal pregnancy from such a plan under Title VII is the same as that presented under the Equal Protection Clause in *Aiello*; does this exclusion constitute sex discrimination? Indeed, the EEOC, AT&T and other parties concerned about the application of Title VII to employer benefit plans recognized that the Court's decision in *Aiello* would have a substantial, if not controlling, effect on interpretations under Title VII involving the differing treatment of pregnancy and sickness. For this reason, many of them filed *amicus curiae* briefs in that case on the issue of whether the exclusion of absences due to normal pregnancy from a disability benefits plan constitutes sex discrimination. As the EEOC stated in its *amicus* brief to the three-judge court in *Aiello*:

> The United States Equal Employment Opportunity Commission files this brief because it believes the standards the Court should apply in determining the constitutionality of § 2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-*et seq.*, as amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (March 24, 1972).[16]

[15] 417 U.S. at 496-497 n. 20 (emphasis added).



Moreover, the dissent in *Aiello* (quoting at length from the EEOC's brief setting forth its interpretation of Title VII) asserted that the exclusion of normal pregnancy from a disability benefits plan constitutes sex discrimination, at least if a comparable and exclusively male condition is not also excluded. The majority emphatically rejected that analysis, stating that such an exclusion is not sex discrimination—

> [a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other. . . .[17]

Finding no evidence that the selection of risks covered discriminated against women in terms of their "aggregate risk protection" the majority decided that the exclusion was neither directly nor by pretext sex discrimination.

The same considerations apply in determining whether an employer discriminates on the basis of sex within the meaning of Title VII by not offering the same benefits for normal pregnancy as for accidents

[16] Brief for the EEOC as *Amicus Curiae* in *Aiello* v. *Hansen*, 359 F. Supp. 792 (N.D. Cal. 1973), *reversed sub nom. Geduldig* v. *Aiello*, 417 U.S. 484 (1974), at 1.

[17] 417 U.S. at 496-497 n.20.

and sickness and other temporary disabilities.[18] The court below, on the other hand, sought to differentiate *Aiello* on the basis that "our case is one of statutory interpretation rather than one of constitutional analysis."[19] As Judge Widener noted in his dissent in the court below,[20] this distinction misses the definitional point of *Aiello*. Furthermore, it is contrary to persuasive authority holding that the standards under Title VII and the Fourteenth Amendment should be the same.[21] As stated in *Chance* v. *Board of Examiners*,[22] it would be "anomalous at best" if public and private employers were held to different standards under Title VII and the Fourteenth Amendment in cases challenging allegedly discriminatory employment practices.[23] Indeed, as Judge Widener also noted, in the present context "illogical results [are] bound to follow" if this Court's reasoning in *Aiello* is held not applicable to cases arising under Title VII:

> A state's disability benefit plan for its own employees covered by Title VII . . . would . . . not be allowed to exclude pregnancy from its coverage. However, such an exclusion could be made freely in a state plan for employees of private employers . . . .[24]

Certainly, the argument that because only women become pregnant, a sickness plan which excludes normal pregnancy, has a "disparate effect" upon women which constitutes a *prima facie* case of sex discrimination ignores the holding of *Aiello* on this precise point. In answer to the same contention, the Court held that

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[18] The Bell System Companies recognize that the plan at issue here differs from that at issue in *Aiello* in one respect, *i.e.*, the General Electric Company's plan excludes from coverage complications of pregnancy. The court below, however, invalidated the General Electric Company's plan as a whole. The Bell System Companies submit that such a result clearly is not warranted by this one factual difference. The proper approach, rather, is to recognize that insofar as the General Electric Company's plan parallels that at issue in *Aiello, i.e.*, its exclusion from coverage of normal pregnancy, it is permissible under Title VII. It is only the exclusion of complications of pregnancy, which was not at issue in *Aiello*, as to which, conceivably, a different conclusion could be reached. If this aspect of the plan were found unacceptable, the appropriate remedy is to enjoin only the offending portion of the practices at issue and not the plan as a whole. *See Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 179 (1972); *Milliken* v. *Bradley*, 418 U.S. 717, 757 (1974) (Stewart, J. concurring).

[19] *Gilbert* v. *General Electric Company*, 519 F.2d 661, 667 (4th Cir. 1975) quoting from *Wetzel* v. *Liberty Mutual Ins. Co.*, 511 F.2d 199, 203 (3d Cir. 1975).

[20] 519 F.2d at 668-669.

[21] There can be no doubt that the development of equal employment opportunity law under Title VII has been significantly affected by concepts first enunciated in equal protection cases. *See e.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), *citing Gaston County* v. *United States*, 395 U.S. 285 (1969) (re educational disadvantage and voting standards); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *citing Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972); and *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972) (both equal protection cases). *See also, Papermakers Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), *citing, e.g., Louisiana* v. *United States*, 380 U.S. 145 (1965) (re facially neutral standards in voting registration as perpetuating past discrimination).

[22] 458 F.2d 1167, 1176 (2d Cir. 1972).

[23] *Accord, U.S.* v. *Chesterfield County School District*, 484 F.2d 70, 73 (4th Cir. 1973) (". . . the test of validity under Title VII is not different from the test of validity under the Fourteenth Amendment.").

[24] 519 F.2d 661, 669 (4th Cir. 1975) (Widener, J. dissenting). *See* Larson, *Sex Discrimination as to Maternity Benefits*, 1975 DUKE L. J. 801, 805 and 825 (1975).

the dispositive factor is not whether an isolated condition is covered or not, but whether there is any condition which is covered for one class but not for another, *i.e.,* whether the "aggregate risk protection" derived from the plan discriminates against the complaining class.[25]

Thus, absent a showing of pretext, a case of sex discrimination is not established by proof that a benefits plan treats normal pregnancy differently from disabilities due to other causes. In this regard, the Bell System Companies note that the Court's recognition of the uniqueness of pregnancy made express in *Aiello* what was implicit in its earlier decision in *Cleveland Board of Education* v. *La Fleur.*[26] In *La Fleur,* both the maternity policies approved and those disapproved by the Court were applied by the Board to pregnant women but not to persons otherwise disabled. The Court, however, recognized the unique nature of pregnancy by resolving the Fourteenth Amendment challenge on due process grounds even though the parties and the courts below had framed the issue in terms of whether a sex-based equal protection claim had been stated.

The appropriateness of applying *Aiello* to Title VII cases is further illustrated by this Court's decisions which hold that a Title VII violation does not exist

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[25] 417 U.S. at 496-497:

> There is no evidence in the record that the selection of risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. [Footnotes omitted.]

[26] 414 U.S. 632 (1974).



simply because one aspect of an employer policy can be identified which affects employees of one sex, race or ethnic group differently from another. In *McDonnell Douglas Corp.* v. *Green* [27] and *Espinoza* v. *Farah Manufacturing Co.,*[28] the Court used an *Aiello*-like analysis to determine whether the practice violated Title VII. In *Espinoza,* the Court affirmed the decision of the Fifth Circuit that an employer did not discriminate on the basis of national origin simply because it refused to employ aliens. The Court acknowledged that "there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin" as where citizenship is used as a pretext to disguise ethnic discrimination.[29] However, the Court found that the company's employment of persons having the same national ancestry as the plaintiff was disproportionately high in the job for which the plaintiff applied, and therefore concluded that the refusal to employ aliens was not a pretext for discrimination.[30]

A similar analysis was followed in *McDonnell Douglas.* There, the Court reversed and remanded a lower

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[27] 411 U.S. 792 (1973).

[28] 414 U.S. 86 (1973).

[29] 414 U.S. at 92.

[30] *Id.* at 93. As a result of its finding, the Court declined to give significance to an EEOC Guideline declaring refusal to hire aliens to be a violation of Title VII since the Guideline's premise ". . . that discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin—is not borne out." 414 U.S. at 93. For a fuller discussion of the appropriate treatment of EEOC Guidelines in such cases, *see* discussion at pp. 18-20, *infra.*

court decision which had held that an employer discriminated against a black employee by refusing to rehire him because of his involvement in a civil rights demonstration which unlawfully obstructed access to the employer's work place. While stressing that Title VII does not permit an individual's prior unlawful conduct to be used as a pretext for racial discrimination, the Court concluded that

> . . . in the absence of proof of pretextual or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove. [citation omitted].[31]

In these cases, the Court has called for review under Title VII of whether challenged employment practices (which are not arbitrary barriers to employment—such as non-job-related tests) are pretexts for discrimination.

A comparison of the distinction challenged in *Phillips* v. *Martin Marietta Corp.*[32] with that involved here and in *Aiello* reveals the logic of the different analytical approaches taken by the Court in applying Title VII. In *Phillips,* the employer had different hiring policies for males and females having pre-school children. Such discrimination on the basis of sex is unlawful, the Court held, at least without a showing that it was based upon factors "relevant to job performance."[33] In contrast, the disability benefits policies at

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[31] 411 U.S. at 806. *Compare Griggs* v. *Duke Power Co., supra. See also Albemarle Paper Co.* v. *Moody,* 43 U.S.L.W. 4880 (U.S., June 25, 1975).

[32] 400 U.S. 542 (1971).

[33] *Id.* at 544.



issue here and in *Aiello* do not differentiate between males and females with identical conditions; it is pregnancy, not parenthood, which is unique. As the Court expressly stated in answer to the same contention in *Aiello*:

> Normal pregnancy is an objectively identifiable physical condition with unique characteristics.[34]

Furthermore, the thrust of the "disparate effect" argument is not limited to sick leave plans which exclude pregnancy. It would seem that, if that argument correctly reflects the law under Title VII, an employer might be required to institute a wage continuation plan for the full spectrum of physical disabilities if, as the Appendix to this Brief illustrates, a substantially higher percentage of females than male employees suffer such disabilities. The necessary implication of the "disparate effect" argument is that the only disabilities for which an employer can lawfully refuse to provide protection are those which the sexes, and races, and ethnic groups, experience in roughly equivalent percentages. Such a conclusion would stand Title VII on its head by requiring employers, in the name of equality, to extend benefits whenever a protected group would gain a *disproportionate* benefit from such an extension.[35]

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[34] 417 U.S. at 496 n.20.

[35] This is exactly the dilemma which the Court has refused to create for state welfare programs. In *Jefferson* v. *Hackney,* 406 U.S. 535, 548-49 (1972), the Court rejected the same kind of "disparity" argument:

> [G]iven the heterogeneity of the Nation's population, it would only be an infrequent coincidence that the racial composition of each grant class was identical to that of the others. The acceptance of appellants' constitutional theory would render

**B. The EEOC Guideline That Sick Leave Benefits Should Be Provided for Normal Pregnancy Should Be Rejected in This Case**

The court below[36] sought to justify the result it reached by relying on EEOC Guidelines[37] to the effect that the exclusion of normal pregnancy from a disability plan constitutes sex-based discrimination in violation of Title VII. We first point out that these Guidelines were issued before this Court declared in *Aiello* that the exclusion of normal pregnancy is not sex discrimination "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other * * * ."[38] Moreover, while that decision is the most definitive statement of reasons why this Court should reject the EEOC Guideline, the Guideline also lacks those attributes which might otherwise warrant this Court's deference.

As the Court held in *Skidmore* v. *Swift & Co.*:[39]

> The weight of . . . [the administrative interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[40]

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suspect each difference in treatment among the grant classes, however otherwise lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment.

[36] 519 F.2d 661, 664 (4th Cir. 1975).

[37] 29 C.F.R. § 1604.10(b).

[38] 417 U.S. at 496-497 n.20.

[39] 323 U.S. 134 (1944).

[40] 323 U.S. at 140.



The importance of these elements was emphasized by the Court in *Espinoza* v. *Farah Manufacturing Co., supra.* The Court there noted that application of the Guideline was inconsistent with the congressionally approved policy of limiting federal employment to United States citizens, and that the then-current Guideline was inconsistent with prior interpretations of the EEOC. Although the Court stated that the EEOC's Guideline "is no doubt entitled to great deference," it concluded that "[c]ourts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.' "[41]

Evaluation of Section 1604.10(b) in such terms reveals compelling indications that it too is wrong. For the first six years following the effective date of Title VII, EEOC consistently and publicly interpreted the Act as permitting employment practices to take into account the obvious uniqueness of pregnancy.[42] Thus, at least through 1970, the EEOC's position was that employers must grant maternity leave to pregnant employees but that such absences need not be covered as a paid leave under temporary disability plans.[43]

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[41] 414 U.S. at 94-95.

[42] In its First Annual Report to Congress, at pages 40 and 41, the EEOC stated as follows:

> The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. *The pregnant female, however, has no analogous male counterpart* and *pregnancy necessarily must be treated uniquely.* (Emphasis added.)

[43] *See, e.g.,* Dec. No. 71-308, Sept. 17, 1970, CCH EEOC Decisions ¶ 6170; Dec. No. 71-562, Dec. 4, 1970, CCH EEOC Decisions ¶ 6184; Dec. No. 70-360, Dec. 16, 1969, CCH EEOC Decisions

The Commission's published policy changed abruptly in 1971 with Decision No. 71-1474. This decision concluded that the exclusion of pregnancy from coverage under a disability benefits plan was discriminatory when all other non-occupationally related disabilities were covered. The decision did not set forth any further rationale for its conclusion or its failure to follow previous Commission policy. Following Decision No. 71-1474, there is no record of further EEOC pronouncements on this subject until the Commission published its revised Guidelines on April 4, 1972, without any accompanying evidentiary support,[44] and without affording any opportunity for public review and comment.

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¶ 6084; Dec. No. 68-4-538E, June 16, 1969, CCH EEOC Decisions ¶ 6125.

During these years, the EEOC's approach to pregnancy continued to follow the Nov. 15, 1966 opinion of its General Counsel, which stated the Commission policy as follows:

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex . . . .

This view, and that advanced by this *amicus*, is consistent with the legislative history of the proposed Equal Rights Amendment:

> . . . [T]he original resolution does not require that women must be treated in all respects the same as men. Equality does not mean sameness as a result. The original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex.

S. Rep. No. 92-689, p. 12.

[44] As one court noted in refusing to follow the new Guideline, "There appears to be no factual basis upon which these regulations were drawn." *Newmon* v. *Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973).



## CONCLUSION

For all of the foregoing reasons, the Bell System Companies urge that the decision of the Court of Appeals be reversed.

Respectfully submitted,

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# APPENDIX

## APPENDIX

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
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202-466-5557

LEE SATTERFIELD
EXECUTIVE ASSISTANT AND ATTORNEY

January 28, 1974

Mr. Philip J. Davis
Director
Office of Federal Contract Compliance
U. S. Department of Labor
14th and Constitution Ave., N.W.
Washington, D. C. 20210

Dear Mr. Davis:

In response to your request, I am transmitting the enclosed data relevant to the proposed revisions to the Office of Federal Contract Compliance Sex Discrimination Guidelines, 38 Fed. Reg. 35336-35338 (Dec. 27, 1973), on behalf of the American Telephone and Telegraph Company and the Associated Bell Companies. This data focuses on proposed Section 60-20.3(h)(2), which provides in part:

> Medically verifiable disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance policies or sick leave plans available in connection with employment . . .

This section would reverse the present position of OFCC that, "There is no requirement that an employee be paid during absence [for maternity leave]." Memorandum of John L. Wilks, Director, OFCC, to Agency Heads, November 12, 1970, at 5.

Without regard to legal arguments against adoption of proposed Section 60-20.3(h)(2), which undoubtedly will be developed by other interested parties, the attached data statistically demonstrates: (1) the present treatment of men and women under the Companies' sickness and accident disability plan; (2) the cost and impact on the male and female share of disability benefits which would occur if normal pregnancy were treated as a sickness or accident; and (3) the fact that nearly half of those taking maternity leave do not return to work which sharply distinguishes the nature of their absence for employee benefit purposes from accident and sickness absences.

Based on this data, as well as the settled medical opinion that pregnancy is neither a sickness nor accident, we urge that OFCC *not* adopt proposed Section 60-20.3(h)(2), but maintain its present position that federal contractors need not provide sickness and accident benefits for pregnancy.

LEE SATTERFIELD
Executive Assistant
& Attorney

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**Bell System Data Relevant to Proposed Revisions in OFCC Sex Discrimination Guidelines Regarding Treatment of Absences Due to Normal Pregnancy**

I. INTRODUCTION

Recently, six companies in the Bell System (Illinois, Southern, South Central, New York, Long Lines and Pacific) have been sued by parties attacking the legality of their sickness and accident disability programs. The crux of these charges is that the failure to treat normal pregnancy as a disability under sickness and accident disability programs, constitutes discrimination against female employees on the basis of sex. Other major employers, such as General Motors, General Electric, and Delta Air



Lines,[1] are facing similar legal challenges, and initial court decisions are now being rendered. For example, a federal district court in Atlanta recently held that Delta Air Lines could not require female employees to leave work at a specific time prior to delivery, but that absence due to pregnancy and childbirth need not be covered under an accident and sickness disability program. *Newmon* v. *Delta Air Lines, Inc.*, Civ. No. 15681 (N.D. Ga., Dec. 31, 1973). *But see, Wetzel* v. *Liberty Mutual Insurance Co.*, Civ. No. 72-169 (W.D. Pa., Jan. 9, 1974).

Since no company in the Bell System treats normal pregnancy as an accident or sickness disability, the implications of these pending cases will reach beyond the companies directly involved. Every company in the System will be affected by the results of these suits. In light of these legal challenges to current sickness and accident disability programs, it is appropriate to review the operation of the Bell System sickness and accident disability program and to estimate its current effect on employees and the effects which would result by treating pregnancy as a sickness or accident disability.

II. PRESENT DISABILITY PLANS

The sickness and accident disabilities of Bell System employees are classified, for record keeping purposes, into seventeen basic groups (see Table 1) which cover every disability recognized under the various plans within the System. For example, disabilities are grouped into infective and parasitic diseases, mental disorders, diseases of the circulatory system, the digestive system, the musculoskeletal system, and even accidents, poisonings and violence. Within each of these groups, the System's records reflect, by sex, the frequency of occurrence of each

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[1] Grogg v. General Motors Corp., 73 Civ. No. 63 (KTD) (S.D. N.Y.); Gilbert v. General Electric Co., No. 142 72-R (E.D. Va.); Newmon v. Delta Air Lines, Inc., Civ. No. 15681 (N.D. Ga.).

group of disability, the number of disability absences, and the duration of these absences (see Tables 2 and 3).

An examination of the Bell System sickness and accident disability figures for the fiscal year 1970-71 (see Table 2), reveals that in sixteen of the seventeen disability group classifications the frequency rate of women absent from work was higher than for men; the number of cases of women disabled was higher than for men; and women lost more total days from work than men.[2] Finally, an examination of the severity rate (average duration) of these absences indicates that women were generally absent for a longer period than men. While women were 48.57% of the System's total work force eligible to receive disability payments as of December 31, 1970, a review of the System's disability statistics, including all disability groups, reveals that they received wage benefits for 64.65% of the total days for which such benefits were paid during fiscal year 1970-71. Thus, even without treating normal pregnancy as a sickness or accident disability, in fiscal year 1970-71 women collected benefits for a percentage of days far in excess of their percentage of the company work force. It should be recognized that wage replacement benefits were paid to women absent on account of complications of pregnancy and childbirth.[3]

Fiscal year 1971-72 reflects the same sort of pattern as 1970-71 (see Table 3). In the same sixteen of seventeen disability group classifications, women were absent at a higher rate than men; experienced more disabilities than men; and lost more days from work than men. Finally, the statistics again show that generally, when absent, women were absent for longer periods than men. Although

[2] The one disability group category where men are absent at a higher rate than women, experience more disabilities than women, and lose more disability days than women is diseases of the circulatory system, which includes heart attacks and similar cardiac problems. (See Tables 2 and 3.)

[3] See classifications 11 and 15, Tables 1, 2, and 3.



women made up 48.29% of the Bell work force eligible for disability payments as of December 31, 1971, they accounted for 63.45% of the total days for which benefits were paid in all disability groups during fiscal year 1971-72. Again this disproportionate figure reflects the present operation of the Bell Companies' disability programs, which are under attack, and which do not treat normal pregnancy as a sickness or accident disability.

## III. The Effect of Treating Pregnancy As A Sickness or Accident Disability

Since disability payments for pregnancies would be made only to women, treating normal pregnancy as a sickness or accident disability would mean that women employees would receive even greater benefits than the disproportionate benefits they already receive.

In late 1973, eight companies in the System performed a manual count of the number of maternity leaves that had been granted in 1972. These companies then compared this count with the total number of female employees as of December 31, 1972. The results are as follows:

| Company | Number of Maternity Leaves Granted in 1972 | Number of Female Employees as of December 31, 1972 | Percent |
|---|---|---|---|
| New York | 2,406 | 48,115 | 5.00 |
| New Jersey | 761 | 16,113 | 4.73 |
| Chesapeake and Potomac | 1,274 | 23,861 | 5.34 |
| Ohio | 732 | 13,321 | 5.50 |
| Illinois | 1,036 | 20,968 | 4.94 |
| Northwestern | 834 | 14,596 | 5.72 |
| Southwestern | 1,700 | 39,316 | 4.33 |
| Pacific Northwest | 533 | 9,969 | 5.35 |
| **Totals** | **9,276** | **186,259** | **4.98** |

By projecting the results of this eight company survey,[4] a fairly accurate estimate can be made of the System-wide effect of treating pregnancy as a sickness or accident disability.

The Bell System Companies employed approximately 434,400 women eligible for disability benefits in fiscal year 1970-71 (as of December 31, 1970). Assuming 5% of these women took maternity leave in that fiscal year, the System would have had to provide disability payments for approximately 21,700 pregnancies if maternity had been treated as a sickness and accident disability during this period. No figures have yet been compiled that accurately reflect the average length of maternity leave taken throughout the System; nevertheless, figures compiled by Illinois Bell indicate that within the Company the average maternity leave per pregnancy has been approximately 5½ months. Of course, it is reasonable to assume that most women would not be disabled for 5½ months as a result of normal pregnancy and childbirth. Indeed, the testimony of medical experts for both sides in a court action pending against General Electric (see note 1 *supra*) that is similar to the suits the Bell Companies are facing indicates that the total period of disability may be less than six weeks. However, two courts have held in a related context that eight weeks may be an appropriate estimate of the time necessarily lost from work due to pregnancy.[5] Using such an eight week period for calculations, and keeping in mind that the actual period could be found to be considerably

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[4] The companies involved in this count have almost 40% of the System's female employees and represent a cross section of the entire Bell System. Thus, there is no reason to believe that the composite figures presented by this survey would not be valid estimates of figures for the entire System.

[5] Health v. Westerfield Board of Education, 345 F. Supp. 501 (S.D. Ohio, 1972); Doe v. Osteopathic Hospital, 3 FEP 1128 (D. Kans. 1971).



longer, or shorter,[6] if the estimated 21,700 women who took maternity leave in fiscal year 1971 had received disability benefits for eight weeks each, an additional 1,215,200 disability days would have been covered in that year. Thus, instead of receiving benefits for almost 65% of the days for which disability payments were made, women, who represented approximately 49% of the System work force eligible for benefits during this period, would have received benefits for over 72% of the days for which disability payments were made.

Similarly, if 5% of the System's fiscal year 1971-72 female work force eligible for disability benefits, approximately 461,500 women as of December 31, 1971, had received disability benefits for maternity absence in that period, a total of approximately 23,000 pregnancies would have been covered. Assuming disability payments had been made for an average of eight weeks for each of these pregnancies an additional 1,288,000 disability days would have been paid in 1971-72. Therefore, women, who represented approximately 48% of the System work force during that period, would have collected 71% of the total disability days.

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[6] A recent example of the conceivable magnitude of payment periods occurred in Illinois. The State Fair Employment Practices Commission awarded two claimants disability payments for the full six of their maternity leaves. Elliott v. Turner Co., (Charge No. 72C-1155, December 12, 1973); Bennett v. Turner Co., (Charge No. 72C-1156, December 12, 1973). If the estimated 21,700 women who took maternity leaves in the System during fiscal year 1970-71 had received disability payments for the entire period of their 5½ month maternity leave (145 days), an additional 3,146,500 days of disability benefits would have been paid in the System. In other words, pregnant women would have received benefits due to their pregnancies for more disability days than all other women received for their non-pregnancy related disability absences; furthermore, pregnant women would have been paid for nearly twice as many disability days due to their pregnancies than were paid to men for all their disabilities!

If pregnancy had been covered during these periods as an eight week disability, 5% of the women, or approximately *2.5% of the System's work force, would have accounted for approximately 21% of the total days for which disability payments were made* in both fiscal years 1970-71 and 1971-72. No other single disability group—even including both sexes—could generate so large a number of disability days for which benefits would be paid.

These figures demonstrate that treating pregnancy as a sickness or accident disability would create a situation far different from the picture of "equality" painted by opponents of the present disability programs. Indeed, the statistics reveal that women employees already are receiving a significantly greater number of paid benefit days for disabilities than are male employees. Treating pregnancy as a sickness or accident disability would further reduce the percentage of disability days paid to male employees.

Moreover, there can be no doubt that cost of treating normal pregnancy as a sickness or accident disability would be immense. Using the previously mentioned figures which were compiled in late 1973 as the basis for projection, representative costs can readily be estimated. All employees are entitled to disability wage payments on the basis of seniority. An Illinois Bell study indicates that the average seniority of women taking maternity leave is between two and five years. Employees with 2-5 years service may receive up to full wage pay for their first week of absence as a departmental expense paid by the Company. Disability plan wage payments begin on the eighth calendar day of absence . During the first four weeks of a disability period, an employee with 2-5 years of service receives full wage pay. Subsequently, for a forty-eight week period disability payments equalling one-half the weekly salary are paid.



The average weekly wage of women with 2-5 years seniority, who were employed by the System Telephone Operating Companies in fiscal year 1970-71 as of December 31, 1970, was $111.75. If eight weeks of disability benefits had been made to pregnant employees, using the average length of Company service of those taking maternity leave during this period and the average wage of these female employees during 1970-71, the cost impact of wage continuation payments that would result from treating pregnancy as a sickness or accident disability can be estimated. Given the figures discussed above, the wage costs of treating each pregnancy as an eight week disability would have been $726.39 per pregnancy.[7] The System-wide costs for all 21,700 pregnancies in fiscal year 1970-71 would have been $15,762,663 in basic wages; in other words, approximately 2.5% of the System's work force would have received 14.4% of the basic wage benefit dollar. This does not include other wage related costs such as Social Security, pensions, health insurance, etc.[8]

The figures for fiscal year 1971-72 are comparable. The average weekly wage of female employees with 2-5 years seniority, who were employed during this period as of December 31, 1971 was $127.34. Assuming the same seniority and average disability figures applied to fiscal year 1970-71 above, the wage costs of treating each 1971-72 pregnancy as a sickness and accident disability would have been $827.71. The costs for all 23,000 pregnancies within the System during this period would have been $19,037,-

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[7] This assumes that a pregnant employee received full wages for her first week of absence (which may be paid by the Company as a departmental expense), followed by full pay for the next four weeks' absence and half pay for the last three weeks' absence under the Company's disability plan.

[8] This also does not include the cost of establishing and administering a program to determine the length of each normal pregnancy disability and the amount of disability payments to be made for each such pregnancy.

330[9] in basic wages, not including other wage related costs. Again, had normal pregnancy been treated as a sickness and accident disability, a significant portion of the basic wage benefit dollar (13.90%) would have been concentrated in a small percentage of the work force (approximately 2.5%).

### IV. Maternity Leave Return Rate

No system-wide figures indicating the precise work return rate from maternity leave and other disablities have yet been prepared; nevertheless, Illinois Bell Telephone Company recently completed such a study. The results clearly established another factor indicating the questionable equity and financial wisdom of treating pregnancy as though it were a sickness or accident disablity. The Illinois study reveals that in calendar year 1972 all but approximately 3% of those employees who were absent as a result of presently covered sickness and accident disabilities returned to work.[10] By comparison, however, during the same period more than 48% of employees who took maternity leave did not return to the Illinois Bell work force following their leave. Projecting the results of this study to the entire System, the inequity of covering pregnancy as a sickness or accident disability is manifest. If

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[9] These figures represent an average of eight weeks disability for each pregnancy. As noted earlier, see footnote 6, this figure could be increased significantly by administrative or judicial decisions. If the entire period of an average 5½ month maternity leave were treated as a disability for purposes of the sickness and accident program, the fiscal year 1971 and 1972 costs of the Bell Companies in basic wages alone would have been $32,739,007 and $39,539,070 respectively.

[10] The vast majority (almost 90%) of employees who did not return to work after absences as a result of presently covered sickness and accident disabilities either died or became eligible for company pensions. Only 0.57% of Illinois Bell's employees actually resigned from company services after absences presently covered by the sickness and accident disability program.



the treatment of pregnancy as a sickness or accident disability would have accounted for between approximately 15.7 million dollars of basic wage benefit payments in fiscal year 1971 and 19.0 million dollars in fiscal year 1972 (assuming an eight week disability period for both fiscal years) approximately 7.6 and 9.1 million dollars of the yearly wage benefits paid in these respective fiscal years would have gone to claimants who never returned to work! These wage payments would not have served as a bridge to carry workers between periods of employment, which is the basic purpose of disability benefits, but instead would have constituted a unique form of severance pay.

### V. Conclusion

The statistical evidence discussed above highlights the effects of treating pregnancy as a sickness and accident disability. An examination of this evidence raises serious doubts about the equity of so treating pregnancies. Already women receive wage benefits for days of absence as a result of sickness and accident disability that are greatly disproportionate to the wage continuation benefits which men receive. Treating pregnancy as a sickness and accident disability no matter how brief the average period of such disability, can only further distort this important benefit in favor of female employees. The cost impact of accomplishing this questionable result will be immense. Furthermore, the wage benefit payments received under this coverage, although amounting to millions of dollars, will inure to the benefit of only 5% of the Bell Companies' female employees—less than 2.5% of the work force. Finally, a look at the work return rates of employees taking maternity leave indicates that nearly half of the benefits paid for pregnancy would be paid to women who will never return to the System's work force.

## Table 1

### Sickness and Accident Summary Bell System

Group 01 Infective and parasitic diseases
Group 02 Neoplasms
Group 03 Endocrine, nutritional and metabolic diseases
Group 04 Diseases of blood and blood-forming organs
Group 05 Mental disorders
Group 06 Diseases of nervous system and sense organs
Group 07 Diseases of circulatory system
Group 08 Diseases of respiratory system
Group 09 Diseases of digestive system
Group 10 Diseases of genitourinary system
Group 11 Complications of pregnancy, childbirth and puerperium
Group 12 Diseases of skin and subcutaneous tissue
Group 13 Disease of musculoskeletal system and connective tissue
Group 14 Congenital anomalies
Group 15 Perinatal morbidity and mortality
Group 16 Symptoms and ill-defined conditions
Group 17 Accidents, poisonings and violence

## Table 2

### Total Bell System Sickness and Accident Figures for Fiscal Year 1970-71

| Disability Category | Sex | No. of Cases | Frequency Rate Per 1,000 Employees | Severity Rate (average duration of illness) | Total Days Lost |
|---|---|---|---|---|---|
| 01 | M | 2,726 | 5.9 | 26.3 | 71,647 |
| | F | 5,422 | 12.5 | 27.1 | 146,930 |
| 02 | M | 1,204 | 2.6 | 66.6 | 80,173 |
| | F | 4,991 | 11.5 | 55.6 | 277,647 |
| 03 | M | 745 | 1.6 | 38.9 | 28,951 |
| | F | 1,134 | 2.6 | 51.8 | 58,785 |



| Disability Category | Sex | No. of Cases | Frequency Rate Per 1,000 Employees | Severity Rate (average duration of illness) | Total Days Lost |
|---|---|---|---|---|---|
| 04 | M | 93 | 0.2 | 40.6 | 3,774 |
| | F | 535 | 1.2 | 36.7 | 19,634 |
| 05 | M | 1,527 | 3.3 | 57.2 | 87,285 |
| | F | 3,306 | 7.6 | 67.6 | 223,503 |
| 06 | M | 1,560 | 3.4 | 44.3 | 69,064 |
| | F | 2,592 | 6.0 | 42.1 | 109,132 |
| 07 | M | 4,637 | 10.1 | 69.4 | 321,773 |
| | F | 3,582 | 8.2 | 62.2 | 222,723 |
| 08 | M | 8,693 | 18.9 | 19.5 | 169,537 |
| | F | 18,397 | 42.3 | 19.2 | 353,955 |
| 09 | M | 5,488 | 11.9 | 38.1 | 208,816 |
| | F | 5,744 | 13.2 | 41.5 | 238,532 |
| 10 | M | 2,289 | 5.0 | 29.3 | 66,982 |
| | F | 11,137 | 25.6 | 33.6 | 374,707 |
| 11 | M | — | — | — | — |
| | F | 3,104 | 7.1 | 27.8 | 86,438 |
| 12 | M | 1,154 | 2.5 | 25.6 | 29,574 |
| | F | 1,617 | 3.7 | 28.6 | 46,319 |
| 13 | M | 3,941 | 8.6 | 46.4 | 182,686 |
| | F | 5,142 | 11.8 | 53.0 | 272,352 |
| 14 | M | 149 | 0.3 | 51.6 | 7,668 |
| | F | 304 | 0.7 | 42.2 | 12,822 |
| 15 | M | — | — | — | — |
| | F | 328 | 0.8 | 58.2 | 19,084 |
| 16 | M | 1,391 | 3.0 | 29.8 | 41,418 |
| | F | 2,909 | 6.7 | 34.6 | 100,758 |
| 17 | M | 5,694 | 12.4 | 37.4 | 212,981 |
| | F | 7,696 | 17.7 | 42.9 | 330,467 |

| Days Lost | |
|---|---|
| Male | 1,582,329 |
| Female | 2,893,788 |
| **TOTAL** | **4,476,117** |

## Table 3

### Total Bell System and Accident Figures for Fiscal Year 1971-72

| Disability Category | Sex | No. of Cases | Frequency Rate Per 1,000 Employees | Severity Rate (average duration of illness) | Total Days Lost |
|---|---|---|---|---|---|
| 01 | M | 2,594 | 5.2 | 30.4 | 78,904 |
| | F | 5,108 | 11.1 | 29.3 | 149,470 |
| 02 | M | 1,305 | 2.6 | 70.0 | 91,352 |
| | F | 5,390 | 11.7 | 57.6 | 310,518 |
| 03 | M | 719 | 1.5 | 45.7 | 32,832 |
| | F | 1,172 | 2.5 | 50.1 | 58,695 |
| 04 | M | 121 | 0.2 | 43.5 | 5,252 |
| | F | 462 | 1.0 | 43.9 | 20,281 |
| 05 | M | 1,568 | 3.2 | 62.4 | 97,893 |
| | F | 3,445 | 7.5 | 66.6 | 229,558 |
| 06 | M | 1,557 | 3.2 | 47.3 | 73,652 |
| | F | 2,584 | 5.6 | 44.7 | 115,477 |
| 07 | M | 5,007 | 10.1 | 73.0 | 365,723 |
| | F | 3,950 | 8.6 | 61.7 | 243,865 |
| 08 | M | 10,093 | 20.4 | 18.9 | 191,101 |
| | F | 21,789 | 47.2 | 18.7 | 408,365 |
| 09 | M | 5,699 | 11.5 | 39.4 | 224,655 |
| | F | 5,994 | 13.0 | 42.3 | 253,522 |
| 10 | M | 2,441 | 4.9 | 29.2 | 71,290 |
| | F | 11,262 | 24.4 | 34.7 | 391,224 |
| 11 | M | — | — | — | — |
| | F | 2,738 | 5.9 | 29.0 | 79,410 |
| 12 | M | 1,325 | 2.7 | 28.0 | 37,150 |
| | F | 1,627 | 3.5 | 30.1 | 48,936 |



| Disability Category | Sex | No. of Cases | Frequency Rate Per 1,000 Employees | Severity Rate (average duration of illness) | Total Days Lost |
|---|---|---|---|---|---|
| 13 | M | 4,129 | 8.4 | 49.4 | 203,846 |
| | F | 5,419 | 11.7 | 55.8 | 302,345 |
| 14 | M | 172 | 0.3 | 46.2 | 7,941 |
| | F | 339 | 0.7 | 53.5 | 18,119 |
| 15 | M | — | — | — | — |
| | F | 255 | 0.6 | 59.5 | 15,164 |
| 16 | M | 1,487 | 3.0 | 30.3 | 45,111 |
| | F | 3,103 | 6.7 | 38.0 | 118,036 |
| 17 | M | 6,597 | 13.3 | 40.0 | 264,127 |
| | F | 7,904 | 17.1 | 43.6 | 344,862 |

| Days Lost | |
|---|---|
| Male | 1,790,829 |
| Female | 3,107,847 |
| TOTAL | 4,898,676 |

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974.

## Nos. 74-1589 and 74-1590

GENERAL ELECTRIC COMPANY,

*Petitioner,*

*vs.*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL.,

*Respondents.*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL.,

*Petitioners,*

*vs.*

GENERAL ELECTRIC COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

## BRIEF AMICUS CURIAE ON BEHALF OF LIBERTY MUTUAL INSURANCE COMPANY.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

---

## BRIEF AMICUS CURIAE ON BEHALF OF LIBERTY MUTUAL INSURANCE COMPANY.

---

### INTEREST OF THE AMICUS CURIAE.[1]

Liberty Mutual Insurance Company (hereafter "Liberty Mutual") is the petitioner in a case now pending before this

1. This brief is filed with the consent of all parties in accordance with Rule 42(2) of this Court.

Court, *Liberty Mutual Insurance Company* v. *Sandra Wetzel and Mari Ross et al.*, No. 74-1245, which is inextricably linked to the instant case.[2] As the parties here have represented to this Court, "the same question" is presented in both cases.[3] Each controversy centers on the evidentiary elements necessary to prove a *prima facie* case of unlawful discrimination under Title VII in the structure or implementation of an employer's employee disability income insurance program. It is Liberty Mutual's position, as articulated in its principal brief in No. 74-1245 already filed with this Court, that a plaintiff, absent (1) a demonstration that the exclusion of a particular risk, such as pregnancy, or any series of risks from an insurance program is "pretextual" in nature, or (2) that the overall impact of the exclusion or exclusions in the program is to exclude a protected group, *e.g.*, females, from their proportionate share of the benefits distributed, has failed to establish a requisite *prima facie* case of discrimination. The plaintiffs in both *Liberty* and the instant case have failed to meet this burden.

## OPINIONS BELOW.

The opinion of the District Court was entered on April 13, 1974, and is reported at 375 F. Supp. 367. Earlier District Court opinions with respect to procedural aspects of the case are reported at 347 F. Supp. 1058 (1972), at 59 F. R. D. 267 (1973), and at 59 F. R. D. 273 (1973). On June 27, 1975, after an initial determination to defer decision until this Court resolved *Liberty* (J. Pet., p. 2), the United States Court of

2. This Court granted Liberty's petition on May 27, 1975. The parties' principal briefs, as well as numerous briefs *amicus curiae* supporting both parties, were filed with this Court before the present Term commenced. No date has yet been set for oral argument.

3. Joint Petition of All Parties for a Writ of Certiorari (hereinafter "J. Pet."), p. 7. Due to this identity of issues Liberty Mutual joins in the request of the parties here that the oral arguments in *Liberty* and *General Electric* be set in tandem.



Appeals for the Fourth Circuit issued an opinion and judgment, printed in the Supplemental Brief of All Parties to Joint Petition for a Writ of Certiorari (hereafter "Supp. br.") at App. F, pp. 1a-14a and App. G, pp. 15a-16a, which in a divided decision (Chief Judge Haynsworth and Judge Russell; Judge Widener dissenting) affirmed the District Court's decision.

## STATUTE INVOLVED.

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e(a)(1) (hereafter "the Act"), in pertinent part provides:

> It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .

## QUESTION PRESENTED.

Whether a disability income protection plan which excludes disabilities due to pregnancy, while providing for equal risk coverage, benefits and contributions on behalf of all employees, is prohibited by the Act.

## STATEMENT OF THE CASE.

As an *amicus*, Liberty Mutual will not attempt to recapitulate the factual record in the instant case. Certain similarities and differences with *Liberty*, however, should be noted:

1. Both the policies here and in *Liberty* cover numerous disabilities which are limited exclusively to females, *e.g.*, hysterectomies, or to males, *e.g.*, vasectomies, as well as a vast majority which affect both males and females in varying proportions.

2. The policy of General Electric here was virtually comprehensive, covering " 'all disability, including cosmetic surgery [hair transplant], disabilities arising from attempted suicides, etc.' except those occurring during childbirth." *Gilbert* v. *General Electric Company* (Supp. br. at App. F, p. 7a). All such coverage, however, is available to both men and women.[4]
3. Under both the Liberty Mutual and General Electric policies, the same formula, dependent on salary only, determines the amounts to be paid to both men and women. In *Liberty*, moreover, the insurance premium is also identical for each employee: one percent of the employee's salary without regard to the employee's gender.
4. The District Court in the present case, as in *Liberty*, held that actuarial evidence of actual equality of insurance coverage or as to the increased cost of providing pregnancy coverages is irrelevant:

> If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's biologically more burdensome place in the scheme of human existence. An industrial policy which does not account for this fails in providing such sexual equality as is within its power to produce. If Title VII intends to sexually equalize employment opportunity, there must be this one exception to the cost differential defense. 375 F. Supp. at 383.

The Fourth Circuit affirmed this holding, stating that:

> '[W]omen, to be treated without discrimination [under the Act], must be permitted to be women,' . . . Supp. br. at App. F, p. 4a,

4. In *Liberty*, the disability income plan is not so comprehensive, does not cover either of the aforementioned examples, is limited to disabilities which affect the capacity to work, and contains exclusions, which although less common than pregnancy, predominantly affect males.



and over the dissent of Judge Widener, distinguished, as did the Court of Appeals in *Liberty*, this Court's decision in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974). Judge Widener responded (Supp. br. at App. F, p. 12a):

> The court, in Geduldig, held that the exclusion of pregnancy from a state disability insurance plan for employees of private employers was not a classification that would support a finding of sex discrimination, since it was not shown that distinctions involving pregnancy were mere pretexts designed to effect an invidious discrimination against one sex. 417 U. S. at 496-97, n. 20. Such a showing was not made here.

## ARGUMENT.

As in *Liberty*, in the instant case this court must construct a Title VII definitional framework against which the income insurance programs of private and public employers will be measured. In previous decisions this Court has provided for the allocation of proof in actions challenging the hiring and testing policies of employers. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). This Court has further determined, *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), the requisite elements of proof to challenge the distribution of income insurance benefits by a state to private employees. Liberty Mutual submits that in *Geduldig* this Court also resolved the threshold question herein, that a pregnancy exclusion in a disability income plan does not constitute *per se* discrimination based on gender, and that what now remains for decision, therefore, is the proper application of *Griggs* to the instant dispute.[5]

5. In *Griggs* and *McDonnell Douglas*, the Court expressly defined the requisite elements of proof for a *prima facie* case by a Title VII plaintiff, in two very specific situations. In *McDonnell-Douglas*, the Court expressly noted the limited application of the framework set forth there to private, non-class-action cases involv-

1. *The courts below failed to properly allocate the burden of proof.* If an employer failed to similarly insure males and females against the same risk, there would be a *prima facie* case of discrimination, shifting the burden of proof to the employer.[6] Such a case would be closely analogous to *McDonnell Douglas*. Here, however, the situation is, as it was in *Geduldig*, markedly different, and, accordingly, so must the requisite allocation of proof. In *Geduldig* this Court recognized "the lack of identity between the excluded disability [pregnancy] and gender as such . . .", 417 U. S. at 496-497 n. 20. Notwithstanding, therefore, whether pregnancy is included or excluded from the covered risks under an insurance program, there is:

> . . . no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. 417 U. S. at 496-497 (footnote omitted).

In such circumstances, without more, no basis exists for a claim that there is a discriminatory employment practice. Stated differently where, as here, both men and women are protected from the same risks, and the challenge is, as it was in *Geduldig* (*id.* at 494), to the "underinclusiveness of the set of risks" for which protection is offered, a plaintiff can not rely, as was

ing challenges to allegedly restricted employment opportunities. See 411 U. S. at 800 and at 802 n. 13. In *Griggs*, the Court barred the use of apparently "neutral" practices used to "freeze" the effect of prior discriminatory practices and erect "barriers" to employment opportunities where those practices were shown to have a disparate impact on the allocation of jobs between racial groups. By its nature, *Griggs* involved the analysis of aggregate group employment statistics, *i.e.*, the numbers of jobs filled by various racial groups. In an insurance coverage context, to apply *Griggs*, Liberty submits that a plaintiff must demonstrate a disproportionate distribution of the plan's overall benefits, rather than to merely point to specific differences in coverage. No such showing has been made in either the present case or in *Liberty*.

6. For example, a hospitalization policy which covered the medical costs of pregnancy incurred by the wives of male employees but did not cover such costs for female employees would be prohibited.



done in this case, solely on establishing that an insurance exclusion impacts on men and women unequally. Otherwise the exclusion of almost every risk, excepting only those that affect men and women identically, would be prohibited *per se*.

The burden must be on the plaintiff attacking a particular exclusion to demonstrate that the exclusion is "invidious" in either effect or intent, *i.e.*, "pretextual" *Id.* at 496-497 n. 20. For example, a plaintiff could demonstrate that the exclusion has been selected so that one gender materially subsidizes the other, *e.g.*, that the employer pays higher amounts to, or on behalf of, each male employee than is paid for each female employee. Similarly, the benefits granted could be shown to disproportionately advantage males. In such instances the plaintiff would have met the *Griggs* burden, and the employer would have to show a business necessity to justify the disparity or some other "rational relationship" to explain the variance. *Jefferson* v. *Hackney*, 406 U. S. 535, 549 n. 19 (1972). In this case, however, there has been no showing that General Electric had inequitable premiums or benefits or that its pregnancy exclusion was otherwise "pretextual." The plaintiffs, like the *Liberty* plaintiffs, did not meet their initial burden of proof, and *Griggs* is inapplicable.

2. *The evidence submitted by the parties below not only fails to sustain the plaintiffs' burden, but negates the plaintiffs' contentions.* General Electric came forward, although, as shown above, it was not required to, and submitted actuarial evidence as to both its own experience and general macrocosmic evidence, to demonstrate the absence of disparate plan benefits. The parties stipulated, for instance, that the average cost per insured General Electric employee in terms of total benefits paid was (J. Pet., pp. 20a-21a):

| | Male | Female |
|---|---|---|
| 1970..... | $45.76 | $ 82.57 |
| 1971..... | $62.08 | $112.91 |

Actuarial testimony also estimated the female cost differential to be 170% more than the cost for male employees, and projected that this differential would rise to 330% if maternity coverage was included. J. Pet., pp. 21a-22a. There is substantial evidence to corroborate these cost figures. Indeed, a *critic* of the insurance industry concluded that "the loss experience of women, even with pregnancy costs excluded, may run *two and a half times higher* than costs for men."[7] The experience of Liberty *amici* American Telephone and Telegraph Company,[8] the American Life Insurance Association, the Health Insurance Association of America, the American Mutual Insurance Alliance, the National Association of Independent Insurers, and the American Insurance Association bear out these conclusions,[9] as does the actual experience in Hawaii and Rhode Island which further demonstrates the inequality that will be borne by males if an employer must provide pregnancy disability coverage.[10]

7. Herbert C. Dennenberg, former Commissioner of Insurance for the State of Pennsylvania, in testimony before the Joint Economic Committee of Congress on the "Economic Problems of Women", 93 Cong., 1st Sess., Report of Proceedings, Vol. 3 (1973), at 198 (emphasis added).

8. Brief of American Telephone and Telegraph Company as Amicus Curiae on Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit in *Liberty*, pp. 5-6.

9. Brief Amicus Curiae of American Life Insurance Association and Health Insurance Association of America in *Liberty*, p. 26, and Brief Amicus Curiae on Behalf of American Mutual Insurance Alliance, National Association of Independent Insurers, and American Insurance Association on Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit in *Liberty*, p. 5.

10. Coverage of pregnancy under the Hawaii disability plan resulted in an increase in female disability premiums from $4.00 a month to $8.76 a month. Reply Brief of Appellant in *Geduldig*, pp. 17-18. Rhode Island initially included payments for pregnancy related work absences in its program but in 1946 placed limits thereon after it had incurred a deficit of $1.5 million between 1944 when the plan began and mid-1946. Brief of Appellant in *Geduldig*, p. 11. Even thereafter, in 1949-1950, Rhode Island still paid out 30.4% of its total benefits for pregnancy related disabilities. Comment, *Geduldig* v. *Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Col. L. Rev. 441 at 480 n. 202 (1975).



Manifestly in this case, as in *Geduldig*, "[t]he fiscal and actuarial benefits of the program thus accrue to [all] members of both sexes.", a pregnant woman receives ". . . insurance protection equivalent to that provided all other . . . employees, . . ." 417 U. S. at 496-497 n. 20 and at 497. If pregnancy is also covered, as the State of California observed in *Geduldig*, the result would be that,

> . . . 36% of all benefits will be devoted exclusively to benefits for normal pregnancy, and concentrated in the hands of approximately 5% of female workers who are pregnant each year. Since normal pregnancy constitutes by far the largest single category of disability benefits, it would result in a truly dramatic benefit advantage for female workers.[11]

The Act, however, seeks only to insure equality of employment opportunity, not to provide a compensatory advantage for either men or women.[12] To construe *Griggs* to find an exclusion unlawful in such circumstances would require that there must be "a greater economic benefit" provided whenever there are biological differences. *Griggs*, it is submitted, does not require such preferential treatment.

11. Brief of Appellant in *Geduldig*, pp. 35-36.

12. The challenge that must be met by plaintiffs if their technique of simply focusing on the effect of the exclusion, rather than the whole plan, is to be considered at all, is that they provide a tool or test which the courts can rationally use to examine the multitude of private insurance programs. An employer, for example, who provided disability protection against only cancer would presumably be immune from attack because, in contrast to the decision below, "[it would not] grant disability benefits generally, . . ." (Supp. br. at App. F. p. 4a); an employer, however, who covered many temporary disabilities but excludes pregnancy would if the decision below is affirmed, be in violation of the Act. Absent a demonstration of gender inequality with respect to plan contributions, aggregate risk coverage or actual distribution of benefits, however, there is no logical difference. Either both companies have complied with the intent of Title VII or both "had the purpose or effect of discriminating against [females]." *Espinoza* v. *Farah Manufacturing Company*, 414 U. S. 86, 92 (1973).

## CONCLUSION.

For the reasons set forth above and in Liberty Mutual's brief in No. 74-1245, as well as those presented by General Electric, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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October Term, 1974

## No. 74-1589 and No. 74-1590

GENERAL ELECTRIC COMPANY,
Petitioner in No. 74-1589,
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versus

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Petitioners in No. 74-1590.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

## MOTION OF AND BRIEF OF ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIR CORP., d/b/a HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

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GENERAL ELECTRIC COMPANY,
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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# MOTION OF AND BRIEF OF ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIR CORP., d/b/a HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH

CENTRAL AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

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COME NOW ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIR CORP., d/b/a HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., hereinafter referred to as "*Amici* Airlines," and pursuant to Rule 42(3) of this Court, hereby respectfully move for leave to file the attached brief *amici curiae* on behalf of Petitioner, General Electric Company. Written consent to the filing of such brief has been requested of both parties and granted.



## APPLICANTS' INTEREST

1. Applicants are major domestic and international U.S. airlines employing over 100,000 women in the airline industry throughout their route systems. Their employment benefit plans and costs of doing business will be dramatically affected if there is an adverse result in this case.

2. Various *Amici* Airlines have been parties defendant in litigation in lower federal courts throughout the country in cases which have raised new and important questions concerning the merits of the exclusion of pregnancy coverage from employer benefit plans.

3. Because these airlines employ large numbers of women of child bearing age, the decision in this case could have a major impact on the future economic health of these companies, a number of which have already suffered net losses of millions of dollars in recent years. It is in the public interest that they be allowed to present their views to this Court.

## QUESTIONS OF FACT AND LAW WHICH HAVE NOT BEEN AND PROBABLY WILL NOT BE ADEQUATELY PRESENTED BY THE PARTIES

*Amici* Airlines believe that the following questions of fact and law have not been, and there is reason to believe they will not be, adequately presented in the briefs of the parties:

1. Whether the issue is at present properly framed so as to reflect the real question before this Court, to-wit: whether under the fringe benefit plan under scrutiny, men receive an unfair advantage in compensation over women or whether fringe benefits as a whole are fairly equivalent between the sexes.

2. Whether, in light of the fringe benefits analysis advanced here, the lower court properly interpreted this Court's holding in *Geduldig v. Aiello*, 417 U.S. 484 (1974).

3. Whether in light of Congressional intent, as expressed in related legislation concerning sex discrimination, such as the proposed Equal Rights Amendment, the lower court properly construed Title VII of the Civil Rights Act of 1964.

4. Whether the EEOC guidelines of April 5, 1972 concerning employment policies relating to pregnancy and childbirth are entitled to any deference since they are the product of naked administrative fiat.

5. Whether the policies under attack are justified by business necessity sufficient to constitute a defense under Title VII.

The questions of law and fact which *Amici* Airlines desire to brief are extremely relevant to the issues in this case, especially the problem created by the fact



that a large percentage of women who go on maternity leave fail to return to work once the baby is born.

For the foregoing reasons, it is respectfully requested that this Court grant *Amici* Airlines leave to file a brief as *amici curiae*.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

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No. 74-1589 and No. 74-1590

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GENERAL ELECTRIC COMPANY,
Petitioner in No. 74-1589,
Respondent in No. 74-1590,

versus

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, et al.,
Respondents in No. 74-1589,
Petitioners in No. 74-1590.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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## SUMMARY OF ARGUMENT

Title VII requires equality in the compensation which an employer provides employees of both sexes. Total compensation is composed of wages and fringe benefits. Equality of wages is not an issue in this case. The test for determining whether equality exists in fringe benefits is whether the value of the fringe benefits are *fairly equivalent* for employees of each sex. In

the absence of a showing of pretextual motivation, the particular benefits provided are irrelevant to the issue of sex discrimination within the meaning of Title VII. Since equal benefits are provided for both sexes and since it costs an employer more to provide these benefits for women, the fringe benefit programs involved in this case certainly do not discriminate against women.

Since the proper test in a Title VII case involving fringe benefits is whether the benefits to the two sex groups are *fairly equivalent* based on the per capita costs of the plan, this Court's holding in *Geduldig v. Aiello*, 417 U.S. 484 (1974) is dispositive of the issues in this case. In *Geduldig* the California disability plan was supported by contributions from workers of both sexes. In this case, the funds spent on premiums for the disability plan are funds allocable to the cost of labor the same as are wages. The substantial increase in cost which would follow the inclusion of pregnancy would be borne by *all* workers, both male and female, in a reduction of the employee benefit dollars available. Added benefits flowing from these added costs could flow only in favor of a small group of workers who, by definition, must be women. On the other hand, the acturial benefits derived from the exclusion of pregnancy coverage, flow to all employees. This important factor is the same one which led this Court to hold that such a practice was not sex based and therefore could not constitute invidious sex discrimination.

Since the legislative history of Title VII's prohibition against discrimination based on sex is extremely sparce, it is necessary to examine more recent ex-



pressions of Congressional intent in the area of women's rights. In the 1970 and 1971 Congressional debates surrounding the proposed Equal Rights Amendment, it was understood that reasonable classifications based on characteristics unique to one sex would remain proper if the Amendment were ratified. Congressional proponents of the Equal Rights Amendment continually explained that laws *concerning physical characteristics unique to one sex*, such as *child-bearing*, would not be laws which discriminated on the basis of sex. It is difficult to imagine that by the last minute inclusion of sex discrimination among the prohibitions of Title VII, Congress intended to enact the sweeping change suggested here.

Much reliance has been placed, by the lower courts in this case and others, on the April 5, 1972, EEOC Guidelines concerning employment policies relating to pregnancy and child birth and "great deference" has been paid to those guidelines in earlier proceedings in this case. As is clear from the circumstances under which those guidelines were issued, they are *in fact* entitled to *no* deference whatsoever because they were issued after *no* studies or investigations, without any procedural protections or public hearings, and are the product of naked administrative fiat.

Even if the non-inclusion of pregnancy in a sickness and accident disability plan constitutes a sex-based classification, this non-inclusion is lawful since it is mandated by business necessity. An employer's substantial interests in maintaining the financial integrity of its sickness and disability programs and in structuring these programs upon in-

surance concepts are sufficient to constitute a defense of "business necessity" as that term has been judicially developed. For these reasons, there is no violation of Title VII in this case.

## ARGUMENT

### I.

### The Non-Inclusion Of Pregnancy Among The Covered Disabilities In A Sickness And Accident Disability Program Does Not Constitute Sex Discrimination Absent A Showing Of Pretextual Motivation.

#### A. *Title VII requires equality in a fringe benefit program as a whole and does not require the inclusion of any particular benefit.*

The *Amici* Airlines respectfully submit that the analysis of the issue in this case has heretofore focused on only one element of a comprehensive method of compensation — wages and fringe benefits. Assuming that an employer provides equal wages for equal work, the true issue becomes whether an employer's fringe benefit program taken as a whole discriminates on the basis of sex. One aspect of a fringe benefit program may be disability insurance, and pregnancy is simply one potentially compensable condition of such a program. Absent an allegation and proof of pretextual motivation, it is impossible to determine whether the inclusion or non-inclusion of any particular condition in a disability program is discriminatory without examining the *entire* program.



Fringe benefits are nothing more than an indirect form of compensation which an employer provides for employees. *Amici* submit that the correct rule, which this Court should adopt can be stated as follows:

> **So long as the value of the fringe benefits provided by an employer are *fairly equivalent* for employees of each sex, the particular benefits provided are irrelevant to the issue of sex discrimination within the meaning of Title VII unless the inclusion or non-inclusion of a particular benefit is a "mere pretext" for discrimination.**

This rule is thoroughly consistent with the statute, with the congressional history in the area (including the ERA), with Fourteenth Amendment standards, and furthermore keeps the courts out of the quagmire of picking and choosing among every possible benefit which does not fall evenly on all employees. As the record in this case shows, and as simple logic dictates, almost all benefits when reduced to the smallest unit are enjoyed more by one sub-group of employees than by another.

It is basic economics that the value of the risk protection provided to *all* employees is equal to the cost of providing such protection. When the value of that program is broken down between male and female employee groups, it is apparent that female employees have a greater expectation of use value

than males. Since the cost of insurance is directly related to the actuarial expectation of use of the benefits provided, it necessarily follows that General Electric is incurring higher costs per capita in providing protection for their female employees than for male employees. To require an employer to increase this disparity in compensation under the rubric of equality is nonsense. *The purpose of Title VII is not to favor one class of employees over another but to require equality of treatment.*

Notwithstanding the substantial evidence presented by General Electric on this point, the district court misconstrued the meaning of equality under Title VII:

> "Provision of a marginally greater economic benefit to women, if such it is, in the form of pregnancy disability benefits within an otherwise all inclusive disability program, cannot reasonably be considered more favored treatment. If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's biologically more burdensome place in the scheme of human existence . . . If Title VII intends to sexually equalize employment opportunity, there must be this one exception to the cost differential defense." *Gilbert v. General Electric Company*, 375 F. Supp. 367, 383 (E.D. Va. 1974).

Such an interpretation of Title VII is indefensible for at least two reasons. Nowhere in the legislative history or the language of the statute itself can there



be found a hint that Congress intended in enacting Title VII to provide greater compensation for women than for men. Moreover, it is impossible to impute to Congress an intention only to provide pregnancy benefits for those workers who work for companies large enough to afford, and voluntarily choose to have sickness and accident disability programs. *Nowhere has it been suggested that the language of Title VII would require an employer who did not provide sickness and accident disability benefits to institute such a program so that pregnancy could be included.*

In General Electric's plan no fringe benefits are provided for male employees which are not also provided for female employees when analogous benefits for physiological characteristics unique to each sex are taken into account. Likewise, no fringe benefits are provided for female employees which are not also provided for male employees.

By focusing on the narrow issue of pregnancy benefits, the Court below has missed the importance of the meaning of equality in the entire area of fringe benefits. The Court of Appeals for the Fourth Circuit held that an employer must provide disability insurance benefits for its employees who become pregnant if the employer provides disability insurance benefits for illness or other disabilities. With appealing simplicity, the Court noted that since only women can become pregnant, the G.E. plan:

> ". . . is manifestly one which can result in a less comprehensive program of employee

> compensation in benefits for women employees than for men employees; and would do so on the basis of sex." 519 F.2d at 664.

It is neither the purpose of Title VII *nor is it necessary to this Court's interpretation of the Act*, to shape the parameters of an employer's disability insurance program item by item. Some conditions will occur only in women, some only in men; some will be more prevalent in women, some more prevalent in men; and some will occur equally in both sexes. The law requires equality of treatment of employees and forbids favoring any class of employees on the basis of the impermissible classifications of race, color, religion, sex or national origin. Equality on the basis of sex under Title VII requires that an employer compensate men and women performing the same or similar jobs equally. ***Equality in direct compensation (wages) must not be destroyed by inequality in indirect compensation (fringe benefits).***

If the payments made by an employer to provide benefits for male and female employees, and the resulting values of those benefits to the employees, are *fairly equivalent*, then the fringe benefit program does not discriminate on the basis of sex within the meaning of Title VII. If wages are also nondiscriminatory, then the employer is compensating male and female employees equally. There is no need for further judicial scrutiny if these conditions are met.

The test proposed above is similar to the approach taken by the EEOC and the courts in evaluating



employment tests under Title VII. An employer is not required to establish the validity of an employment test *until* it is shown that the test has a disparate impact on a particular class of employees. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Likewise, *an employer should not be required to justify the item-by-item makeup of his disability insurance program until it is shown that that program provides disparate compensation for one class over another.* In the absence of a showing of pretextual motivation, judicial scrutiny of a fringe benefit program should end when it has been determined that the value to the employees of the payments by an employer to provide the insurance are fairly equivalent for each class of employees. When this standard is applied to disability insurance programs, it is clear that these programs do not discriminate against women. The simple fact is that *it now costs more for an employer to provide the type of insurance involved in this case for women than it does for men*, even *without* any additional benefits for pregnancy.[1]

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1 Actuary Paul Jackson, a Fellow in the Society of Actuaries, who has worked in the area of disability insurance coverage since 1956 testified without contradiction in this case concerning the insurance industry practice and experience with respect to disability insurance. His testimony showed that approximately 40 percent of the work force in the United States under age 65, or some 32,000,000 employees, are covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 percent of the plans provide for 13 weeks benefit coverage; 50 percent provide coverage for 26 weeks; and only 5 percent provide coverage for 52 weeks. Only 40 percent of these plans, covering about 12,800,000 employees, provide a pregnancy benefit, and such coverage is almost always limited to six weeks. The cost per unit of benefit under the existing insurance plans for a female employee is approximately 170 percent of that for a male employee even where no maternity benefit is provided; where a six-weeks maternity benefit is provided, the female cost per unit of benefit runs up to 210 percent of the male employee cost; and the latter percentage goes up to 300-330 percent of the male employee cost per unit of benefit where full maternity coverage is provided.

B. ***The inclusion of pregnancy in a disability insurance program would force the restructuring or abolition of fringe benefit programs to maintain the equality that presently exists.***

The inclusion of pregnancy benefits in a disability insurance program is not a minor adjustment. It is a major expense in the aggregate which is not normally included in disability policies. The evidence in this case shows the estimated annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States to be over $1,000,000,000.

Employers and employees have an obvious interest in maintaining the financial integrity of their disability insurance programs. The purpose of these plans is income protection during a temporary period of disability at an affordable cost. *Unlike other conditions, pregnancy often represents a permanent change in status from employee to non-employee.* Between forty and fifty percent of female employees who have children do not return to work following the birth of their child. For these employees, pregnancy does not represent an interruption in their employment but rather a change from a full-time employee to a full-time parent. To provide disability benefits to employees who desire to leave their employment to raise a family would amount to a massive form of severance pay. Such a result is patently unfair to the employer and the remaining employees who are seeking income protection for temporary disabilities. It is self-evident that there is no reliable way to determine



which employees would return following childbirth and which would not. The point is not that some persons would abuse the program — the point is that the cost of these programs would be substantially increased to provide benefits *which would accrue to a large number of non-employees.* It simply is not possible for pregnancy benefits to be provided without drastically increasing the cost and affecting the purpose of existing disability insurance programs.

Because females normally receive a larger share of the benefit dollar even in disability plans which do not include pregnancy, the inclusion of pregnancy as a compensable condition would increase the disparity in compensation between men and women. Since Title VII proscribes sex discrimination and not merely sex discrimination against women, it is doubtful that it will be long before male employees begin challenging such benefit programs on the ground that they result in discriminatory higher compensation of women than men. Indeed, similar attacks have already begun. *See, e.g., Board of Regents v. Dawes,* ___ F.2d ___, 27 W.H. 453 (1975).

In response to such a challenge in the fringe benefit area of compensation, employers will be faced with the dilemma of having to reduce some other benefits to women or increasing the benefits paid to men. The employer may opt to avoid the entire problem by simply abandoning its disability insurance program and increasing wages accordingly so that employees could purchase their own disability insurance. *Title VII only requires equality. It does not require an employer to provide any fringe benefits at all — in-*

*cluding disability insurance.* This option vividly displays the fallacy in the argument that an employer's disability insurance must include maternity benefits

> ***If* it is not discriminatory for an employer to have *equal wages* and no insurance program (allowing employees of either sex to purchase whatever coverage they desire), *then* it must not be discriminatory for an employer to have *equal compensation* consisting of equal wages and equal fringe benefits.**

Otherwise, an employer who provided no insurance program would have to increase the wages of female employees so that they could purchase pregnancy disability insurance. Title VII was never intended to require the anomalous result of higher wages for women than for men. There simply is no need for this Court to examine the particular benefits which employers and employees have decided to purchase as part of the fringe benefit program. Once this Court determines that total compensation, including wages and fringe benefits, is equal for male and female employees, the requirements of Title VII have been met. The *Amici* Airlines respectfully submit that the only *workable test* for determining whether equality in fringe benefits exists, which can be clearly understood and administered fairly and easily by both employers and the courts, is a test which focuses on the value of the benefits provided. If these values are fairly equivalent for both sexes, equality exists and the requirements of Title VII have been met.



### *C. The Issue in this Case has Already Been Determined by this Court in* Geduldig *vs.* Aiello

The Fourth Circuit Court of Appeals held that this Court's opinion in *Geduldig v. Aiello*, 417 U.S. 484 (1974), is not controlling authority with regard to the issues in this case. Both cases involved the permissibility of the non-inclusion of coverage for disability from pregnancy in a sickness and accident disability plan. Although the plans were essentially the same, in *Aiello* the manager of the plan was the State of California whereas here it is a private employer. The Court of Appeals grounded its holding on distinctions between Fourteenth Amendment "standards" and Title VII "standards" and stated:

> There is a well-recognized difference of approach in applying *constitutional* standards under the Equal Protection Clause as in *Aiello* and in the statutory construction of the "sex-blind" mandate of Title VII. 519 F.2d at 667.

The Court of Appeals obviously felt that while situations could exist in which a state might lawfully carry on a discriminatory practice, it did not follow that a private employer could lawfully carry on the same discriminatory practice. This analysis may be correct as far as it goes.[2] *Amici* Airlines do not contest

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2 Prior to this case, the rule in the Fourth Circuit was *contra*. Judge Widener, in his dissent in this case, pointed out that the Fourth Circuit rule was that, "the test of validity under Title VII is not different from the test of validity under the fourteenth amendment." 519 F.2d at 669. Indeed, as Judge Widener points out, that rule is widely followed. See 75 Col. L. Rev., 441, 464, 467 (1975).

that there may be different tests under the Equal Protection Clause and Title VII to determine whether a discriminatory practice is lawful.

If *Aiello* had held that the practice there under scrutiny was sexually discriminatory but was justified because of some compelling governmental purpose, then that case would not necessarily have any precedential value here. But such was simply not the case.

1. *Two-Step Analysis.*

Though the laws governing sex discrimination in this country are different in certain major respects,[3]

3 Charges of sex discrimination may be examined under several laws of the United States. As in *Geduldig*, the permissibility of discrimination on the basis of sex by the states is governed by the Equal Protection Clause of the 14th Amendment, while the permissibility of such discrimination on the part of the federal government is controlled by the 5th Amendment. Similarly, the extent to which private employers may discriminate on the basis of sex in hiring, compensation or wages is governed by Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. Using these various laws as weapons, women are attacking stereotyped barriers of entry into what was heretofore a male-dominated employment market.

Some forms of differentiation on the basis of sex are legally permissible, however, and under each of the laws mentioned above, certain defenses are available to a party charged with sex discrimination. Thus, a state may show that it is not in violation of the Equal Protection Clause of the 14th Amendment when it establishes a discriminatory classification based on sex by showing that the classification had a "rational basis" or that its resulting discrimination is justified by a "compelling state interest." These same defenses are available to the federal government under the 5th Amendment. Likewise, under Title VII of the 1964 Civil Rights Act, an employer may justify discrimination on the basis of sex if it is the result of a bona fide occupational qualification or is required by overriding business necessity. An employer may also discriminate in pay between employees of different sexes provided that the system under which the pay differentials are calculated is one which measures earnings by quantity or quality of production.



under each there is a two-step analysis. The threshold question for each is the same — whether the act or practice complained of constitutes discrimination on the basis of sex. If the answer to the threshold question is in the affirmative, then the party accused may interpose a defense of justification, the type and extent of justification required being governed by the particular law under which the action is brought. If, and only if, this Court is convinced that the non-inclusion of disability resulting from pregnancy in an employee sickness and accident disability program constitutes discrimination on the basis of sex, does it then become necessary to consider whether such sex discrimination is of the unlawful variety.

In *Aiello*, this Court definitively rejected Respondents' position by recognizing that classifications involving pregnancy distinguish between pregnant and non-pregnant persons — not between men and women. In deciding that case, this Court necessarily discussed the appropriate constitutional standard to be applied in determining whether California's insurance program should be upheld. In that regard, it is important to note that a state must justify any classification — not just sex-based ones — with a rational basis or a compelling state interest. This need flows from the fact that although the Title VII classifications of race, color, religion, *sex* or national origin are covered under The Fourteenth Amendment, that constitutional provision is broader and all classifications are subject to its strictures. It was only in response to the assertion in the dissenting opinion that the failure to include pregnancy in disability coverage "inevitably con-

stitutes sex discrimination," 417 U.S. at 501, (Brennan, J. dissenting), that the majority examined the nature of the distinction. That view was expressly rejected.

2. *The Phrase "Discrimination on the Basis of Sex" has one meaning.*

In order to prevail, Respondents must convince this Court that the words "discrimination on the basis of sex" mean something different when the Fourteenth Amendment is involved than they do when Title VII comes into play. They must also convince this Court than a plan which already provides greater per capita benefits to women is discrimination *against* women. In this regard, the cases which hold that Title VII "standards" are different than Equal Protection "standards" are inapposite.

It is not here asserted that once an event of sex discrimination is found that this Court must apply the same standards for determining its permissibility under both laws. It *is* asserted that a determination by this Court that a practice does not constitute "discrimination on the basis of sex," as a statement of logic, requires the application of the same logical equation to the *same practice* when the statutory proscription is against discrimination on the basis of sex. Such an equation was set forth in *Aiello:*

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, 404 U.S. 71, and *Frontiero v. Richardson*, 411 U.S. 677, involving discrimination based on gender as such. The California insurance



> program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to affect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this one on any reasonable basis, just as with respect to any other physical condition. The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes. 417 U.S. at 496 n. 20.

The bearing of this statement on Title VII cases becomes more striking when one considers that facially neutral policies or practices are also illegal

under the Act if they are "mere pretexts" for discrimination. *McDonald Douglas Corp. v. Green, supra*. It was thus open to the Respondents in this case to allege and prove that General Electric's facially neutral practices are mere pretexts for unlawful sex discrimination. To the contrary, General Electric introduced overwhelming evidence that its disability insurance program is soundly based on non-pretextual factors which cannot be linked to sex discrimination.

As was advanced in the initial section of this brief, a fringe benefit plan is not discriminatory in favor of one sex if the *benefits* to the two sex groups are "fairly equivalent" based on the per capita cost of the plan. Thus a decision to include or not to include a particular benefit or to extend or to extract coverage of disabilities by an employer does not require judicial scrutiny *unless one sex derives an unfair benefit over the other*. In *Aiello* this Court found it important that the substantial increase in cost which would accompany inclusion of normal pregnancy among the covered disabilities in the California plan would have to be borne by the non-pregnant citizens of California — both male and female. *Aiello, supra* at 496. This important factor is equally present when the plan is operated by a private employer. To assume that it would be the employer alone and not the employee-beneficiaries of the plan who would bear the staggering costs of pregnancy inclusion, omits entirely the give and take of the revenue allocation process and is in fact nothing more than economic naiveté.

Any business has a finite amount of money available for distribution to all those with an interest



in the revenue of the business. Suppliers, lenders, owners and employees all share in those funds. Premiums paid the employer on sickness and accident policies are attributable to the employee share of revenue along with salaries, wages and other fringe benefits.

Additional funds expended on higher premiums, which would accompany the inclusion of pregnancy benefits are funds which employees, male and female, might otherwise have received in the form of higher wages or other benefits. Those higher wages and benefits must, under Title VII, inure to employees of both sexes.

The individual Plaintiff in this case is in exactly the same posture as the Appellee in *Aiello*. In regard to her claim this Court stated:

> The Appellee simply contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she encountered a risk that was outside the program's protection. *Aiello, supra* at 497.

In sum, the distinctions which Respondents attempt to draw between *Aiello* and this case are *distinctions without differences*. Under the Fourteenth Amendment citizens are guaranteed equal protection under state laws. Under Title VII citizens are guaranteed equal opportunity from their employers. It is submitted that *Aiello* was not written in a vacuum, but

with an eye to Title VII cases to come.[4] Its holding is consistent with the purpose of the 1964 act — to equalize opportunity, not to create an advantage for either men or women.

## II.

## The Legislative History Of Title VII And The Proposed Equal Rights Amendment To The Constitution Supports The View That The Failure To Include Pregnancy Benefits Here Is Not Unlawful.

As is known to this Court, the legislative history of Title VII's prohibition against discrimination based on sex is extremely sparse. The House debate on the sex discrimination amendment covers only nine pages in the Congressional Records.[5] The problem presented in this case was not anticipated during that brief debate, although one of its proponents, Congresswoman St. George, did state that women do not seek or need "special privileges" of the type sought here.[6] Senator Humphrey, manager of the pending Senate bill, commented at one point that, "differences of treatment in industrial benefit plans, including

4 519 F.2d at 669 (Widener, J. dissenting). Footnote 21 of the majority opinion in *Aiello* supports this reading. There it was stated "Indeed, the Appellant submitted to the District Court data that indicated that both the annual claim rate and the annual claim cost are greater for women than for men. As the District Court acknowledged, 'women contribute about 28 percent of the total disability insurance fund and receive back about 38 percent of the fund in benefits.' 359 F. Supp. 792, 800. *Several amici curiae had represented to the Court that they had had a similar experience under private disability insurance programs.*" 417 U.S. at 497 (Emphasis supplied).

5 110 Cong. Rec. 2577-2584 (1964). *See generally*, Note, "Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964." 1968 Duke L.J. 671.

6 110 Cong. Rec. 2581 (1964).



earlier retirement options for women, may continue in operation under this bill if it becomes law."[7] Certainly, these remarks strongly suggest that Congress wisely recognized that the inherent differences between men and women would justify certain distinctions which employers could make with regard to benefit plans. What Congress in effect said was that Title VII's sex discrimination provisions did not reach those particular situations where men and women were not similarly situated.

There are some, including the EEOC, who feel that these earlier expressions of congressional intent are outmoded in light of the changes in societal attitudes toward women. However, these proponents of the expansion of rights and privileges for women ignore a much more recent and explicit expression of the Congressional mind.[8] In 1970 and 1971, Congress considered the proposed Equal Rights Amendment to the Constitution ("ERA"). During the hearings and debates on the ERA, which, if adopted will overlap Title VII in many respects, much was said about the concept of sex discrimination in a situation where members of the two sexes were *not similarly situated*. For example, fourteen members of the House Committee on the Judiciary who supported the version of the ERA which was ultimately approved by both Houses of Congress stated as their Separate Views:

7 110 Cong. Rec. 13663-4 (1964).

8 The practice of looking to analagous legislative activity to glean the general legislative understanding of any given provision was sanctioned by this Court in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973).

> ". . . the original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'same.' As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, law providing for payment of the medical costs of child-bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." H.R. Rep. No. 92-359, 92d. Cong., 1st Sess. 7 (1971).

This understanding was adopted by the majority Report of the Senate Committee on the Judiciary,[9] by the authors of the ERA[10] and by various constitutional scholars and commentators.[11] Proponents of the ERA continually explained that laws concerning wet-nurses, sperm banks, *child-bearing*, forcible rape and other matters related to physical characteristics unique to one sex are not laws which discriminate on the basis of sex. Thus, a classification dealing with pregnancy in a separate manner, consistent with the general concepts set forth above, is not a scheme within the Congressional mind which discriminates on the basis of sex.

9 S. Rep. No. 92-689, 92nd Cong., 1st Sess. 11 (1971).

10 Hearings on H.J. Res. 35,208 and Related Bills, and H.R. 916 and Related Bills, before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Cong. 1st Sess. 40 (1971).

11 *E.g.*, T. Emerson, Hearings on S.J. Res. 61 S.J. Res. 231 before Committee on Judiciary, U.S. Senate, 91st Cong., 2nd Sess. 430, n. 7 (1970).



## III.

## The Sex Discrimination Guidelines Issued By The EEOC On April 5, 1972 Concerning Employment Policies Relating To Pregnancy And Childbirth Are Not Entitled To Any Deference In The Decision Of This Case Because They Are The Product Of Naked Administrative Fiat.

The Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, went into effect on July 2, 1965. Guidelines on Discrimination Because of Sex were originally issued by the EEOC on November 24, 1965;[12] they were amended first on February 21, 1968;[13] again on August 19, 1969;[14] and were last amended and revised effective April 5, 1972.[15] Prior to the last revision, the Guidelines expressed no view whatsoever with respect to the way disabilities resulting from pregnancy or childbirth were to be treated. However, in a series of opinion letters issued contemporaneously with the passage of Title VII and adhered to consistently up to 1972, the EEOC repeatedly stated its position that it was not necessary that pregnancy be included. For example, in an opinion letter issued in 1966, General Counsel Charles Duncan succinctly explained the EEOC's position on the issue:

> ". . . The Commission policy with respect to pregnancy does not seek to compare an

12 30 Fed. Reg. 14926.

13 33 Fed. Reg. 3344.

14 34 Fed. Reg. 13367.

15 37 Fed. Reg. 6835.

> employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. . . . We do not believe an employer must provide the same fringe benefits for pregnancy as he provides for illness . . ."

On the specific question before this Court as to whether pregnancy need be covered under disability insurance benefit plans, Mr. Duncan set out the EEOC's position in another opinion letter "issued pursuant to 29 C.F.R. 1601.30":

> ". . . An insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory." (Excerpt from an EEOC opinion Factor dated November 10, 1966.)[16]

General Counsel Opinion Letters are considered to be interpretations of Title VII by the Commission. *Williams v. New Orleans S.S. Association*, 341 F. Supp. 613, 615-616 (E.D. La. 1972). Absent more, and since the opinion letters are reasonably contemporaneous with the Act, and consistent with each other, they are entitled to "great deference" by the courts. *National Labor Relations Board v. Boeing Company*, 412 U.S. 67, 75 (1973).

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16 Certain of the Opinion Letters issued in 1966 regarding the instant question were published in the CCH Reporting Service. *E.g.*, CCH EPG ¶ 17,304.43.



Notwithstanding its prior interpretations of the Act with regard to the pregnancy benefits question, the EEOC suddenly reversed itself and issued revised guidelines on April 5, 1972. These are the guidelines which respondents here assert are entitled to "great deference." As will be shown, these guidelines are not entitled to any deference. These radically different "guidelines," which obviously will have a major economic impact on the business sector, were developed in a factual vacuum with no respect whatsoever for necessary procedural safeguards and with absolutely no investigation whatsoever.

The Chief of the Legislative Council Division of the EEOC at the time these guidelines were published was Mrs. Sonia P. Fuentes, who had held that position for several years before the guidelines were issued. (See testimony of Mrs. Fuentes, attached hereto as Appendix A, pages 1a through 8a, *infra*.) The Office of Legislative Council was responsible for drafting rules, regulations and guidelines in the area of sex discrimination and other related matters. Thus, this office was responsible for preparing the 1972 guidelines. (Page 8a)

In an early case, following the issuance of the new Guidelines, *Newmon v. Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973), where the precise issue before this court was considered, Mrs. Fuentes (as the author of the "Guidelines"); was subpoenaed and testified by deposition concerning the issuance of the guidelines by the Commission. In considering what effect those guidelines were to have on the case before him, Judge Henderson concluded that they were not

worthy of judicial deference because "there appears to be no factual basis upon which these regulations were drawn."[17] An examination of that testimony will show that Judge Henderson's statement was well founded.

Among other things, the testimony was that the EEOC knew of *no* medical studies concerning pregnancy which had been conducted by the EEOC prior to the issuance of the guidelines.[18] The testimony also indicated that the Commission was *not aware of any* financial studies concerning the impact of the guidelines on industry as a whole which had been made either by it or anyone else at the time the guidelines were drafted.[19] And, in spite of the fact that the EEOC was totally *unaware* of *any relevant data* collected by it or others, the Commission held no public hearings in connection with the development of the guidelines which might have elicited helpful information. Instead of being developed under the protection of any sort of procedural due process consistent within the concepts guaranteed by the Constitution, the 1972 guidelines were composed by one person who had no expertise in the field of medicine, economics or labor relations, and who was assisted by only four other people, including two law students employed as law clerks. Thus were the guidelines for American Industry in the area of maternity leave programs developed.

The false logic underlying the EEOC position is brought into clear focus by examining a dialogue conducted between the court and counsel for the EEOC in

17 374 F. Supp. at 245.

18 Appendix at 3a-8a.

19 Appendix at 5a-6a.



*Communication Workers of America v. American Telephone & Telegraph Company*, 379 F. Supp. 679 (S.D.N.Y. 1974), at a hearing held expressly to consider the impact of *Aiello* in a Title VII setting. In response to a question posed by Judge Knapp as to whether exclusion of pregnancy benefits from a disability or medical expense plan would constitute sex discrimination if the contract at issue were negotiated by an all female union, the EEOC acknowledged that it would not.[20] If however, the omission of pregnancy coverage alone from a benefit plan constitutes a *per se* sex discrimination under Title VII, then the origin of the plan or the composition of the work force should be irrelevant. Indeed, the rule in the Fourth Circuit, and elsewhere, is clearly set forth in the case of *Robinson v. Lorillard Corporation*, 444 F.2d 791 at 799, where the court stated:

> The rights assured by Title VII are not rights which can be bargained away — either by a union, by an employer, or by both acting in concert.

This particular quote was cited with approval in the District Court opinion in this case. 375 F. Supp. at 382. The only conclusion to be drawn then is that, without more, the non-inclusion of pregnancy in a disability plan is not sex discrimination in violation of Title VII.

The mere fact of the existence of such an administrative determination, supposedly entitled to "great deference" necessarily leads one to an ex-

20 The colloquy with the attorney for the EEOC appears at pp. 28-30 of the transcript of that case, and is alluded to in Judge Knapp's decision. 379 F. Supp. 679, 683 n. 1.

amination of how the 1972 guidelines came into existence. In its prefatory remarks to the guidelines published on April 5, 1972, the Commission stated:

> "Because the material herein is interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in the effective date are inapplicable." (37 Fed. Reg. 6835, 6836) (April 5, 1972)

Having dispensed with the procedural safeguards which Congress clearly intended federal agencies to use when it enacted the Administrative Procedure Act, the EEOC then proceeded to have the guidelines published in the April 5, 1972 edition of the Federal Register within the pages entitled "Rules and Regulations," in a shocking attempt to clothe these writings with the dignity which this Court had given to earlier guidelines on job testing.

Where did the agency get the authority to issue guidelines in such a manner? The EEOC states it was by virtue of Section 713(b) of Title VII of the Civil Rights Act of 1964, U.S.C. Section 2000e-12(b). *See* 37 Fed. Reg. 6835. Section 2000e-12 sets forth as follows:

> *Regulations: Conformity of Regulations*
>
> With Administrative Procedure Act; Reliance on Interpretations and Instructions of Commission



> (a) The Commission shall have authority from time to time to issue, . . . suitable *procedural* regulations to carry out the provisions of the subchapter. Regulations issued under this section *shall be in conformity with the standards and limitations of the Administrative Procedures Act.*
>
> (b) In any action or proceeding based on any alleged lawful employment practice, no person shall be subject to any liability or punishment for, or on account of, (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with and in reliance on *any written interpretation or opinion* of the Commission . . . [Emphasis added.]

Section 2000e-12(a) authorizes the Commission to issue procedural regulations in conformance with the APA. Since the 1972 Guidelines are clearly substantive in nature, the EEOC has no authority to make such regulations under Section 2000e-12(a).

It looks to (b) where although it has no authority to make regulations there, it finds implicit power to issue "written interpretations and opinions," which do not have the same procedural limitations attached. It is difficult to believe that Congress intended procedural regulations of the EEOC to be promulgated in a Constitutional manner, and yet not afford the

same protection to *substantive* written interpretations, which obviously have a far greater impact on our society. Although it is difficult to understand why the EEOC appears eager to avoid compliance with the APA, it must, nevertheless, adopt the latter interpretation in order to avoid compliance and it has done so.

It is submitted that Congress never intended that the EEOC would promulgate substantive rules under the "written interpretation" clause of Section 2000e-12(b) and that the Commission has greatly overstepped its authority by doing so. There is certainly a great deal of difference between guidelines interpreting a portion of the statute which requires that testing be job-related, as in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and a naked declaration that a previously approved practice is *prima facie* unlawful. In *Griggs* this Court said that the guidelines there under consideration were entitled to great deference because "the Act and its legislative history support the Commission's interpretations," a remark which the opinion carefully documented.

It is submitted that the interpretive history of Title VII supports the conclusion that the failure to include pregnancy among covered disabilities in employment disability insurance coverage does not constitute "discrimination on the basis of sex" within the meaning of Title VII. The 1972 EEOC guideline to the contrary possesses none of the *indicia* of validity, was issued after no study or hearing, is otherwise wrong, and deserves no deference whatsoever. Rather, the contemporaneous position taken by the EEOC itself



prior to 1972 is a proper interpretation of the meaning of sex discrimination under Title VII as related to individualized treatment of pregnancy.

## IV.
## Even If The Non-Inclusion Of Pregnancy In A Sickness And Accident Disability Plan Is Sex-Based, Such Non-Inclusion Is Not Unlawful.

### A. *The business necessity defense is applicable.*

As has been pointed out above, the non-inclusion of pregnancy among the covered disabilities in a sickness and accident disability plan does not constitute sex discrimination within the meaning of Title VII. Petitioner rested its case below principally on this ground and introduced substantial evidence regarding the excessive cost involved with pregnancy inclusion not in the way of a defense of business necessity, but to show that its motives were not pretextual. 519 F.2d at 667 n.23. While *Amici* Airlines agree with the Petitioner that the evidence adduced below conclusively shows lack of pretextual motivation, they also assert that such evidence presents a valid defense of business necessity. *Amici* assert that the crippling cost increases which would accompany pregnancy inclusion would destroy many of the plans as they are now constituted. Furthermore, these plans are built around insurance concepts and the pregnancy inclusion sought here is violative of many of the basic principles of insurance. *Amici* assert that the substantial business interest which employers have in maintaining the integrity of their plans as they are now

constituted is sufficient to amount to a defense of "business necessity." *Robinson v. Lorillard Corporation*, 444 F.2d 791 (4th Cir. 1971), *cert. dis.* 404 U.S. 1006.

Perhaps the most significant factor which justifies the maintenance of these plans as they are now constituted is the inordinate cost of including pregnancy benefits. Testimony in this case showed that the annual cost of the inclusion of pregnancy benefits in existing plans would amount to in excess of One Billion Dollars. More significantly, evidence has been adduced in other cases that pregnancy benefits would approximately *double* the current cost of short-term disability programs. (Such is the case in an action now pending in the Eastern District of Pennsylvania styled *EEOC v. Delta Air Lines, Inc.*, Civil Action No. 75-98). Although these factors alone are substantial, they become compelling when considered in relative terms. Since females currently receive a greater portion of the benefit dollar nationally, the inclusion of pregnancy benefits would significantly increase the disparity in compensation which already exists. Moreover, there does not appear to be any method by which this inequality could be rectified short of abolishing the programs. This Court should recognize and protect an employer's right to maintain the financial integrity of a compensation program which currently provides *fairly equivalent* benefits to both sexes.

B. ***Inclusion of pregnancy benefits is violative of the basic insurance concepts upon which sickness and accident disability plans are built.***

In the case of *EEOC v. Delta Air Lines, Inc., supra*, Actuary David M. Holland testified by affidavit that



the Defendant, in selecting the benefits to be provided without direct cost to its employees, did not select a number of possible coverages but instead chose to provide income protection to its employees "disabled as a result of demonstrable injury or disease". In a series of interesting observations dealing with insurance concepts, Mr. Holland set forth the basic principles necessary to guard the integrity of any plan of insurance. Certain of those observations are set forth below:

> In the very early beginnings of modern life insurance, insurance was based on the assessment principle. For a group of insureds, the insurance claims and expenses were equally divided (per capita) and assessed to all remaining in the group. Younger members of a group, who had a low expected value of benefit, tended to drop out of the group, and older individuals with a high expected value of benefit tended to try to join the group. As assessments increased, the size of groups decreased, and eventually many assessment plans ended in financial disaster. These plans suffered through antiselection on the part of their members. *Although assessment plans treated all members equally, they did not treat all members equitably.*

Thus, the real origin of modern life insurance was when certain "scientific" principles were applied to insurance.

a. One of the basic principles of insurance is equity. The premium charged for a risk

must bear a direct relation to the expectation of loss from the risk. . . .

Another principle of insurance is that the risk insured should represent a substantial loss, the timing of which is not definitely determinable in advance of the loss. If the risk is small in general but very close to the value of the premium payment, then the situation is more of a pre-paid expense than a transfer of risk via insurance. If the time of loss is definitely determinable in advance of the loss, then the situation is no longer a risk but is a certainty, and accordingly should be budgeted rather than transferred by insurance. . . .

Another principle is that the possibility of an insured selecting adversely against the insurer should be avoided. Obviously insurers would share the fate of assessment societies if they allowed a person who is on his deathbed to apply for insurance, to pay a small premium, and then for his beneficiary to receive a substantial benefit. Therefore, underwriting rules have been established to aid the insurer in selecting risks. . . . In group insurance, underwriting safeguards are also included; for instance,

(1) only certain types of groups are eligible,

(2) there must be a minimum number of people insured,



(3) if the coverage is optional, there are minimum participation standards,

(4) insurance should be incidental to the group,

(5) the amount of benefit should not be subject to individual selection,

(6) individual requirements such as being actively at work or completing a probationary period of employment are also used, and

(7) the benefits as designed should preclude individual selection.

The opportunity for claim abuse should be minimized. . . . (emphasis supplied)

After setting forth these basic principles of insurance which are necessary to the financial and equitable integrity of any plan, Mr. Holland analyzed the effects of the pregnancy inclusion sought by the Plaintiff upon the Defendant's plan:

. . . Addition of maternity benefits . . . . would violate the basic principles of insurance listed above.

a. Addition of maternity benefits would be inequitable in that it would increase the value of benefits to females, and as set forth above, the value of the benefits for

females is already greater than the value of benefits to males.

b. Although a person on maternity leave experiences a loss of income, the loss is not usually so substantial that it cannot be budgeted and time of the loss is fairly predictable. There is usually a period of months after conception where the individual can plan for the birth of a child, and often the general time of conception is planned so that the budgeting period may be even longer.

c. Whether to become pregnant and when to become pregnant are selections which are most often within the control of an individual female. Thus, there is an opportunity for a woman to select against an insurance program. For instance, if a woman learns of an insurance program which provides maternity benefits with no waiting period or only a short waiting period, she could apply for a job with the sole intent of obtaining maternity benefits.

d. With any disability insurance program, the possibility of claim abuse exists; however, if disability benefits are provided for maternity leave, the possibility rapidly approaches a certainty. Based on Delta records for 1970, 1971 and part of 1972, 30% of the employees who requested maternity leave did not return to work with



Delta. [These data omit employees who *indicated* they *would not* return to work.] Thus, providing disability benefits for maternity leave would be more like providing a special termination bonus for 30% of females taking maternity leave. Usually, disability benefits are for less than full pay so that there will be an incentive for the disabled employee to return to work; however, if a woman taking maternity leave has decided not to return to work, the fact that the benefit is less than the full pay provides no incentive to return to work.

It must be remembered when the above factors are considered that an employer does not provide disability coverage as a gift to its employees. Insurance protection is provided to employees as a part of compensation for work done. Certainly Title VII does not require an employer to be used as a stepping stone for an employee desiring to leave its employment and take up the duties of raising a family. Certainly it is a business necessity that an employer receive a *quid pro quo* for compensation provided. The number of employees who do not return to work following the birth of a child without the additional funds provided from disability insurance would almost certainly increase if those funds were available. This Court has never definitively set the parameters of the defense of business necessity. *Amici* Airlines urge that if those parameters are to be set within the confines of this action, they must take into account the financial and conceptual integrity of disability plans as they are now constituted.

## CONCLUSION

For the foregoing reasons it is urged that this Court should reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

GORDON DEAN BOOTH, JR.
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Atlanta, Georgia 30303

Attorney for Amici

Of Counsel:

WILLIAM H. BOICE
J. STANLEY HAWKINS
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1400 Candler Building
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing has been served on Petitioner and Respondents by depositing same in the United States mail, postage prepaid, properly addressed this ____ day of November, 1975.

GORDON DEAN BOOTH. JR.



## APPENDIX A

Proceedings
Taken at the Offices of the
Equal Employment Opportunity Commission
Washington, D.C. 20506

Testimony of Sonia Pressman Fuentes (Called as a witness by Delta Air Lines in the Matter of *Newmon v. Delta Air Lines*, Civil No. 15681, Northern District of Georgia, on May 31, 1973, to give a deposition concerning the drafting and promulgation of the "EEOC Guidelines on Discrimination Because of Sex", issued April 5, 1972.)

EXCERPTS FROM TRANSCRIPT
OF PROCEEDINGS

Whereupon

SONIA PRESSMAN FUENTES
was called for examination by counsel for the defendant, and having been first duly sworn, was examined and testified as follows:

Direct Examination
By Mr. Murphy:

Q. Please state your name for the record. A. My name is Sonia Pressman Fuentes.

* * * *

Q. By whom are you presently employed? A. By the Equal Employment Opportunity Commission.

* * * *

Q. What was your job with the Equal Employment Opportunity Commission? That is, commencing in 1965? A. I was a member of the General Counsel's Office.

* * * *

[12] Q. Approximately when did you become Chief of the Legislative Counsel Division? A. I gave you my best recollection. It was during the time Stanley Hebert was counsel, several years ago. I am sorry. I am not that good on time. Maybe two or three years ago.

Q. Did you continue in that position as Chief, Legislative Counsel up until this day, or have your responsibilities changed in the interim? A. No. I think commencing the first February of this year, that Division was abolished and I became an attorney in the trial litigation section.

Q. Now, do you recall meeting with me here at your office on or about May 4, 1973? A. I don't remember the date, but I did meet you.

Q. And at that time can you recall me asking you several questions concerning the development of the Equal Employment Opportunity Commission Guidelines which [14] are contained in Section 1604.10, I



guess it is of the Commission's Regulations and Guidelines . . . In fact, is this a copy of the Guidelines on Discrimination Because of Sex of the Equal Employment Opportunity Commission? A. It appears to be. It is. I don't know whether it is complete or not. They are published in the Code of Federal Regulations. I don't know whether this is complete. These are certainly some of the documents.

Q. I refer you specifically to the last page on the document and I refer you to specifically Section 1604.10 and I ask you if those are the . . . Guidelines with regard to Pregnancy and Childbirth which we discussed during my visit on May 4, 1973? A. Well, they are the Guidelines on Pregnancy and Childbirth. They are so entitled.

Q. At the time of my discussion with you in early May, can you recall me asking you if you participated in the development of these Guidelines with other attorneys [15] here of the Equal Employment Opportunity Commission? A. I recall that I said I was one of many Commission personnel who had participated in the formulation of the Guidelines.

Q. Can you recall me asking you at that time whether you knew of any medical studies which had been made in conjunction with the development of those Guidelines? A. As I recall, *I think you asked me whether the EEOC had conducted any medical studies and I think I recall saying to my knowledge it had not.* I think I also recall stating that there had been medical testimony, considerable medical testimony presented in Court cases which involved allegations of discrimination in connection with Employer

policies in the pregnancy area and I cited such court cases to you. I am trying to think of the name of it now. There was one case where there was considerable medical testimony pointing out that a woman can safely work when she is pregnant, and so on. *To my knowledge, EEOC had not itself made such studies.*

[17] Q. Can you recall me asking you at our conversation in early May whether or not the EEOC to your knowledge had conducted any studies with regard to the financial impact of the pregnancy and maternity leave guidelines? A. Well, [18] if there was such a study, since it was not made public, whether or not it was made would be a matter available to the general public; therefore I could not testify about it.

[19] Q. To refresh your memory, can you recall us discussing in early May a study about the financial impact of the Commission's Guidelines which had been made by a Bank [20] in the Boston area? A. I am trying to think. I think I have seen some write up but I don't recollect where, in a publication put out by Prentice-Hall. Prentice-Hall put out a study on leave policies in connection with maternity leave policies. *It might have contained some information on the cost.* There might also have been some information on that in a speech Jacqueline Gutwillig gave. She gave a speech in this area which has just been published. That might have contained some facts on cost. *I am just not sure.*

[21] Q. Are you aware of any studies which any one might have made with regard to the job performance



of pregnant women which based upon studies of work output in relation to other women in the work force? A. *The only information I have seen, or testimony or position, are in court cases.* As I recall, the testimony indicated that by and large pregnant women could perform as well as anyone else except in jobs requiring standing where the woman involved had difficulty with swelling of the feet or ankles.

[22] Q. Do you recall or do you know of any studies which have been made by anyone with regard to the psychiatric disorders which occur in pregnancy, including phobias, depression, psychoses, and emotional instability of pregnant women as it affect their job performance? A. This is the first time in my life that I have heard there are such things associated with pregnancy . . .

Q Can you recall having seen any studies having to do with the percentage of the female population with enters labor prematurely? A. No.

Q. Do you recall or are you aware of any studies which have concerned the phenomenon of a histal hernia occurring in pregnant women? A. That is the first time I have heard that is related to pregnancy, if it is.

Q. Have you ever seen or are you aware of any studies concerning urological problems of pregnancy as related to working women and the impact of frequent urination on job performance? A. I have seen no such study.

Q. Have you seen or are you aware of any studies with regard to the physical phenomenon of pregnancy, phenomena of pregnancy as they are related to job performance? A. That is a difficult question. With regard to studies, *I don't think so.*

Q. Are you aware of any hearings which were held, public hearings which were held in connection with the development of the Equal Employment Opportunity Commission's Guidelines on Employment Policies relating to pregnancy and childbirth? A. *No.*

[24] Q. Now, is it not true that the Equal Employment Opportunity Commission's position with regard to pregnancy and childbirth has changed since the effective date of the Civil Rights Act of 1964, which was July 2, 1965. A. Prior to the publication of these Guidelines on April 5, 1972, the Commission had no Guidelines on the matter of pregnancy and childbirth. There had been several Commission decisions in that area and the General Counsel's office had written some letters on that subject, but there had been no commission's position expressed in Guideline form until April 5, 1972.

[28] Q. Basically, do you recall my calling you up and telling you that I had a number of clients who were interested in the Commission's guidelines on discrimination because of sex, and that you said that there was another [29] woman, or man, I can't remember, another person who was primarily responsible in that area; at the present time, due to a change in positions, that you had with the Commission several



months before. A. I recall, I don't recall you saying that you had a number of clients who were interested. I got the impression from our conversation, of course it was a month ago, that you said you had some clients that were interested. There was a question in this area, that you wanted to come up with them, that somebody had given you my name, I can't recall exactly what I said, I think I would have said, *in the past my jurisdiction included the formulation of guidelines on behalf of the Commission,* but that was no longer within my jurisdiction and I believe I referred you to Issie Jenkins, a woman who was in charge of the office of legal counsel, who had that area within her jurisdiction. I think I might have mentioned she was out on leave in connection with the forthcoming birth of a child, and a man named John Goins was acting in her place . . .

* * * *

[46] Cross-Examination
By Mrs. Rindskopf:

Q. Do you know of any published studies indicating the incidence of premature birth in pregnant women? A. Do I know of any? What do you mean, "Do I know of any?" Do you mean, have I heard there have been any?

Q. Have you read or been informed of the results of any? A. To the best of my recollection, I have not read any such studies.

Q. I think I am correct if I stated that you were not aware of the problem of hiatal hernia in pregnancy? A. That is correct.

* * * *

Q. While you were functioning as Chief of the Office of Legislative Counsel . . . You enumerated a number of areas for which you had responsibility. One of the areas you stated was the drafting of rules, regulations and guidelines. Now, the guidelines to which you refer are those that are published from time to time in the Code of Federal Regulations, is that correct? A. They were published in the Federal Register. I think some of them find their way into the Code of Regulations.

Q. Will you describe the rules to which you referred: How do they differ from the guidelines? A. *I don't know that they do* . . .

Q. Was the first Guidelines, Sex Discrimination as it related to Pregnancy Leaves, issued on April 5, 1972? A. That is correct.

Q. Prior to that time there have been no Guidelines on that subject? A. No guideline rule or regulation, that is correct, although there have been Commission Guidelines on Sex Discrimination and on other subjects, published since 1965 or 1966 . . .

[59] Q. Has anything ever been published in the Federal Register that has not had the prior approval of both the General Counsel and the Commission? A. I don't know.



VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

November 13, 1975

Gordon Dean Booth, Jr., Esq.
Troutman, Sanders, Lockerman
& Ashmore
1400 Candler Building
Atlanta, Georgia 30303

Re: General Electric v. Gilbert, et al.
Supreme Court of the United States
Nos. 74-1589 and 74-1590

Dear Mr. Booth:

Pursuant to your request, General Electric Company hereby consents to the filing of a brief *amicus curiae* in the subject case by Alaska Airlines, Inc., Aloha Airlines, Inc., Allegheny Airlines, Inc., American Airlines, Inc., Braniff Airways, Incorporated, Continental Air Lines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Hawaiian Airlines, Inc., Hughes Air Corp., d/b/a Hughes Air-West, National Airlines, Inc., North Central Airlines, Inc., Ozark Airlines, Inc., Pan American World Airways, Inc., Piedmont Airlines, Inc., Southern Airways, Inc., Texas International Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., Western Airlines, Inc., and Wien Alaska Airlines, Inc.

Very truly yours.

/s/ STANLEY R. STRAUSS
Stanley R. Strauss

INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS
AFL-CIO, CLC

1126 Sixteenth Street, N.W. Washington, D.C. 20046
296-1206

Paul Jennings
President

Winn Meuman
General Counsel

David J. Fitzmaurice
Secretary-Treasurer

November 19, 1975

J. Stanley Hawkins
Troutman, Sanders,
Lockerman & Ashmore
1400 Candler Building
Atlanta, Georgia 30303

RE: General Electric Company v. Martha V. Gilbert, et al, Nos. 74-1589 and 74-1590

Dear Mr. Hawkins:

On behalf of Martha V. Gilbert, et al, Respondent in No. 74-1589 and Petitioner in No. 74-1590, we consent to the filing of a brief Amicus Curiae by you as counsel for the below listed clients in support of the position of General Electric Company in the above listed cases.

Alaska Airlines, Inc.
Aloha Airlines, Inc.
Allegheny Airlines, Inc.



American Airlines, Inc.
Braniff Airways, Incorporated
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
Hawaiian Airlines, Inc.
Hughes Air Corp., d/b/a Hughes Airwest
National Airlines, Inc.
North Central Airlines, Inc.
Ozark Airlines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
Western Airlines, Inc.
Wien Alaska Airlines, Inc.

Sincerely yours,

/s/ RUTH WEYAND
RUTH WEYAND
Counsel for Respondent in
No. 74-1589 and Petitioner in
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

GENERAL ELECTRIC COMPANY,
*Petitioner,*

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,
*Petitioners,*

v.

GENERAL ELECTRIC COMPANY

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

## BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF GENERAL ELECTRIC COMPANY

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## BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF GENERAL ELECTRIC COMPANY

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This brief *amicus curiae* is filed by Westinghouse Electric Corporation (hereinafter "Westinghouse") with the consent of all parties,[1] as provided for in Rule 42 of the Rules of this Court.

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1. Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

## INTEREST OF WESTINGHOUSE ELECTRIC CORPORATION

Westinghouse is engaged in the manufacture of industrial electrical equipment, consumer electrical appliances, electronic equipment, electric motors, jet engines, as well as other electrical items and machinery.

Westinghouse is the defendant in various civil lawsuits presently pending in the United States District Court for the Western District of Pennsylvania in which issues have been raised which are similar to those presented in the instant case. The complaints in those suits alleged, *inter alia,* that Westinghouse has discriminated, and is discriminating, on the basis of sex by maintaining sickness and accident plans which exclude pregnancy from their disability income protection coverage, in violation of Title VII of the Civil Rights Act of 1964, as amended[2] (hereinafter "Title VII"). Plaintiffs in those cases, on behalf of a nationwide class, are seeking, *inter alia,* an injunction requiring the elimination of the pregnancy exclusion from Westinghouse's sickness and accident insurance coverage, and monetary damages for many prior years.

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2. 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e, *et seq.*

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## QUESTION PRESENTED

Whether the exclusion of pregnancy from disability income protection plans violates Title VII of the Civil Rights Act of 1964, as amended.

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## STATEMENT OF THE CASE

General Electric Company provides temporary disability income protection to all its employees disabled by sickness or accident in accordance with the terms of the General Electric Insurance Plan. Income protection is not payable for absences from work due to pregnancy.

Respondents[3] alleged in their Complaint that the denial of income protection to female employees absent from work due to pregnancy constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended.

The case was tried before the United States District Court for the Eastern District of Virginia, which court found that General Electric's denial of income protection to employees absent because of pregnancy violates Title VII.[4]

An Appeal to the Fourth Circuit from the District Court's decision was perfected in May, 1974. On June 9,

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3. The parties have agreed that, subject to the approval of this Court, General Electric Company shall be treated as petitioner with respect to the briefing. Joint Petition for Certiorari, p. 1, n.1.

4. *Gilbert v. General Electric Company,* 375 F. Supp. 367 (E.D. Va. 1974).

1975, the Court of Appeals entered an order[5] announcing that its decision in the case would be delayed pending this Court's decision in *Wetzel v. Liberty Mutual Insurance Company,* No. 74-1245, certiorari granted May 27, 1975.

The parties filed a joint petition for a writ of certiorari in advance of the judgment of the Court of Appeals for the Fourth Circuit.

Subsequently, on June 27, 1975, the Court of Appeals issued an opinion and its judgment in this case.[6] The court (Chief Judge Haynsworth and Judge Russell; Judge Widener dissenting) affirmed the District Court's holding, relying in part upon a 1972 Sex Discrimination Guideline issued by the Equal Employment Opportunity Commission ("EEOC"). The Fourth Circuit dismissed the applicability of this Court's decision in *Geduldig v. Aiello,* 417 U.S. 484 (1974) on the grounds that *Aiello* was a case of constitutional analysis, and held that General Electric's income protection plan violated Title VII on the ground that it constituted sex discrimination.

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5. Joint Petition for Certiorari, App. A, p. 1a.

6. *Gilbert v. General Electric Company,* —— F2d ——, (4th Cir., June 27, 1975), Supplemental Brief to Joint Petition for Certiorari, App. F, App. G.



## SUMMARY OF ARGUMENT

In *Geduldig v. Aiello,* 417 U.S. 484 (1974), this Court held that a disability insurance system which excludes pregnancy, but includes coverage for men and women who suffer from other disabilities, is not sexually discriminatory.

This Court determined in *Aiello* that the relevant classifications resulting from the exclusion of pregnancy are "pregnant women" and "non-pregnant persons," and that such classifications do not discriminate on the basis of sex.

In the instant case the Fourth Circuit, looking at the same classification system, held that that system discriminated on the basis of sex. The Fourth Circuit erroneously dismissed the *Aiello* decision on the basis that *Aiello* had involved constitutional interpretation. The Fourth Circuit did not explain why the *Aiello* determinations of the relevant classification system and the effect of that system upon the sexes were determinations peculiar to constitutional analysis.

The *Aiello* determinations as to the relevant classifications and also that such classifications do not discriminate on the basis of sex are legal principles which were not dependent upon deference to the California legislature and are therefore as applicable to a Title VII case as they are to an Equal Protection case.

Moreover, there is significant evidence that Congress does not intend to outlaw the exclusion of maternity benefits in disability income protection plans. Although the legislative history of Title VII's sex provisions is meager, the comments therein reveal that Con-

gress did not take the view that the sex discrimination provisions are to be applied against every employer action which affects males and females differently. In addition, the legislative history of the proposed Equal Rights Amendment to the United States Constitution, which has been adopted by Congress, shows that Congress has explicitly disavowed the position that an employment policy or practice constitutes sex discrimination merely because it is based upon a sex-related physical characteristic.

The EEOC's 1972 Guideline concerning pregnancy and childbirth, upon which the Fourth Circuit in part relied, is entitled to no judicial deference. The Guideline constitutes a substantive regulation and as such is beyond the scope of the EEOC's statutory authority to issue procedural rules. In addition, prior to adopting the 1972 Guideline, the EEOC failed to give notice or solicit comments regarding the proposed rule as required by Section 4 of the Administrative Procedure Act, 5 U.S.C. §553.

Even assuming the 1972 Guideline were a validly issued interpretative regulation, it would still be entitled to no judicial deference because it fails to meet the criteria which this Court has employed in determining the weight, if any, to be accorded administrative interpretations. The 1972 Guideline was adopted without solicitation of testimony or comments; it is inconsistent with the EEOC's prior opinions issued contemporaneously with the arrival of Title VII; and it is a judgment upon a pure question of law—a matter which is for the courts.

The Fourth Circuit's opinion also involves important social policy considerations which affect long-accepted employment practices and well-established legal principles. In the instant case the Court of Appeals held that because a policy operates to the disadvantage of a particular subgroup (pregnant women), of a larger group protected from discrimination by Title VII (women), the policy is *per se* a violation of that statute. Under the Court of Appeals' decision it is irrelevant that the employer may have acted without intention to discriminate and for a highly legitimate business reason—in fact the essential business reason—cost considerations. If this Court affirmed the decision of the Fourth Circuit, then it would be advising employers that an employment practice which disadvantages a subgroup of a larger group protected by Title VII is *per se* illegal even though the practice is undertaken for legitimate business reasons.



Accordingly, this Court should reverse the decision of the Fourth Circuit because (1) the Fourth Circuit's decision does not involve the elimination of sex discrimination but instead involves the imposition of the cost of childbearing upon the employer and upon the entire employee workforce; (2) affirmance would create gross cost inequities between employers in states with public disability plans, such as that approved by this Court in *Aiello,* and employers in states which lack such a plan; and (3) affirmance would be inconsistent with the prior decisions of this Court which have recognized cost as a legitimate basis for employment practices.

When these policy considerations are added to the *Aiello* precedent and the strong congressional intent reflected in the legislative history of the Equal Rights Amendment, we submit that this Court should hold that the exclusion of pregnancy from a disability income protection plan is not a violation of Title VII.

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## ARGUMENT

### I. The Exclusion Of Pregnancy From Disability Income Protection Plans Is Not Discrimination Between The Sexes Because The Exclusion Does Not Classify On The Basis Of Sex.

The Court of Appeals held, *inter alia,* that General Electric's employee disability plan violates the Civil Rights Act of 1964[7] in that the program, "while granting disability benefits generally, denies such benefits expressly for disability arising out of pregnancy . . ."[8]

That determination by the Court of Appeals conflicts with the decision of this Court in *Geduldig v. Aiello,* 417 U.S. 484 (1974) and should be reversed.

The *Aiello* case involved a challenge to the constitutionality of the disability insurance system of the State of California. Under that system benefits were paid to persons who were temporarily unable to work because of a disability not covered by workmen's compensation. The California plan excluded from coverage

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7. Title VII provides in pertinent part as follows:

"It shall be unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex; or

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."

8. *Gilbert, supra,* —— F.2d ——, Supplemental Brief to Joint Petition for Certiorari, App. F, p. 4a.



disabilities that were attributable to pregnancy. The District Court held that the exclusion of such disabilities violated the Equal Protection Clause of the Fourteenth Amendment.

This Court reversed.

The Fourth Circuit in the instant action read the opinion in *Aiello* as finding (a) that the California plan discriminated on the basis of sex, but (b) that such discrimination was "rationally supportable" and thus not violative of the Fourteenth Amendment. The Fourth Circuit viewed the real conflict between the majority and dissenters in *Aiello* as being not over whether sex discrimination was present in that case, but over what standard should be used in determining whether the sex discrimination violated the Fourteenth Amendment.

We submit that the Fourth Circuit's reading of *Aiello* is erroneous.

First, the Fourth Circuit's statement of the reasoning in *Aiello* carries with it its own refutation. Had the majority in *Aiello* determined that the California plan was sexually discriminatory, a mere "rational basis" would not have been sufficient to sustain the plan. This is clear from the earlier decisions of this Court in *Reed v. Reed,* 404 U.S. 71 (1971) and *Kahn v. Shevin,* 416 U.S. 351 (1974).

Those cases indicate that once the Court has determined that a given scheme classifies on the basis of sex, the scheme will meet the standards of the Equal Protection Clause only if there is a "fair and substantial"

relation between the basis of the classification and the purposes to be served by it.[9]

In *Reed,* Chief Justice Burger, joined by all members of the Court, first articulated the "fair and substantial relation" test, which requires stricter scrutiny of a sex classification than does the mere "rational basis" test. In *Kahn,* decided just two months before *Aiello,* a majority of six Justices of this Court again employed the "fair and substantial relation" test in passing on an equal protection claim dealing with sex discrimination.[10] It is significant that every member of the majority in *Aiello* joined in the opinion in *Reed,* and five members of the *Aiello* majority joined in the opinion in *Kahn.*[11]

It is thus clear that had the majority in *Aiello* found that the exclusion of pregnancy benefits in the California plan discriminated on the basis of sex, a "fair and substantial" relation between the basis of the classification and its object would have had to be found to sustain the plan. In fact, as the Fourth Circuit itself noted, the holding in *Aiello* "was simply that a legislative classification incorporating a pregnancy-childbirth classification was rationally supportable' . . ."[12] By this holding, the *Aiello* majority implicitly acknowledged that it did not view distinctions based upon pregnancy as sexually discriminatory.

Further, the *Aiello* opinion also provided an explicit statement that the exclusion of pregnancy was not viewed as sex discrimination:

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[20] There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." [Footnote 20 is that of the Court.][13]

Footnote twenty to the *Aiello* opinion further explains the above-quoted passage and makes absolutely clear that, unless the exclusion of pregnancy is a mere pretext, it is not a sexually discriminatory classification.

> "The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed,* 404 U.S. 71 (1971), and *Frontiero v. Richardson,* 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance pro-

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9. The Fourth Circuit, itself, in the instant case stated its view that the "fair and substantial" relation test is the one to be employed in judging Equal Protection cases involving sex discrimination. *Gilbert, supra,* Supplemental Brief to Joint Petition for Certiorari, App. F, p. 8a, n. 17.

10. In the majority, in *Kahn,* were Chief Justice Burger, Justices Douglas, Stewart, Blackmun, Powell, and Rehnquist.

11. In the majority in *Aiello* were Chief Justice Burger, Justices Stewart, White, Blackmun, Powell, and Rehnquist. Justice White was the only member of the *Aiello* majority who did not join in the *Kahn* majority opinion. In his *Kahn* dissent, Justice White stated that he felt sex was a "suspect classification." Justice White then, like the other members of the *Aiello* majority, was not likely to have held that sex discrimination was present there, but "rationally supportable."

12. *Gilbert, supra,* Supplemental Brief to Joint Petition for Certiorari, App. F, p. 9a.

13. *Aiello, supra,* 417 U.S. at 496-497.

gram does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."[14]

In the face of this explicit language in *Aiello,* the Fourth Circuit stated in its opinion:

> "It should be noted, perhaps parenthetically, that the opinion in *Aiello* did not declare that the distinction in disability benefit rights in that case be-

14. *Aiello, supra,* 417 U.S. at 496-97, n. 20.



> tween males and females, a distinction which excluded pregnancy-related disabilities, was not discriminatory. In fact, the language of the Court indicates rather clearly that the Court considered the differentiation discriminatory. What it concluded was, as we have said, that such discrimination was not 'invidious' and was not without a rational relationship to the objective of the legislature in establishing the social welfare program under review."[15]

This reading of *Aiello* is clearly erroneous. It is evident that when the *Aiello* majority concluded that the California classification was not "invidious" it meant that the classification was not a pretext or camouflage behind which the state could effectuate an intent to discriminate against females. The *Aiello* majority engaged in a three-step analysis. First, the exclusion of pregnancy benefits from the California plan did not constitute sex discrimination. Second, it was not used as a pretext designed to implement an intent to discriminate against women. Finally, since no sex discrimination, invidious or otherwise, was present, the system could be sustained if there was a "rational basis" for it. Since such a basis existed, the system was upheld.

The Fourth Circuit, having stated erroneously that *Aiello* stands for the proposition that the exclusion of pregnancy benefits in a disability plan is sex discrimination, concluded that the *Aiello* decision is not relevant to the instant action. The court stated, "There is a well-recognized difference of approach in applying constitutional standards under the Equal Protection Clause as in

15. *Gilbert, supra,* Supplemental Brief to Joint Petition for Certiorari, App. F, p. 9a.

*Aiello* and in the statutory construction of the 'sex-blind' mandate of Title VII."[16]

We submit, however, that such difference, if any exists, between analysis under the Equal Protection Clause, as opposed to Title VII, would relate solely to the justification which may be offered to sustain a classification system once it has been found to be sexually discriminatory. For example, as discussed *supra* at 10, perhaps a statutory classification system which was sexually discriminatory would be reviewed under a "fair and substantial relation" test, while a different test might be employed in examining a private employer's conduct. However, that difference does not come into play where, as here, the classification system involved has already been found, by virtue of *Aiello,* not to be sexually discriminatory. This Court's determination in *Aiello* of the relevant classifications resulting from exclusion of pregnancy and its conclusion that those classifications do not discriminate on the basis of sex are, in themselves, legal principles regarding the effect of the classification upon the sexes. These principles are not dependent upon any economic analysis or legislative deference. These *Aiello* principles are therefore applicable to statutory interpretation as well as constitutional analysis.

Our interpretation of this Court's decision in *Aiello* is consistent with prior decisions of this Court.

In *Frontiero v. Richardson*[17] and *Reed v. Reed*[18] this Court did not deal with the question of "pregnant

16. *Gilbert, supra,* Supplemental Brief to Joint Petition for Certiorari, App. F, p. 9a.

17. 411 U.S. 677 (1973).

18. 404 U.S. 71 (1971).



persons." Those cases both involved discrimination based upon gender, as such,[19] and were expressly distinguished on this basis in *Aiello.*[20]

Similarly, in *Phillips v. Martin Marietta Corp.,*[21] the alleged discrimination was based solely on sex in that females with pre-school age children were subject to different hiring policies than men with pre-school children. The condition on which the alleged discriminatory action was based in *Martin Marietta, i.e.,* having pre-school children, was a condition which can and does occur among both males and females.

This Court's decision in *Cleveland Board of Education v. LaFleur,*[22] which involved a mandatory leave policy for pregnant teachers, is also clearly reconcilable with *Aiello.* First, *LaFleur* did not hold that the maternity leave regulations were sexually discrimatory within the meaning of the Equal Protection Clause of the Fourteenth Amendment. Rather, this Court held

19. *Frontiero, supra,* concerned the right of a female member of the uniformed services to claim her spouse as a "dependent" for purposes of obtaining increased quarters allowances and medical and dental benefits on an equal footing with male members. *Reed* involved the constitutionality of a mandatory provision of the Idaho probate code that gave preference to men over women when persons of the same entitlement class applied for appointment as administrator of a decedent's estate.

20. *Aiello, supra,* 417 U.S. at 496, n. 20. Distinguishable on the same basis are the recent decisions of this Court in *Stanton v. Stanton,* 43 U.S.L.W. 4449 (U.S. April 15, 1975) and *Weinberger v. Wiesenfeld,* 43 U.S.L.W. 4393 (U.S. March 19, 1975).

21. 400 U.S. 542 (1971).

22. 414 U.S. 632 (1974).

that the Due Process Clause of the Fourteenth Amendment prohibited the state government, through the school system, from depriving a teacher of her job upon the basis of arbitrary unwarranted presumptions as to how long a pregnant person can work. Second, the restrictive maternity leave policies in *LeFleur* involved no legitimate cost variables to the employer to justify the withholding or termination of a job, whereas the conveyance of disability benefits is extremely costly.[23]

The Fourth Circuit's decision is inconsistent with this Court's opinion in *Aiello* and should be reversed.

**II. The Exclusion of Pregnancy From Disability Income Protection Plans Does Not Constitute Sex Discrimination Within The Meaning of Title VII Because Congress Did Not Intend To Outlaw The Exclusion.**

Contrary to the assertions of the Court of Appeals,[24] there is significant evidence that Congress does not intend to outlaw the exclusion of pregnancy from disability income protection plans.

The legislative history of Title VII pertaining to "sex" is meager.[25] Certainly, there is nothing in that

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23. *Brief, infra* at 35, n. 62.

24. *Gilbert, supra,* ..... F.2d ....., Supplemental Brief to Joint Petition for Certiorari, App. F, p. 2a.

25. *Wetzel and Ross v. Liberty Mutual Insurance Company,* 511 F.2d 199, 204 (3rd Cir. 1975).

The prohibition against sex discrimination was added as an amendment by Congressman Smith of Virginia, probably in an attempt to defeat passage of the entire bill. The amendment was quickly adopted in the House by a vote of 168-133 after cursory debate which covers only nine pages of the Congressional Record. 110 Cong. Rec. 2484-92 (1964).



legislative history to suggest that Congress intended to outlaw the practice of excluding payment under sickness and accident income protection plans for absences due to pregnancy.

The debate in the House is devoid of any mention as to how biological differences between the sexes would be resolved under Title VII. Congresswoman Green expressed her dismay that problems arising out of such differences had not been considered by the Judiciary Committee prior to its voting on the measure:

> "Because of biological differences between men and women, there are different problems which will arise in regard to employment. These should be carefully considered by the Committee. There will be new problems for business, for managers, for industrial concerns. These should be taken into consideration before any vote is made in favor of the amendment without any hearings at all on the legislation."[26]

The only comments regarding so-called "fringe benefits" of employment such as the disability income protection plan involved in this case negate a finding that the exclusion of pregnancy from such plans is sexually discriminatory. For example, Congresswoman St. George emphasized that women do not want or need special privileges.[27] Congresswoman Kelly[28] stated that she agreed with her colleague, Mrs. St. George, that "fringe benefit" [sic] and the protective laws of the several states would not be destroyed by favorable

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26. 110 Cong. Rec. 2491 (1964).

27. 110 Cong. Rec. 2488 (1964).

28. 110 Cong. Rec. 2490 (1964).

action on the amendment relating to sex discrimination.[29]

In the Senate, there was even less comment regarding sex discrimination. The legislative history in the Senate dealt essentially with an amendment offered by Senator Bennett to resolve "possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act."[30]

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29. The remainder of the House debate consisted mostly of comments by Southern Congressmen who opposed the Civil Rights Act and included citations to material provided by female proponents of the sex discrimination amendment to the effect that women, *qua* women, were provided no protection under the civil rights bill without the amendment. Every male member of the House voicing support for the inclusion of the amendment (110 Cong. Rec. 2485, 2490-2492) ultimately voted against the civil rights bill (110 Cong. Rec. 2708-2709).

30. 110 Cong. Rec. 13168 (1964). Senator Bennett stated that the purpose of his amendment was to provide that in the event of conflicts, the Equal Pay Act, 29 U.S.C. §206(d)(1), shall not be nullified. The leadership in charge of the bill favored the Bennett Amendment and it was adopted. *Id.*

There is no implication in the Equal Pay Act legislative history that an employer is prohibited from excluding maternity benefits from disability income protection plans. To the contrary, the Secretary of Labor's regulations under the Equal Pay Act exclude "payments related to maternity" from coverage as "wages" under that Act. 29 C.F.R. §800.110. Even if employer contributions for maternity benefits were considered "wages," the Secretary of Labor's regulations specifically approve benefit plans in which equal employer contributions are provided for male and female employees, even though "the benefits which accrue to the employees in question are greater for one sex than for the other." 29 C.F.R. §800.116(d).



The Fourth Circuit found a congressional intent to apply the broad purposes of the statute to sex discrimination and to strike at all discriminatory treatment of men and women. [31] The Fourth Circuit's analysis of congressional intent begs the question, however, since the issue is not whether Congress intended to provide equal employment opportunity for members of both sexes but whether Congress intended that the particular employment practice in question here constitutes a sexually discriminatory employment practice.

Moreover, the legislative history of the proposed Equal Rights Amendment to the United States Constitution ("ERA")[32] indicates that the denial of maternity benefits should not be regarded as discriminatory on the basis of sex.

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31. *Gilbert, supra,* ..... F.2d ....., Supplemental Brief to Joint Petition for Certiorari, App. F, p. 2a.

At least one other Court of Appeals has drawn the opposite inference from the Title VII legislative history. In *Willingham v. Macon Telegraph Publishing Co.,* 507 F.2d 1084, 1090 (5th Cir. *en banc* 1975), the Fifth Circuit *en banc* stated:

> "We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate."

32. The ERA requires that:

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

The legislative history of the ERA constitutes credible evidence of the intent of Congress with respect to sex discrimination matters since the Amendment has been adopted by both houses of Congress.[33] This Court has held that subsequent legislation is entitled to weight in construing the intent of an earlier law dealing with the same subject. *F.H.A. v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Glidden Company v. Zdanok*, 370 U.S. 530, 541 (1962); *Great Northern Railway Co. v. United States*, 315 U.S. 262, 277 (1942).

The legislative history of the ERA clearly shows that Congress has disavowed the position that an employment policy or practice constitutes sex discrimination merely because it is based upon a sex-related physical characteristic.

Fourteen of the members of the House Committee on the Judiciary who supported the original version of H. J. Res. 208, the version of the ERA ultimately approved by both houses of Congress, stated as their Separate Views on H. J. Res. 208:[34]

> "The legal principal underlying the Equal Rights amendment as proposed by Mrs. Griffiths [Rep. Martha Griffiths of Michigan] is that the law must deal with the individual attributes of the particular

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33. The House approved the ERA by a vote of 354-23. H. J. Res. 208, 92d Cong., 1st Sess., 117 Cong. Rec. H9392 (daily ed. Oct. 12, 1971). The Senate approved it by a vote of 84-8. S. J. Res. 122, 92d Cong., 2d Sess., 118 Cong. Rec. S4612 (daily ed. March 22, 1972). The Amendment has been submitted to the states for ratification.

34. H. R. Rep. No. 92-359, 92d Cong., 1st Sess. 7 (1971) (hereinafter cited as H. R. Rep. No. 92-359) (The Separate Views).



> person and not with stereotypes or overclassification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'sameness.' *As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child bearing could only apply to women.* In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." [Emphasis added.]

The majority Report of the Senate Judiciary Committee characterized these "Separate Views" as stating "concisely and accurately the understanding of the proponents of the Amendment . . . ."[35]

These Committee Reports were based largely on testimony given at hearings by a number of key supporters of the Amendment, including Congresswoman Griffiths, the sponsor of the ERA in the House. In her testimony, Congresswoman Griffiths explained that there must necessarily be certain limits on "sex discrimination" as that concept would be treated under the Amendment. In explaining what the Amendment would *not* do, she testified:[36]

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35. S. Rep. No. 92-689, 92d Cong., 1st Sess. 12 (1972) (hereinafter cited as S. Rep. No. 92-689). The Senate Report includes several paragraphs from the Separate Views, including the one quoted above.

36. Hearings before Subcomm. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 40 (1971) (hereinafter cited as ERA House Hearings).

> "Like private action, governmental action dealing with a physical characteristic unique to one sex would not be affected by the equal rights amendment. Where a law deals with a physical characteristic unique to one sex, equality between the sexes could not be achieved, for such a law could not apply in practice to both sexes. Therefore, the equal rights amendment would not affect laws dealing with a physical characteristic unique to one sex, such as laws governing childbearing, sperm donation, or criminal acts capable of being committed by members of only one sex."

In response to questioning on whether the ERA would prohibit all classifications taking account of sex, Mrs. Griffiths again acknowledged the natural limitation on the scope of the Amendment:[37]

> "But you would have to have some distinction in laws that apply to mothers, to pregnant women, because men aren't pregnant. You don't have to have the same law applying because of different functions of the body. The bodies are not exactly the same, so there could be a difference."

Mrs. Griffiths' position was repeatedly adopted by other Congressional supporters of the ERA. Congresswoman Bella Abzug testified that the Amendment would retain sex-based distinctions "where the law could not possibly apply to both sexes, for example, as in the laws against rape."[38] Similarly, during the House debate, Congressman William Ryan pointed out:

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37. ERA House Hearings at 51.
38. ERA House Hearings at 116.



> "The basic principle underlying the equal rights amendment is that legal rights must be determined by the actual attributes of an individual, not by sex. This principle does not preclude legitimate differentiation based on the unique physical characteristics of the sexes."[39]

This approach to the general question of what constitutes sex discrimination was endorsed by even those supporters of the ERA who claimed to prefer a broader, more "absolutist" application of the Amendment. Professor Thomas I. Emerson, Lines Professor of Law at The Yale Law School,[40] explained in testimony presented to both the House and Senate Committees that the Amendment would not prohibit legislation or other official action dealing with physical characteristics unique to one sex. He testified before the Senate Judiciary Committee that:

> "The fundamental legal principle underlying the equal rights amendment, then, is that the law must deal with the individual attributes of the particular person, not with a vast overclassification based upon the irrelevant factor of sex. It should be noted at this point that there is one type of situation where the law may focus on a sexual characteristic but the basic principle just stated has no application.

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39. 117 Cong. Rec. H9368 (daily ed. Oct. 12, 1971). To the same effect, see remarks of Congressman Drinan, *Id.* at H9374; Congressman Mitchell, *Id.* at H9378; Congressman Broyhill, *Id.* at H9383; and Senator Gurney, 118 Cong. Rec. S4394 (daily ed. March 21, 1972).

40. Professor Emerson and his co-authors were the first to articulate the "absolute" interpretation of the ERA. Brown, Emerson, Falk, and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 *Yale L. J.* 871 (1971).

"This occurs where the legal system deals directly with a physical characteristic that is unique to one sex. In this situation it could be said that, in a certain sense, the individual obtains a benefit or is subject to a restriction, because he or she belongs to one or the other sex.

"Thus a law providing for payment of the medical costs of childbearing would cover only women, and a law relating to sperm banks would restrict only men. Such legislation cannot be said to deny equal rights to the other sex. There is no basis here for seeking or achieving equality."[41]

And in his testimony before the House Subcommittee, Professor Emerson stated:

"[T]he equal rights amendment does not preclude legislation, or other official action, which relates to a physical characteristic unique to one sex. Thus a law relating to wet nurses would cover only women, and a law regulating the donation of sperm would restrict only men. Such legislation does not, however, deny equal rights to the other sex. So long as the characteristics [sic] is found in all women and no men, or all men and no women, the law does not violate the basic principle of the equal rights amendment; for it raises no problem of ignoring individual characteristics in favor of a prevailing group characteristic or an average.

"Instances of laws directly concerned with physical differences found only in one sex are relatively rare. Yet they include many of the examples cited by opponents of the equal rights amendment as demonstrating the nonviability of that proposal. Thus not only would laws concerning wet nurses and sperm donors be permissible but so would laws establishing medical leave for child bearing, though medical leave for child rearing would have to apply to both sexes. Laws punishing forcible rape, which relate to a unique physical characteristic of man, would remain in effect. So would paternity legislation. Laws dealing with homosexual relations would likewise be unaffected, for such laws also deal with physical characteristics pertaining only to one sex."[42]

Similarly, Lucille H. Shriver, Federation Director, The National Federation of Business and Professional Women's Clubs, Inc., observed:

"The significant point always is: Is the distinction one of sex alone or, is there something added or some special function served. On this basis, for example, maternity legislation would not be affected by the equal rights amendment. Maternity legislation affects only females, but any man who could use it certainly would be thereby eligible. The fact is, that maternity legislation can be available only to women because they alone, physiologically, house the prenatal child and childcarrying is the criterion for maternity legislation."[43]

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41. Hearings on S. J. Res. 61 and S. J. Res. 231, before the Sen. Comm. on the Judiciary, 91st Cong., 2d Sess. 298-99 (1970).

42. ERA House Hearings at 402.

43. Prepared statement of Ms. Shriver presented to House Subcommittee, ERA House Hearings at 156. *Accord:* testimony of Betty Friedan, founder of National Organization for Women, Hearings on S. J. Res. 61 before the Subcomm. on Constitutional Amendments

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In view of the failure of the ERA to treat a matter such as that involved in this case as sexually discriminatory, it would be anomalous in the extreme to regard it as sex discrimination under Title VII. The legislative history of the ERA in this respect should be viewed as the controlling substitute for the comparatively barren legislative history of Title VII on sex discrimination.

In summary, the above analysis of Congress' concept of sex discrimination under both Title VII and the ERA shows that the exclusion of pregnancy benefits from a disability income protection plan should not be regarded as discriminatory on the basis of sex.

**III. The 1972 Guideline Issued by the Equal Employment Opportunity Commission Concerning Disability Due To Pregnancy and Childbirth Is Not Entitled To Judicial Deference.**

On April 5, 1972, the Equal Employment Opportunity Commission ("EEOC") issued its revised "Guidelines on Discrimination Because of Sex" to require that health or temporary disability insurance plans cover disability due to pregnancy or childbirth on the same terms as they cover other temporary disabilities.[44]

The Fourth Circuit erroneously gave deference to the 1972 Guideline concerning pregnancy and childbirth

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of the Senate Judiciary Comm., 91st Cong., 2d Sess. 493 (1970) ("The only full special protection that women need is in the matter of maternity and childbering [sic] and none of the so-called protective laws cover this. And furthermore, that is a functional distinction that the equal rights amendment wouldn't touch because men don't bear babies.")

44. 29 C.F.R. §1604.10(b).



in holding that it is sexually discriminatory for an employer to exclude pregnancy benefits from a disability income protection plan that includes other kinds of temporary disabilities.[45]

The EEOC's 1972 Guideline concerning pregnancy and childbirth is entitled to no judicial deference because (1) the Guideline constiitutes a substantive rule which the EEOC has no statutory authority to issue and it is therefore invalid; and (2) even assuming, *arguendo,* that the Guideline were an "interpretative" rather than a "substantive" rule and as such within the EEOC's rulemaking power, the Guideline fails to meet the criteria which this Court has employed in determining the weight, if any, to be accorded such administrative interpretations.

A. THE EEOC EXCEEDED THE SCOPE OF ITS AUTHORITY IN ISSUING THE 1972 GUIDELINE CONCERNING PREGNANCY AND CHILDBIRTH.

Section 713(a) of the Act provides that the EEOC "shall have authority from time to time to issue, amend, or rescind suitable *procedural* regulations to carry out the provisions" of Title VII.[46] The original bill as reported out of the Judiciary Committee of the House of Representatives did not contain the word "procedural."[47] The word "procedural" was inserted on the House floor pursuant to an amendment offered by Con-

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45. *Gilbert, supra* ..... F.2d ....., Supplemental Brief to Joint Petition for Certiorari, App. F, p. 5a. The Third Circuit relied even more heavily on this 1972 EEOC guideline in *Wetzel, supra,* 511 F.2d at 204-205.

46. 42 U.S.C. §2000e-12 (emphasis added).

47. H. R. Rep. No. 88-914, 88th Cong., 1st Sess. (1963).

gressman Cellar[48] and was intended as a mandate to the Commission that it was not to have authority to make substantive rules and regulations.[49]

The EEOC violated this congressional mandate when it issued its 1972 Guideline concerning pregnancy and childbirth. The Guideline constitutes a substantive legislative rule. It affects virtually all disability and sick leave plans in effect in the United States[50] and represents a complete reversal of the prior EEOC policy and announced position.[51] More significantly, the guideline requires fundamental and drastic changes in industry

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48. 110 Cong. Rec. 2482 (1964). The original language was very similar to the rule-making authority of the NLRB as set forth in 29 U.S.C. §156:

> "The Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter."

49. In *Dobbins v. Local 212, IBEW,* 292 F.Supp. 413, 449 (S.D. Ohio 1968), the Court observed:

> "We note first that the agency charged with the enforcement of Title VII, the Equal Employment Opportunity Commission, is authorized by Congress only to issue 'suitable *procedural* regulations.' That excludes substantive and the history of the adoption of the Act bears this out." (italics in original).

50. Title VII covers virtually all employers, both public and private, throughout the United States and almost every such employer in the United States either excludes absence due to pregnancy from sickness and accident benefit coverage or limits such coverage more strictly than coverage for sickness or accident. *See e.g.,* U.S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Selected Health Insurance Plans Under Collective Bargaining, Early 1966, Bull. No. 1502 (September 1966).

51. *Brief, infra,* at 33.



insurance practices, not only by requiring the creation of a new insurance benefit but also by greatly increasing the cost of existing temporary disability insurance and sick leave plans.[52] The Guideline purports to answer the ultimate legal question—whether the exclusion of pregnancy is, under Title VII, an illegal classification system—a question which Congress did not address and which the courts must answer. The Guideline clearly exceeds the scope of a "procedural" regulation.[53]

This Court has not hesitated in the past to invalidate administrative rules which exceeded the scope of agency authority. *Helvering v. Sabine Transportation Co.,* 318 U.S. 306, 311-312 (1943); *Helvering v. Credit Alliance Corp.,* 316 U.S. 107, 113 (1942).

The Guideline concerning pregnancy and childbirth is invalid for the further reason that the EEOC failed to comply with the requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. §553, in issuing the guideline.

Section 4 requires that before an agency adopts a rule, notice must be published in the Federal Register

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52. *Brief, infra,* at 35.

53. Compare the EEOC Guideline discussed in *Albemarle Paper Co. v. Moody,* 43 U.S.L.W. 4880 (U.S. June 25, 1975) which consists of the EEOC's interpretation of specific statutory language in connection with the validation of an employer's pre-employment tests pursuant to §703(1) of Title VII. Unlike the guideline in *Albemarle,* the EEOC's 1972 Guideline concerning pregnancy and childbirth is not based upon a provision in the statute. The EEOC testing guidelines were also adopted pursuant to extensive commentary and assistance from professional psychologists. No such outside testimony was sought by the EEOC on its 1972 maternity Guideline. *Brief, infra,* at 33.

and interested parties must be given an opportunity to comment. No such notice or opportunity to comment was given before the EEOC promulgated the 1972 Guideline concerning pregnancy and childbirth.

The requirements of Section 4 apply to "substantive legislative rules and regulations" which "create law, usually implementary to an existing law." *Gibson Wine Co., Inc. v. Snyder,* 194 F.2d 329, 331 (D.C. Cir. 1952). Section 4 does not apply to an agency's "interpretative rules," which "are statements as to what the administrative officer thinks the statute or regulation means." *Gibson, supra,* at 331.

The EEOC has characterized its 1972 Guideline concerning pregnancy and childbirth as "interpretative in nature."[54] This Court, however, is not bound by the label attached by the administrative agency but instead must look to such factors as the real effect of the rule, the source of authority for its promulgation, and the force and effect which attaches to the rule itself. *Hou Ching Chow v. Attorney General,* 362 F.Supp. 1288, 1292 (D.D.C. 1973).[55] As discussed above, the Commission's 1972 Guideline attempts to create a substantive employment standard which must be met by employers. Thus, even if the EEOC had the statutory authority to issue substantive regulations, the 1972 Guideline concerning pregnancy and childbirth nevertheless would be invalid

54. 37 Fed. Reg. 6836 (April 5, 1972).

55. *See also Columbia Broadcasting System, Inc. v. United States,* 316 U.S. 407, 416 (1942) ("The particular label placed upon [the commission's order] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.")



because it was not issued pursuant to the requirements of the Administrative Procedure Act.

### B. Assuming, *Arguendo,* That The Guideline Concerning Pregnancy And Childbirth Is Interpretative In Nature, The Guideline Is Still Entitled To No Deference By This Court.

Assuming, *arguendo,* that the EEOC's 1972 Guideline concerning pregnancy and childbirth is "interpretative" rather than "substantive" in nature and that the EEOC possesses the statutory authority to issue an "interpretative" regulation, the Guideline is, in any event, not entitled to judicial deference.

This Court has set forth various standards to be followed by the judiciary in determining the weight, if any, to be accorded an administrative agency's interpretation of a statutory provision.

In *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86 (1973) this Court rejected the EEOC's interpretation of the phrase "national origin" in §703 of Title VII, explaining that deference to administrative guidelines must have limits where "application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question."[56]

In *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944), a case involving certain interpretative judgments issued by the Wage and Hour Administrator under the Fair Labor Standards Act, this Court noted, *inter alia,* the following criteria to be considered in evaluating an administrative regulation: the degree to which the regu-

56. *Espinoza, supra,* 414 U.S. at 94.

lation involved judgment in an area where the administrator had special expertise; its consistency with earlier and later pronouncements; and the thoroughness of the agency's consideration.

Application of the *Espinoza* and *Skidmore* criteria to the EEOC's 1972 Guideline concerning pregnancy and childbirth indicates that the Guideline meets none of these criteria and should therefore be accorded no deference by the Courts.

First, application of the Guideline concerning pregnancy and childbirth would be inconsistent with the intent of Congress. As discussed *supra* at 16-19, there is nothing in the legislative history of Title VII to indicate that Congress intended to outlaw the practice of excluding payment under sickness and accident income protection plans for absences due to pregnancy. Moreover, when Congress re-enacted the Title VII legislation in March of 1972, the published opinions of the EEOC sanctioned the pregnancy exclusion. Also, the legislative history of the Equal Rights Amendment to the Constitution indicates that Congress does not intend that an employment policy or practice be held to constitute sex discrimination because it is based upon a sex-related physical characteristic such as pregnancy.[57]

Further, the subject matter of the instant Guideline is not a matter as to which the EEOC has special experience or expertise. The Guideline involves a question of law, *i.e.*, whether the classification of "pregnant persons" is sex discrimination. That question is for the courts not an administrative agency.

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57. *Brief, supra,* at 19-26.



Next, the history of the issuance of the Guideline in question indicates that the Guideline is not entitled to the judicial deference normally accorded agency interpretations. The 1972 Guideline is neither a contemporaneous nor a consistent construction of the statute.[58] Rather, the EEOC's contemporaneous position on the treatment of pregnancy under Title VII appeared in a series of opinion letters issued by the EEOC's General Counsel in 1966.[59] The EEOC's position at that time (and up to April, 1972) was that an insurance plan or other benefit plan may exclude maternity as a covered risk, and such an exclusion would not be discriminatory.

Finally, as pointed out in Part III-A, *supra,* the EEOC did not comply with the notice and comment provisions of the Administrative Procedure Act before it promulgated its 1972 Guideline concerning pregnancy and childbirth. No testimony, comments or opinions were solicited with respect to the Guideline.[60] The issuance

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58. In *Udall v. Tallman,* 380 U.S. 1, 16 (1965), this Court noted that contemporaneous constructions of a statute are more likely to be given deference. In *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86 (1973) this Court found it significant that the EEOC had once held a different view as to the meaning of the phrase "national origin."

59. *E.g.,* General Counsel Opinion Letter, December 9, 1966, which was reported in CCH Employment Practice Guide, December 21, 1966 at ¶17,334.44.

60. Ms. Sonia P. Fuentes, the Chief of the Legislative Counsel Division of the EEOC at the time the Sex Discrimination Guidelines were promulgated, admitted that the EEOC had conducted no medical studies prior to issuing the Guidelines, and that she was not aware of any financial studies conducted concerning the monetary impact of the Guidelines on industry. The Office of Legislative Counsel drafted the Guidelines, yet Ms. Fuentes

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of the Guideline in such manner reveals that the guideline was not thoroughly or objectively considered.

In summary, judged by the above standards, it is clear that the EEOC Guideline concerning pregnancy and childbirth is not entitled to judicial deference.

## IV. The Decision Of The Fourth Circuit Is Inconsistent With This Court's Prior Determinations That Cost Is A Legitimate Basis For Employer Conduct; In Addition, Affirmance Of The Fourth Circuit's Decision Would Have An Undesirable Effect Upon Long-Accepted Employment Practices And Well-Established Legal Principles.

The Fourth Circuit has in effect held that because a policy operates to the disadvantage of a particular subgroup (pregnant women), of a larger group protected from discrimination by Title VII (women), the policy is *per se* a violation of that statute.[61] Under the Fourth Circuit's holding it is irrelevant that the employer may have acted without intention to discriminate and for a highly legitimate business reason—in fact the essential business reason—cost considerations. If this Court affirms the Fourth Circuit, then it will be telling employers that a practice which operates to the disadvantage of some subgroup of a larger group pro-

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had no expertise in medicine, economics, or labor relations. Deposition Testimony of Ms. Fuentes in *Newman v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973). *See* "Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted," 24 *DePaul L. Rev.* 127, 130 (1974).

61. *Gilbert, supra,* ..... F.2d ....., Supplemental Brief to Joint Petition for Certiorari, App. F, p. 4a.



tected by Title VII is *per se* illegal even when undertaken for legitimate business reasons.

We submit that this Court should not affirm the Fourth Circuit (1) because the Fourth Circuit's opinion does not involve elimination of sex discrimination but instead involves the imposition of the cost of childbearing upon the employer and upon the entire employee workforce, as a matter of law, without regard to the wishes of the union or employees in respect to the manner of distributing employment benefits, (2) because affirmance would create an inequity between employers in states with public disability insurance plans such as that approved in the *Aiello* decision and employers in states which lack such a plan, and (3) because affirmance would be inconsistent with the prior decisions of this Court which have recognized cost considerations as a legitimate basis for business practices.

Employers, of necessity, cannot convey every fringe benefit possible to each group or sub-group of employees. In creating a benefits program, employers (and/or unions where there is collective bargaining) seek a balanced package of many benefits which best serve overall employee needs. In effect, since no benefits package can satisfy all wants of all employees, the parties seek to utilize the benefits dollars in the most effective manner, keeping in mind the needs of all the employees.

Disability income plans throughout the United States have consistently excluded or have strictly limited coverage for absence due to pregnancy because of the relatively high cost of such coverage.[62] This Court has

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62. At the trial in this action Mr. Paul H. Jackson, an experienced insurance actuary, testified that the

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recognized that the increased cost of pregnancy coverage is a legitimate and rational basis for its exclusion. *Geduldig v. Aiello, supra,* 417 U.S. at 493-494. Private employers and unions, like the State of California in *Aiello,* also have a "legitimate interest" in distributing the available resources in such a way as to keep benefit payments at an adequate level for those disabilities that are covered, rather than to cover all disabilities inadequately.

If the decision of the Fourth Circuit is affirmed, employers as well as employees will be required to subsidize the decision made by a couple to have a child. Couples bearing children would, as a matter of law, receive a certain portion of the benefits package at the expense of those employees who are single, widowed, divorced, beyond the childbearing age, or who simply choose not to have children.

Affirmance of the Fourth Circuit's decision would also create gross inequities among employers in light of this Court's previous holding in *Geduldig v. Aiello,* 417 U.S. 484 (1974).

At least five states (including New York and California) administer disability insurance systems that pay benefits to persons in private employment who are temporarily unable to work because of disability not cov-

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annual cost of adding coverage of pregnancy to short and long term disability income plans currently in effect in the United States, would be $1.35 billion. Joint Appendix, pp. 524-569, especially p. 537, referring to GE Exhibit 42 at p. 846. The trial judge concluded that maternity sickness and accident benefits would increase GE's benefit costs by a large, though indeterminate, amount. *Gilbert, supra,* 375 F. Supp. 367, 378.



ered by Workmen's Compensation.[63] *Geduldig v. Aiello* held that such state systems need not include coverage for disability resulting from normal pregnancy.[64]

In California, for example, employers have the option of providing their own insurance coverage[65] or having the employees make contributions to the state for state disability plan coverage.[66]

Under *Aiello* the California state plan need not provide disability insurance for pregnancy. If this Court affirms the Fourth Circuit, then there will be inequities between employees covered by the state disability insurance in California, for example, and the employees in that state covered by their employer's own plan.

An even greater inequity would be created to the disadvantage of employers in the 45 states where no state disability insurance option exists.

In short, affirmance of the Fourth Circuit's decision would create the anomaly that certain employers will be statutorily required to include pregnancy as a covered

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63. In addition to California (California Unemployment Insurance Code, §2601 *et seq.*) and New York (Workmen's Compensation Law, Art. IX, §200-242), Rhode Island (Rhode Island Temporary Disability Insurance Act, General Laws R.I., §28-39-1), New Jersey (Temporary Disability Benefits Law, N.J. Stat. Ann. §43:21-25) and Hawaii (Hawaii Temporary Disability Insurance Law, 4 Hawaii Rev. Stat., Title 21, Chapter 392) also administer such disability insurance systems.

64. *Geduldig v. Aiello, supra,* 417 U.S. at 497.

65. California Unemployment Insurance Code, §3251.

66. California Unemployment Insurance Code, §2901.

risk under their disability insurance programs whereas certain other employers may insure through a state disability insurance system and thus need not provide disability benefit coverage for pregnancy-related disabilities.

Even if such inequities were acceptable, there is no reason for them to exist. *Aiello* held that the exclusion of pregnancy was not sex discrimination. There is no more reason for that exclusion to be sex discrimination when the practice is that of a private insurance plan than when the exclusion is in a state insurance plan.

Moreover, by requiring employers to include childbearing costs in their disability benefits plans, this Court would be advising employers that cost considerations are irrelevant in formulating employment policies or practices. Yet, this Court has permitted the use by employers of "legitimate considerations" such as cost in formulating policies, for example, in the areas of employee selection and promotion.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Albemarle Paper Co. v. Moody*, 43 U.S.L.W. 4880 (U.S. June 25, 1975), this Court held that the use of a testing device which accurately measured job ability would not violate Title VII regardless of whether a disproportionate number of minority applicants for the job were thereby excluded. The permissible criterion for judging the tests in *Griggs* and *Albemarle, i.e.*, job relatedness, is essentially based upon cost considerations to the employer since the specific purpose of personnel testing is to increase the effective use of a firm's manpower.[67] Affirmance of the Fourth Circuit's decision,

67. Guion, *Personnel Testing* 3 (1965).
*(footnote continued on following page)*



however, would reject the use by employers of such legitimate cost considerations.

Finally, if this Court affirms the decision of the Fourth Circuit this Court will be advising employers that it is *per se* a violation of Title VII to have an employment practice which operates to the disadvantage of a particular subgroup (pregnant women) of a larger group (women) protected from discrimination by that statute.

This Court refused to adopt such a far-reaching theory of employment discrimination in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973). In that case, a woman of Mexican origin and Mexican citizenship brought suit under Title VII against an employer who refused to hire her because she was not a United States citizen. Although the employment practice in *Espinoza* clearly disadvantaged persons of Mexican origin who were not United States citizens, this Court held that the employment practice did not violate Title VII because discrimination against aliens is not discrimination on the basis of national origin.[68]

By analogy, a disability income protection plan's classification on the basis of being pregnant is not classification on the basis of sex.

If this Court determines that the exclusion of pregnancy from income protection plans constitutes sex dis-

*(footnote continued from previous page)*

Almost any individual could be put on many jobs if cost were irrelevant. The unqualified performer, however, would impose additional costs to the employer from, *inter alia*, poor performance of a specific job, disruption of other employees' normal workload, added administrative costs, extraordinary training or supervisory expenses, lost production, *etc.*

68. *Espinoza, supra*, 414 U.S. at 88-89.

crimination, the logical extension of such a theory of proscribed discrimination could be far-reaching. For example, under such a theory of discrimination, the practice of giving incentive pay to an employer's factory production workforce (which contains males and females) while offering no such incentive program to the employer's office clerical workforce (which might be predominantly or exclusively female) would be illegal. Similarly, the military service credit[69] would be suspect under Title VII since many more men than women have served or are serving in the uniformed services.

Further, affirmance of the Fourth Circuit's decision in the instant case would imply that employers could no longer lay off employees pursuant to a "last hired, first fired" clause of a collective bargaining agreement when application of the clause would result in the lay-off of a disproportionate number of racial and ethnic minorities and/or women because a large percentage of that employer's black or female workforce have been recent hirees.[70]

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69. Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, provides, *inter alia,* that private employers must reinstate former employees who are honorably discharged to their former positions or positions of like seniority and pay. (Section 8 of the 1940 Act was re-enacted in the Universal Military Training and Service Act of 1948 and again in the Military Selective Service Act of 1967 and is codified at 50 U.S.C.A. App. §459). For purposes of determining seniority, the returning veteran is to be treated as though he had been continuously employed during the period spent in the armed forces. *Accardi v. Pennsylvania R. Co.,* 383 U.S. 225, 228 (1966).

70. In suits challenging such layoffs, the United States Courts of Appeals have found that the use of seniority to allocate layoffs does not violate Title VII.

*(footnote continued on following page)*



For all of the above reasons, this Court should reverse the decision of the United States Court of Appeals for the Fourth Circuit. The Court should not adopt a rule which makes it a *per se* violation of Title VII for an employer to adopt a policy which operates to the disadvantage of some subgroup of a larger group which is protected from discrimination by Title VII. This Court rejected such an approach in *Aiello.* It should reject that approach in the instant case.

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*(footnote continued from previous page)*

*E.g., Waters v. Wisconsin Steel Works,* 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed,* 43 U.S.L.W. 3476 (U.S. Feb. 24, 1975) (No. 74-1064); *Jersey Central Power & Light Co. v. IBEW,* 508 F.2d 687 (3d Cir. 1975).

## CONCLUSION

For the reasons set forth above, it is requested that the judgment of the Court of Appeals for the Fourth Circuit be reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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**No. 74-1589**

GENERAL ELECTRIC COMPANY,
*Petitioner,*
v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.

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**No. 74-1590**

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,
*Petitioners,*
v.

GENERAL ELECTRIC COMPANY.

---

**On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

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## BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE

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**On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

---

## BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE

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American Society for Personnel Administration files this brief *amicus curiae* pursuant to the written consents of the parties hereto, which are on file with the Court as required by Supreme Court Rule 42.

## INTEREST OF THE AMICUS CURIAE

The American Society for Personnel Administration (hereinafter "ASPA") is a non-profit professional society with approximately 16,000 members representing some 10,000 employing organizations in the private and public sectors. The employers include school districts, hospitals, municipalities and corporations, which together employ over 25 million people. ASPA's membership thus comprises a substantial and wide-ranging cross section of public and private employing organizations vitally concerned with personnel and industrial relations administration. ASPA conducts seminars, publishes magazines, and prepares research, surveys, and publications for its members on equal employment opportunity law and problems, occupational safety and health issues, salary policies, trends in employment of college graduates, and similar areas of current professional and social interest. ASPA has expressly committed itself to equal employment opportunity in its articles of social commitment, and is the only professional society with an affirmative action program directed to the placement of women and minorities in its paid and volunteer leadership positions.

ASPA's members are intimately involved in the formulation, funding and administration of employee benefit plans, which are a major component of the total employment costs borne by its members. It is ASPA's belief that an affirmance of the decision below will have a potentially disastrous impact on the benefit policies and employment budgets of these member organizations, and in many instances will further jeopardize their fiscal stability. Because of



this potentially devastating impact, and because ASPA's membership includes substantial segments of the public employer sphere—which has concerns and characteristics unique to itself, albeit similar to those of the private sphere—this brief *amicus curiae* is submitted.

## ARGUMENT

The legal, philosophical and medical issues of this case have been presented to the Court by the parties and other *amici curiae*, and will not be reiterated herein. Rather, ASPA wishes to stress the severe financial impact on private and public employers which would result should this Court hold that pregnancy-related disabilities must be covered by sickness and accident disability insurance programs. In particular, ASPA will herein demonstrate the disastrous consequences that would follow to public employers who are already beset by massive financial and fiscal problems.

### Compulsory Pregnancy Disability Benefits Would Have A Devastating Impact On Both Public and Private Employers.

Unrefuted actuarial testimony offered during trial in this case established that the annual cost of adding pregnancy disability coverage to existing disability benefit plans in the United States would be $1,353,000,000 (II App. 537; GE Ex. 42, III App. 848).[1] Another actuarial study estimated the total

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[1] References designated "I App. —" are to the Appendix filed by the parties in this case. This Appendix consists of four volumes and is paginated consecutively.

cost at between $1,005,000,000 and $1,620,000,000, depending on whether the benefit period was twenty or thirty weeks (GE Ex. 13, II App. 737-38). Moreover, these massive cost figures, covering some 32 million employees or, 40 percent of the United States work force under age 65, apply only to plans in effect in July 1973 (II App. 528-29; GE Ex. 42, III App. 846-49). The current estimated annual cost (assuming there has been no increase in the number of plans since July 1973) would rise to $1,634,424,000.[2]

The magnitude of these costs is further borne out by documented studies conducted by the American Telephone and Telegraph Company (hereinafter "AT&T") and the State of California.

AT&T has calculated that if normal pregnancy disabilities received disability insurance coverage in 1970-1971, its female employees, who comprised 49 percent of its work force, would have received 72 percent of the total disability benefit days. See Brief *Amicus Curiae* of AT&T filed in *Liberty Mutual Insurance Co.* v. *Wetzel*, No. 74-1245, *cert. granted*, 43 U.S.L.W. 3621 (May 27, 1975), p. 7, appendix

[2] This figure was calculated according to the increase in average hourly earnings (excluding overtime) of production workers on manufacturing payrolls. The percentage increase of 20.8 percent was found by ratioing the average per hour earnings for October 1973 (see Bureau of Labor Statistics Report, "Employment and Earnings," Vol. 20, No. 4, Oct. 1973, Table C-4) with the average per hour earnings for October 1975 (see Bureau of Labor Statistics Report, "Employment and Earnings," Vol. 22, No. 4, Oct. 1975, Table C-4). Multiplying the previously determined $1,353,000,000 figure by 20.8 percent produces the $1,634,424,000 figure.



pp. 6a-7a (hereinafter "AT&T *Amicus* Brief").[3] Had such coverage been made available for normal pregnancies in 1971-1972, AT&T female employees would have accounted for 71 percent of all disability benefit days, though constituting only 48 percent of the total AT&T work force (*Id.*). Indeed, according to AT&T calculations, system-wide costs for disability benefits in the Bell Telephone System alone would have increased by $15,762,663 in 1970-1971 and by $19,037,330 in 1971-1972 (*Id.*).

The State of California's calculations further corroborate the ravaging costs of including pregnancy disability under disability insurance plan coverage. Thus, California has estimated that the increased cost of including normal pregnancy within the risks covered by its disability insurance system for the employees of private employers would increase benefits paid out by from 33 percent to 36 percent. See *Geduldig* v. *Aiello*, 417 U.S. 484, 494 n. 18.

Further aggravating this cost problem is the fact that—even excluding pregnancy disability coverage completely—the present nationwide cost per unit of an accident and disability insurance benefit for a female employee is 170 percent of that for a male employee (II App. 635). Uncontradicted actuarial evidence adduced at the trial herein shows that adding full coverage for pregnancy disability would raise the per-unit benefit cost for the female employee to

[3] This figure assumes an average duration of 8 weeks for a normal pregnancy. However, estimates of the period of actual disability connected with normal pregnancy range from less than 6 weeks to 6 months (AT&T *Amicus* Brief, p. 6, appendix pp. 6a-7a).

330 percent of that for the male (*Id.*). The experience of AT&T confirms this estimate in concrete terms. Studies done on a representative survey group show that—exclusive of maternity absences—female employees show a greater frequency and severity rate in medical leaves than male employees. See, AT&T *Amicus* Brief, p. 5, appendix p. 4a.

Examination of the public sector reveals a strikingly similar experience. See, e.g., testimony of Herbert S. Deneberg, former Commissioner of Insurance for the State of Pennsylvania before the Joint Economic Committee of Congress:

> Disability coverage poses the most difficult problem [to unisex rates] as the loss experience of women, *even with pregnancy costs excluded*, may run two and a half times higher than costs for men.[4]

Similarly, before the State of Hawaii amended its state disability law to include pregnancy within the term "disability," [5] the premium rate for female employees was 23 percent higher than the male rate. However, after the State of Hawaii amended its state disability law in 1973 to include pregnancy within the term "disability," the premium rate for female employees was 142 percent higher than the male rate. See, Brief *Amicus Curiae* of American Mutual Insurance Alliance, National Association of

[4] Report of the Proceedings of the Hearings on the "Economic Problems of Women" before the Joint Economic Committee of Congress, Vol. 3 (July 12, 1973), p. 198; emphasis supplied.

[5] Hawaii Temporary Disability Insurance Low, 4 Haw.Rev. Stat., Title 21, §§ 392-3.



Independent Insurers, and American Insurance Association filed in *Liberty Mutual Insurance Co.* v. *Wetzel*, No. 74-1245, *supra*, p. 4.[6]

The massive costs generated by the inclusion of pregnancy disability benefits in employer sickness and accident disability insurance programs could lead to disastrous results for employers, especially for those in the public sector. Indeed, an increase at this time in costs of the magnitude contemplated in this case could well wreak havoc on numerous municipalities, school districts and other public employers whose fiscal integrity and liquidity are already undergoing the greatest combined pressures and strains faced in many years.

As stated recently by one commentator:

> City after city across the United States is finding itself caught in a financial vise—and the pressure is tightening almost daily.[7]

Indeed, some of the nation's largest cities, including St. Louis, New Orleans and Cleveland, are close to bankruptcy.[8] As stated earlier this year in *Business Week*:

[6] See also, the experience of the State of Rhode Island discussed in Koontz, "Childbirth and Child Rearing Leave: Job Related Benefits," 17 N.Y.L.F. 480, 485 (1971). Beginning in 1943, Rhode Island included pregnancy within the definition of "disability" in its state disability insurance plan. By 1949-1950 pregnancy benefit claims constituted 22.62 percent of all benefit claims and 30.4 percent of all benefits paid.

[7] "New Squeeze on Cities," *U.S. News & World Report*, August 18, 1975, p. 11.

[8] "Cities in Peril," *U.S. News & World Report*, April 7, 1975, pp. 29-36. See also "Mayors Survey: Cities Face Huge Fiscal Gaps," *The American City*, May 1975, p. 26.

> New York City may be the municipality with the best-publicized set of financial woes, but it is by no means the only one in bad shape.[9]

In the last ten years, combined debts of the nation's local governments have climbed from $103 billion to $209 billion as spending outran tax receipts.[10] Indeed, owners of municipal bonds saw the value of their holdings drop by $12 billion in the scant five-month period between March and August, 1975,[11] while municipality after municipality has seen its bond rating downgraded,[12] and public borrowers have been forced to raise their interest rates to exorbitantly high levels.[13]

The results of this fiscal crunch are felt in many ways short of the ultimate impact of collapse. A recent survey by the National League of Cities found

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[9] "The Underwriters Grow Wary of City Issues," *Business Week*, July 7, 1975, pp. 56-57 (citing Cleveland, Detroit, Newark and the Commonwealth of Puerto Rico). See also "More States Turn to Gambling to Raise Money in Hard Times," *U.S. News & World Report*, June 30, 1975, pp. 22-23; "Going Broke the New York Way," *Fortune*, August 1975, pp. 144-49; "City and Suburb: The Anatomy of Fiscal Dilemma," *Land Economics*, May 1975, pp. 133-38.

[10] "Uncle Sam Can Bail Out New York, But Who Will Bail Out Uncle Sam?", *Forbes*, July 1, 1975, pp. 42-43.

[11] "Shock Waves in the Bond Market," *U.S. News & World Report*, August 18, 1975, p. 12.

[12] "The Underwriters Grow Wary of City Issues," *Business Week*, July 7, 1975, pp. 56-57.

[13] Vartan, "Shadows of City's Fiscal Ills Darken Bond Market for Other Municipalities," *New York Times*, August 24, 1975, p. 16, col. 6 (city ed.).



that 43 of 67 cities surveyed expected revenue shortfalls in 1975; 42 expected to raise taxes, cut services or both; 36 were postponing capital improvements, and 21 reported job layoffs and hiring freezes.[14]

Indeed, it is not surprising that increasing numbers of states, cities, and other public employers are seeking to ameliorate their fiscal plights through easing employment budgets and outlays, since labor costs constitute the most significant cost item for many local governments.[15] To impose an additional labor cost of millions of dollars on the already financially strained local and state governments at this time could well, we submit, lead to a further deepening of the financial crisis.

## CONCLUSION

If the decision below is affirmed by this Court, thousands of employers across the nation—private and public alike—face an imemdiate and enormous increase in their employment costs. Such increase will intensify an already disproportionate imbalance in disability insurance plan coverage costs between the sexes, and a substantial part thereof will be diverted from those persons intended to be benefitted by disability plans, i.e., those persons temporarily unable to work because of involuntarily incurred illness or accident. The impact of these dramatic, over-

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[14] "The Crunch on City and State Budgets," *Business Week*, March 10, 1975, pp. 78-79. See also, Shanahan, "Many Cities in Crisis Cut Payrolls and Raise Taxes," *New York Times*, May 27, 1975, Sect. 1, p. 1, col. 1 (city ed.).

[15] Raskin "Much More Labor Strife is Just Ahead," *New York Times*, August 24, 1975, p. 1, col. 3 (city ed.).

night increases is, therefore, potentially staggering for both public and private employers. For these reasons, as well as those stated by Petitioner General Electric Company, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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MOTION FILED

DEC 3 1975

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1589

GENERAL ELECTRIC COMPANY,

*Petitioner,*

*v.*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL.,

No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL.,

*Petitioners,*

*v.*

GENERAL ELECTRIC COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## MOTION OF CELANESE CORPORATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

## MOTION OF CELANESE CORPORATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

---

Celanese Corporation ("Celanese") respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the petitioner herein has been obtained, but the attorney for the respondent herein has refused to consent to the filing of the brief.

Celanese has an interest in this case because it is the defendant in two actions pending in United States District Courts which will be directly affected by the Court's decision in this case. *Odom* v. *Celanese Domestic Fibers Group,* Civil Action No. C-C-74-41, is a class action pending in the Western District of North Carolina, Charlotte Division. *Hull* v. *Celanese Corporation, et al.,* Civil Action No. 73 Civ. 3725 (R. O.) is pending in the Southern District of New York. In both actions plaintiff claims that Celanese's basic hospitalization, long-term disability and sick-leave program violates Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e, *et seq.*)

In its *amicus curiae* brief Celanese seeks to bring to the attention of the Court certain facts which are not found in petitioner's brief. Those facts pertain to Celanese's experience in the operation of its aforementioned plan with respect to the employees in its Charlotte facilities.

The facts show that total medical costs on a per employee basis were substantially higher for females than for males. Of possible greater importance, however, Celanese has determined the cost per employee for treatment of conditions which are peculiar to one sex, e.g., tubal ligations, abortions and hysterectomies for women, and vasectomies and prostate treatment for men. The costs per employee for such sex-oriented medical treatments were forty-two times greater per female employee than per male employee.

Celanese believes that facts such as these are plainly relevant to the disposition of this case in that they demonstrate an absence of sex discrimination under the rationale of *Geduldig* v. *Aiello,* 417 U. S. 484 (1974). Where substantially higher medical payments are made per employee to women than to men, and where payments for treatment for purely female medical conditions are substantially higher per employee than payments for treatment of purely



male medical conditions, it cannot be sex discrimination for an employer, acting solely for economic reasons, to limit payments for maternity. This is especially true in light of the high costs of maternity benefits and the other factors relating to the problem, such as the number of female employees who do not return to their jobs following the birth of a child, which are set forth in petitioner's brief.

Celanese respectfully requests that its motion for leave to file a brief *amicus curiae* be granted.

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IN THE

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*v.*

GENERAL ELECTRIC COMPANY.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

## BRIEF OF CELANESE CORPORATION AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

### Interest of The *Amicus Curiae*

Celanese Corporation (Celanese) is a corporation, transacting business in a number of states, including North Carolina and New York. It employs more than 6,000 females in its operations.

Celanese is the defendant in two actions pending in United States District Courts which will be directly affected by the Court's decision in this case. *Odom* v. *Celanese Domestic Fibers Group,* Civil Action No. C-C-74-41, is a class action, pending in the Western District of North Carolina, Charlotte Division. *Hull* v. *Celanese Corporation, et al.,* Civil Action No. 73 Civ. 3725 (RO), is pending in the Southern District of New York. Plaintiff in both actions alleges that Celanese's basic hospitalization, long-term disability, and sick-leave program violates Title VII of the 1964 Civil Rights Act (42 U. S. C. § 2000e, *et seq.*).

Accordingly, Celanese has a proper interest in the resolution of the issues before the Court in this case.

## ARGUMENT

### Petitioner's Plan Must Be Found To Be Not Discriminatory under the Standard as Formulated in *Geduldig* v. *Aiello*

This Court has already formulated the constitutional meaning of "sex discrimination" in *Geduldig* v. *Aiello,* 417 U. S. 484 (1974). That case held that an income protection program which excluded pregnancy from its list of compensable disabilities does not involve "discrimination based upon gender as such" and does not violate the Constitution. *Geduldig* v. *Aiello,* supra, at 496-97, n. 20. Since the plan now being reviewed by this Court is similar in all material respects to the plan in *Aiello,* Petitioner's plan clearly does not violate Title VII of the Civil Rights Act.

"The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of [male] employees over [female] employees." *Griggs* v. *Duke Power Co.,* 401



U. S. 424, 429-30 (1971). The Act outlaws employment practices which express an employer's stereotypical beliefs concerning the sex of its employees. The employer can no longer prefer to recruit, hire, fire, place, or promote an employee solely because of the employee's sex.

That type of employer action is not present in this case. "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Geduldig* v. *Aiello,* supra, at 496-97. The purpose of the Act is to equalize opportunity, not establish advantages for either men or women. If the decision below is affirmed, an advantage not contemplated by Congress would be created; pregnant women would be improperly afforded preferential treatment.

The experience of the operation of the Celanese plan, as illumined by the affidavit of R. G. Wells, submitted in *Odom* v. *Celanese,* supra, illustrates the point.[1] That affidavit establishes that females, as compared to males, are afforded preferential treatment in payments for medical claims, as follows:

> An analysis was made of all claims filed by, and paid to, Celanese's Charlotte facilities male and female employees, both active and inactive, for the years 1972, 1973, and 1974. (The average number of female employees during the three-year period was 506 and the average number of male employees was 1,189.) The incidence and costs of the claims were identified by sex and charged to twenty-eight (28) broad classifications of diagnosis and treatment embracing all of the claims filed. (See *Appendix I.*) Of these twenty-eight classifications, ten were sex oriented; eight for female (abor-

[1]The affidavit of Mr. Wells, Personnel Manager of Celanese Domestic Fibers Group, was submitted in support of defendant Celanese's Response to plaintiff Odom's Motion for Partial Summary Judgment.

tion, breast conditions, caesarean section, D & C, hysterectomy, gynecology, normal delivery and tubal litigation) and two for male (prostate conditions and vasectomy).

All claims for the same diagnosis and treatment (physician, hospital, drugs, etc.) were counted as one and all costs for the same diagnosis and treatment were totaled. During the three-year period, an employee could have submitted more than one claim and expenses for the same, or different, diagnosis and treatment.

This study established the following facts:

1. The total female medical costs for the three-year period amounted to $223,706, or $442 per female employee (which does not include 12 per cent "administrative charges").

The total male medical costs during the same period amounted to $229,228, or an average of $193 per employee (which does not include 12 per cent "administrative charges").

On a per employee basis, the medical costs for females were 129 per cent greater than for males.

2. Total claims paid to Celanese's employees at its Charlotte facilities during the three years amounted to $452,934. Among the male employees, 897 (approximately 75 per cent) filed 1,153 claims for a total dollar payout of $229,228, whereas 580 female employees (approximately 115 per cent) filed 917 claims and received $223,706.

The average cost per employee filing was $256 for males and $386 for females, or 50.8 per cent more for females than males.

The average cost per claim filed was $199 for males and $244 for females, or 22.6 per cent more for female claims than for male.



3. One hundred seventy-six (176) female employees (34.8 per cent of the total) received $73,296 in claims that were sex oriented. This amounts to $416 per female employee filing a claim and $145 per female employee in the Charlotte facility work force.

Thirty-seven (37) male employees (3.1 per cent of total) received 4,034 in claims that were sex oriented, This amounts to $109 per male employee filing a claim, and $3.40 per male employee in the Charlotte facility work force.

The costs for sex oriented medical treatments were forty-two (42) times greater per female employee than per male employee.

Sex-oriented claims for the female employees represented 16.2 per cent ($73,296 divided by $452,934) of all male and female claims paid for the three-year period in question, while sex oriented claims for males represented less than 1.0 per cent ($4,034 divided by $452,934) of the total claims paid. (See *Appendix II.*)

4. Claims paid in 1972, 1973 and 1974 for illnesses not sex oriented (i.e., diagnosis same for either sex) follow:

| | Number of claims | Total Cost | Cost per employee |
|---|---|---|---|
| Male ..... | 1,116 | $225,194 | $189.39 |
| Female ..... | 741 | 150,410 | 297.25 |

For the three-year period, non-sex oriented medical costs per employee were 56.9 per cent greater for females than for males. (See *Appendix III.*)

5. Medical costs, as a percentage of average salary base ($17,697,481 for males and $3,612,872 for females) for the three-year period equaled 6.2 per cent for females and 1.3 per cent for males, or a ratio of almost five to one.

6. There were 567 (47.7 per cent) active male employees on the payroll as of December 31, 1974 who had no medical claims for the preceding three years, and 191 (37.7 per cent) females with no claims for the same period.

7. Of the total amount of hospital/surgical/medical claims paid ($452,934) in the three-year period, female employees received 49.4 per cent of the total, although they represented only 29.8 per cent of the total average Charlotte facility work force.

8. From January 1, 1971, through August 30, 1974, Celanese paid out $193,756 at its Charlotte facilities in long-term disability (LTD) payments. Of this amount, females received $109,166 and contributed only $27,350, while males received $84,590 but contributed $157,408. In other words, male employees subsidized female LTD costs in the amount of $72,818 and Celanese paid the other $8,998.

9. The benefit costs for Celanese when comparing an average female and male employee at its Mecklenburg County facility who are both age 29, were employed on the same date and who both earn an annual salary of $8,050 are as follows (based upon actual



experience and/or actuarial pension cost estimates and/or life insurance company rate tables):

| | Male | Female |
|---|---|---|
| Annual Pension Costs | $523 | $ 692 |
| Basic Life Insurance Costs ($15,000) | 47 | 28 |
| Av. Annual Sick Pay Received (1/1/71 to 8/16/74) | 43 | 155 |
| Av. Annual Medical Benefits Paid (1/1/71 to 7/1/74) | 57 | 128 |
| Stock Bonus & Investment Plan Costs (2% participation) | 322 | 322 |
| Annual "Benefit Costs" of above | $992 | $1,325 |
| Percent of "Benefit Costs" to Annual Salary | 12.3% | 16.5% |

The number of claims and average amount of benefits paid under Celanese's sick leave plan to employees at its Charlotte facilities for the period January 1, 1971 to August 16, 1974 follows:

| | Males | | | Females | | |
|---|---|---|---|---|---|---|
| | No. | Average benefit per claim | Average benefit per employee | No. | Average benefit per claim | Average benefit per employee |
| 1971 | 378 | $200 | $ 62 | 361 | $188 | $130 |
| 1972 | 376 | 271 | 84 | 359 | 181 | 131 |
| 1973 | 345 | 242 | 73 | 329 | 219 | 144 |
| 1974 | 280 | 258 | 63 | 279 | 155 | 92 |
| | | | $282 | | | $497 |

Thus, the costs of providing benefits to females under the sick leave plan exceeds the costs for males by 76.2 per cent.

Where under an employer's medical plan substantially higher medical payments are made per employee to women than to men, and where payments for treatment for purely female medical conditions are substantially higher per employee than payments for treament of purely male medical conditions, it cannot be sex discrimination for an employer, acting solely for economic reasons, to limit payments for one condition, maternity. It was not the intent of Congress, in enacting Title VII of the Civil Rights Act, to require employers to change the long-established policy of limiting such payments in medical plans and to impose upon them and the public the extraordinarily high costs entailed by such a change.

If there is any question with respect to the intent of Congress on a matter so far-reaching as this, the issue should be left to the Congress to determine.

## CONCLUSION

The decision of the Court below should be reversed.

Respectfully submitted

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## APPENDIX I

### Employee Medical Claim Experience for 1972, 1973 & 1974

| | MALE | | FEMALE | | Cost Per Male Employee (N = 1189) | Cost Per Female Employee (N = 506) |
|---|---|---|---|---|---|---|
| | No. | $ | No. | $ | | |
| Abdominal Surgery | 6 | $ 6,488 | 10 | $ 10,613 | $ 5.45 | $ 20.97 |
| Abortion | 0 | — | 6 | 1,306 | — | 2.58 |
| Allergy | 17 | 2,207 | 19 | 3,358 | 1.85 | 6.64 |
| Breast | 0 | — | 26 | 10,090 | — | 19.94 |
| Caesarean Section | 0 | — | 3 | 2,408 | — | 4.76 |
| Cardio-Vascular | 41 | 45,103 | 16 | 14,237 | 37.93 | 28.14 |
| Diagnostic | 227 | 9,151 | 163 | 10,279 | 7.70 | 20.31 |
| D & C | 0 | — | 19 | 6,515 | — | 12.88 |
| Eye, Ear, Nose and Throat | 45 | 7,768 | 13 | 2,568 | 6.53 | 5.08 |
| Excisions and Incisions | 131 | 5,691 | 84 | 6,880 | 4.79 | 13.60 |
| Gastro-Intestinal | 50 | 12,468 | 35 | 8,407 | 10.49 | 16.61 |
| Hernia | 16 | 12,710 | 5 | 4,476 | 10.69 | 8.85 |
| Hysterectomy | 0 | — | 22 | 27,313 | — | 53.98 |
| Lung | 20 | 12,373 | 7 | 3,379 | 10.41 | 6.68 |
| Minor Injuries | 114 | 3,579 | 42 | 1,755 | 3.01 | 3.46 |
| Miscellaneous | 44 | 27,027 | 26 | 14,335 | 22.73 | 28.33 |
| Misc. (Gynecology) | 0 | — | 47 | 3,810 | — | 7.53 |
| Normal Delivery | 0 | — | 35 | 13,844 | — | 27.36 |
| Office Visits and Drugs | 176 | 18,110 | 166 | 21,230 | 15.23 | 41.96 |
| Orthopedic | 138 | 36,346 | 91 | 24,857 | 30.57 | 49.12 |
| Prostate | 7 | 1,113 | 0 | — | .94 | — |
| Psychiatric | 12 | 3,487 | 15 | 7,565 | 2.93 | 14.95 |
| Rectal | 26 | 5,791 | 16 | 6,277 | 4.87 | 12.41 |
| Teeth | 19 | 2,079 | 10 | 984 | 1.75 | 1.94 |
| Tubal Ligation | 0 | — | 18 | 8,010 | — | 15.83 |
| Urology | 32 | 13,827 | 21 | 7,532 | 11.63 | 14.89 |
| Vasectomy | 30 | 2,921 | 0 | — | 2.46 | — |
| Varicose Veins | 2 | 989 | 2 | 1,678 | .83 | 3.32 |
| Total | 1,153 | $229,228 | 917 | $223,706 | $192.79 | $442.12 |

## APPENDIX II

### Cost Per Employee

| Sex-Related Diagnosis | Male (N=1189) | Female (N=506) |
|---|---|---|
| Hysterectomy | $ — | $ 53.98 |
| Normal Delivery | — | 27.36 |
| Breast | — | 19.94 |
| Tubal Ligation | — | 15.83 |
| D & C | — | 12.88 |
| Gynecology (Misc.) | — | 7.53 |
| Caesarean Section | — | 4.76 |
| Abortion | — | 2.58 |
| Vasectomy | 2.46 | — |
| Prostate | .94 | — |
| | $ 3.40 | $ 144.86 |
| TOTAL COSTS | $4,034.00 | $73,296.00 |



## APPENDIX III

### Cost Per Employee/Sex

| Non-Sex Related Diagnosis | Male (N=1189) | Female (N=506) |
|---|---|---|
| 1. Cardio-vascular | $ 37.93 | $ 28.14 |
| 2. Orthopedic | 30.57 | 49.12* |
| 3. Misc. | 22.73 | 28.33* |
| 4. Off. Visits & Drugs | 15.23 | 41.96* |
| 5. Urology | 11.63 | 14.89* |
| 6. Hernia | 10.69 | 8.85 |
| 7. Gastro-Intestinal | 10.49 | 16.61* |
| 8. Lung | 10.41 | 6.68 |
| 9. Diagnostic | 7.70 | 20.31* |
| 10. Eye, Ear, Nose & Throat | 6.53 | 5.08 |
| 11. Abdominal Surgery | 5.45 | 20.97* |
| 12. Rectal | 4.87 | 12.41* |
| 13. Excisions & Incisions | 4.79 | 13.60* |
| 14. Minor Accidental Inj. | 3.01 | 3.46* |
| 15. Psychiatric | 2.93 | 14.95* |
| 16. Allergy | 1.85 | 6.64* |
| 17. Teeth | 1.75 | 1.94* |
| 18. Varicose Veins | 0.83 | 3.32* |
| | $189.39 | $297.26 |

*Females exceed males in "cost per employee" in 14 out of the 18 broad non-sex related categories.

Supreme Court, U. S.
FILED
DEC 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 74-1589**

**No. 74-1590**

GENERAL ELECTRIC COMPANY,

*Petitioner in No. 74-1589*
*Respondent in No. 74-1590,*

—v.—

MARTHA GILBERT, INTERNATIONAL UNION OF ELECTRIC RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

*Respondents in No. 74-1589*
*Petitioners in No. 74-1590.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF *AMICI CURIAE* OF WOMEN'S LAW PROJECT AND AMERICAN CIVIL LIBERTIES UNION

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## INTEREST OF AMICI

### WOMEN'S LAW PROJECT

The Women's Law Project is a tax-exempt, non-profit corporation organized under the Pennsylvania Nonprofit Corporation Act and dedicated to working for the legal equality of women through litigation, public education, research and the representation of local women's organizations. The Project is particularly concerned with the the theory and implementation of the equal rights amendment, and is currently preparing a major report on state law conformance to the amendment's principles.

Two attorneys at the Project were co-authors with Professor Thomas I. Emerson and Gail Falk of the Yale Law Journal article, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale Law Journal 871 (1971), which was distributed to all members of Congress before the final debates on the equal rights amendment and was made part of the legislative history of the amendment by its proponents. Since its inception, one of the major components of the Project's work has been research, writing, and the provision of technical assistance concerning the theory of the amendment.

The Project has engaged in litigation under Title VII of the Civil Rights Act of 1964 concerning the right of women employed

by the City of Philadelphia to use sick leave for maternity-related disabilities and is therefore familiar with the issues raised by this case. The Project is particularly concerned with the part which discrimination against women based on their childbearing capacities has played in keeping them in a subordinate position in the labor market and society as a whole. In this brief, amicus draws upon its expertise in the theory of the equal rights amendment and in the policies at issue here to present to the Court an argument that the legislative history of the ERA supports, rather than negates, the conclusion that Title VII prohibits the exclusion of pregnancy-related disabilities from the General Electric disability income protection plan.

AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that confinement of women's opportunities is a pervasive problem at all levels of society, public and private, the American Civil Liberties Union has established a Women's Rights Project to work towards the elimination of gender-based discrimination. The American Civil Liberties Union believes that this case, concerning the rights of work force members disabled due to pregnancy, poses an issue of great



significance to the achievement of full equality between the sexes.

Lawyers for the American Civil Liberties Union have participated in a number of cases involving government and employer rules subjecting women who bear children to disadvantageous treatment. We appeared as amicus curiae in Cohen v. Chesterfield County School Board and Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), which declared inconsistent with due process forced termination of a teacher's employment at a fixed stage of pregnancy, and Geduldig v. Aiello, 417 U.S. 484 (1974), which upheld, against an equal protection challenge, the exclusion of women disabled by childbirth from a state-operated social insurance program. Lawyers for the American Civil Liberties Union were counsel for the Petitioner in Struck v. Secretary of Defense, 461 F.2d 1372 (9th Cir. 1971, 1972), cert. granted, 409 U.S. 947, judgment vacated and case remanded for consideration of mootness, 409 U.S. 1071 (1972), which challenged the Air Force discharge of Captain Struck for pregnancy, and for the Petitioner in Turner v. Department of Employment Security, 44 U.S.L.W. 3298 (U.S.S.C. Nov. 17, 1975), which struck down Utah's arbitrary exclusion of childbearing women from unemployment compensation.

With regard to gender-based discrimination generally, lawyers for the American Civil Liberties Union presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later as amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351

(1974), and the appellees in Edwards v. Healy, 421 U.S. 772 (1975), and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

Letters of consent to file the within brief have been filed with the Clerk of the Court.

## SUMMARY OF ARGUMENT

General Electric Company and amici in support of General Electric [hereafter, GE] argue that the legislative history of the equal rights amendment supports the proposition that Title VII permits GE to penalize women employees disabled by pregnancy and childbirth by denying them disability insurance benefits available to employees for virtually all other disabilities. To put forward this argument, GE and its amici make use of selected portions of legislative history, quote those portions out of context and thus distort the meaning of that history. In fact, congressional consideration of the equal rights amendment centered on that body's grave concern for the deplorable treatment of women in the labor market and its recognition of the importance of not penalizing women, in or out of the paid labor force, for bearing children. In line with the central tenet of the ERA -- that legal support for sex discrimination is to be eradicated root and branch -- Congress clearly intended the amendment to end all categorical discrimination by law, including the improper use of pregnancy-based classification, which relegates women to an inferior position in



the labor market.

Legislative history reflects the congressional intention that there be a two-tiered standard of judicial review under the ERA: (1) explicit gender classifications are per se outlawed; (2) classifications purporting to deal with a "unique physical characteristic" of one sex are subject to strict scrutiny. Some pregnancy classifications would survive this review. Others, the one at issue here for example, would not.

The legislative history of the ERA, therefore, to the extent it illuminates the meaning of the anti-discrimination guarantee of Title VII, fully supports the conclusion that GE's policy of excluding pregnancy-related disabilities from its plan is illegal.

## ARGUMENT

### I. The Purpose Of The ERA Is Remedial. Congress Intended To Outlaw Policies and Practices That Injure Women, Especially In Employment, and Disavowed Any Intention To Disadvantage Working Women As Childbearers.

The equal rights amendment was first introduced in 1923, but received only sporadic attention until both Houses of Congress took it under consideration in the early 1970's. In response to a growing awareness of the extent of sex discrimination in our

laws and institutions and to the demand by women that a commitment to sex equality be included in our fundamental instrument of government, Congress held hearings and engaged in debate devoted exclusively to the amendment. On March 22, 1972, the amendment received final congressional approval and was sent to the states for their consideration.

In its deliberations, Congress acknowledged that women suffered discrimination in many and varied forms and that the purpose of the ERA was to improve the situation of women and to eliminate all differential treatment based on gender from our legal system. These points are made forcefully and repeatedly throughout the legislative history of the amendment, particularly in floor debates preceding final passage in the House of Representatives and the Senate:

> All of these various forms of discrimination undermine the confidence of many Americans in our institutions and have an adverse effect on our national morale. Even if these injustices injured only a small number of our female citizens, they constitute wrongs that ought not to go unremedied. The tragic fact is that such discrimination prevents many millions of women from realizing their true capacity to lead full and creative



> lives. Rep. Edwards (Oct. 6, 1971).[1]

> Even among the resolution's opponents, there seems to be little question but that tradition and law have worked together to relegate women to an inferior status in our society. In many cases this has been intentional, based on an archaic precept that women, for physiological or functional reasons, are inferior. Sen. Percy (March 22, 1972).[2]

Members of Congress saw constitutional amendment as the most effective method of reaching the multifarious shapes and guises in which sex discrimination is displayed in our society:

> I firmly believe that the Constitution of the United States should be amended only when a matter of broad and fundamental principle is at stake. The matter we are considering today - the extension to women of equal

---

[1] 117 Cong. Rec. 35306.

[2] 118 Cong. Rec. 9595. See also Remarks of Sen. Hartke, 118 Cong. Rec. 9551 (March 22, 1972).

rights under the law - is such a principle.

Discrimination against women is deeply entrenched in the United States and flourishes in both our social and legal spheres, a fact which many opponents of the equal rights amendment acknowledge when they argue that its passage would cause fundamental changes in our national life and institutions. History has shown us that any system which confers benefits or imposes obligations on the basis of such things as race, creed, color or sex inevitably is repressive. Those who wield the greater influence in formulating the law have invariably found it hard to resist enhancing their position at the expense of others. The need for a constitutional amendment to change this pattern by requiring a broad national commitment to the ideal of equality between the sexes under the law is evident. Rep. Ashley (Oct. 12, 1971).[3]

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[3] 117 Cong. Rec. 35089.



Congress intended that the amendment state an encompassing and, in most spheres, an absolute principle, expressive of that body's fundamental commitment to the elimination of the inferior status of women in the nation's economic, political and social life:

> There is but one principle involved, although, as is clear from the discussions, the ramifications are many and varied.
>
> The principle is that sex, by and of itself, cannot be used as a classification to deny or abridge any person of his or her equal rights under the law. This, of course, is more than a mere negative statement that henceforth there can be no legally sanctioned discrimination against women. The amendment should accomplish that but it will do more. It will tell the Federal Government and the governments of the several states that in all their laws they must set up reasonable distinctions and qualifications based not on the overbroad categorization of sex, but rather on the characteristics of individuals. Sen.

Stevenson (March 22, 1972).[4]

No area of the law is exempt; no defenses for an explicit gender-based classification are provided; no exceptions to the scope or dimensions of equality are permitted. The amendment was an answer to a problem of extraordinary magnitude and was intended to reach as far as necessary to solve it:

> I strongly believe that equality is a concept which cannot be diluted. Once even the slightest of qualifications is attached the word becomes meaningless and the system of democracy founded on this principle is therewith diminished. Rep. Koch (Oct. 12, 1971).[5]

One of Congress' prime concerns was discrimination against women in the work force. Congressman Drinan, for example, said:

> Of all the appeals to their country's conscience being issued by American women,

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[4] 118 Cong. Rec. 9547. See also Remarks of Sen. Cook, 118 Cong. Rec. 9576 (March 22, 1972); Remarks of Sen. Kennedy, 118 Cong. Rec. 9371 (March 21, 1972).

[5] 117 Cong. Rec. 38506-07.



> perhaps the most powerful is that women must have equal rights in employment. 117 Cong. Rec. 35797, (Oct. 12, 1971).[6]

Among the aspects of discrimination against working women upon which Congress focused attention was penalization of childbearing. It was acknowledged that such discrimination had no place in the bias-free system Congress envisioned. As Representative Reid stated:

> An abiding concern for home and children should not restrict the freedom of women to choose the role in society to which their interest, education and training entitle and qualify them. 117 Cong. Rec. 35325 (Oct. 6, 1972).

And Representative Abzug noted:

> These benefits [of protective laws] are ridiculously slight -- some states require that women unlike

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[6] See also Remarks of Rep. Hogan, 117 Cong. Rec. 35793 (Oct. 12, 1971); Remarks of Rep. Broyhill, 117 Cong. Rec. 35802 (Oct. 12, 1971); Remarks of Senators Gurney, Hartke, Brooke and Stevenson, 118 Cong. Rec. 9336 (March 21, 1972), 9547, 9548, 9551 (March 22, 1972).

men be given chairs for rest periods but I want any member to show me what states provide a guarantee of security for maternity leave so that women will have jobs to return to after giving birth. 117 Cong. Rec. 35789 (Oct. 12, 1971).[7]

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[7] Similarly, Congress realized that gender-based discrimination in public schools encompassed harsh treatment of pregnant students. Representative Griffiths, the primary sponsor of the ERA in the House, said:

> At least one Federal district court has found unconstitutional the practice of excluding girls from public school solely because they are unwed mothers . . . . In order to become capable of supporting herself and her child, an unwed mother vitally needs an education -- it is cruel to bar her, permanently or temporarily from public high school . . . . [H]ow many courts must consider this issue before it is resolved across the country? This is a clear example of sex discrimination, which would be corrected by the equal rights amendment.

[Footnote continued on next page.]



It is in light of this unqualified legislative commitment to eradicating sex discrimination in all of its forms and to improving the position of women in the labor market that the question of pregnancy-related discrimination must be considered.

## II. Under the ERA, Classifications Purporting to Deal With Unique Physical Characteristics Of One Sex Are Subject To Strict Scrutiny.

The legislative history of the ERA includes several examples of pregnancy classifications permissible under the amendment. Among these are "a law providing for payment of the medical costs of childbearing,"[8] and "laws establishing medical leave for childbearing."[9] These pregnancy classifications are valid not because (as suggested by GE[10])

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Hearings on H.J. Res. 35208 and Related Bills and H.R. 916 and Related Bills before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92d Cong., 1st Sess. 38 (1971) (hereafter cited as ERA House Hearings).

[8] Separate Views on H.J. Res. 208, H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 7 (1971).

[9] Testimony of Prof. Emerson, ERA House Hearings at 402.

[10] Brief for GE at 41.

pregnancy classification is outside the scope of the ERA, but because the test applicable under the ERA is satisfied.

As noted in the previous section, the ERA broadly proscribes classifications based on gender as such. For classification purporting to deal with "unique physical characteristics" of one sex,[11] however, legislative history demonstrates that strict scrutiny must be the review standard applied, to insure that the basic premise of the amendment is not undermined.

The most detailed explication of strict scrutiny under the ERA appears in a Yale Law Journal article by Professor Thomas I. Emerson and three co-authors, which was distributed to all members of Congress and made part of the legislative history by the proponents of the amendment.[12] The abbrevi-

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[11] Those physical characteristics unique to one sex and thus possessed by all or most women and no men or by all or most men and no women.

[12] Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871 (1971) (hereafter referred to as "Emerson article"). The Emerson article was distributed to all members of Congress by the ERA's chief proponent in the House, Rep. Martha [Footnote continued on next page.]



ated comments made on the floor of Congress and in response to questions during the hearings, quoted in part by GE and its amici, are firmly grounded in the Yale Law Journal discussion, and must be read with its more finely textured arguments in mind.

The Emerson article indicates that in reviewing classification based upon a unique physical characteristic, a court would pursue inquiries indicated by established precedent regarding strict scrutiny in constitutional adjudication. 80 Yale L. J. at 894-896. The six step analysis set forth in the article may be summarized as follows:

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Griffiths, several weeks before the final vote in the House, and five months before the final vote in the Senate. In an accompanying letter, Rep. Griffiths described the article to her colleagues as a "detailed analysis of the scope and effects of the ERA" which will "help you understand the purpose and effects of the ERA, which is to do away with the sex discriminations that now so grievously disfigure American law." Letter from Martha Griffiths, Member of Congress to her colleagues, Sept. 20, 1971. Senator Birch Bayh introduced the article into the Congressional Record on Oct. 5, 1971. 117 Cong. Rec. 35012. It was referred to extensively in the debates which preceded final passage of the ERA by Congress, and was termed "primary legislative history" of the amendment. 118 Cong. Rec. 9097 (1972).

(1) Is the unique feature of the characteristic relevant to the purpose of the classification?

(2) Is there a compelling state interest in legislating on this particular subject in this manner?

In attempting to show that its pregnancy classification would survive scrutiny under the ERA, GE has totally ignored the thrust of the first inquiry. For as the Emerson article points out, unless the principle permitting classification based on unique physical characteristics is

> strictly limited to situations where the regulation is closely, directly and narrowly confined to the unique physical characteristic, it could be used to justify laws that in overall effect seriously discriminate against one sex.

80 Yale L.J. at 894.

Under the first of the two tests stated above, the properties of the characteristic in question must be examined. The condition of pregnancy, for example, possesses a number of properties, some of them shared with other conditions (need for medi-



cal care, period of disability[13]), and some, wholly unique (the birth of a child is a usual result). The uterus, too, shares some characteristics with other organs (subject to disease and malfunction), and has some features wholly unique to it (the reproductive function). The first test is met only where the purpose of a classification based upon pregnancy, the uterus or some other unique physical characteristic is related to the unique properties of that characteristic.

To illustrate the essential point missed by GE. A temporary disability program excludes from coverage disabilities associated with uterine cancer, but covers other forms of cancer, including cancer of the prostate gland. The classification is based on a unique physical characteristic of women. However, it is unrelated to the

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[13] Dr. Bernice Sandler, testifying on behalf of the Women's Equity Action League during the House hearings, stated in a colloquoy with Representative Wiggins:

> Insofar as pregnancy is a disabling condition and one goes to the hospital and one may die from it, it is a disability and you might very well cover it with the same rules that cover disability.

ERA House Hearings at 284.

unique feature of the uterus -- its reproductive function. Nothing about this form of cancer differs from any other cancer for the purpose at hand -- replacing income lost through disability. Perhaps coverage of uterine cancer is expensive, but even if it is, this too is a feature uterine cancer shares with many other conditions which are experienced by both males and females. Thus, an exclusion on the basis of cost would also fail to satisfy the close nexus demanded by the test. Yet under GE's superficial analysis, the exclusion, in fact, a broader exclusion covering every disease or disability associated with female reproductive organs, would pass muster under the ERA. Congress could not possibly have intended to permit a loophole so large, so easily invoked, and so destructive of the grand and encompassing purpose of the amendment.

Statements in ERA legislative history, quoted by GE and its amici, to show that unique physical characteristic classification is permissible under the ERA, in fact reflect approval only of those classifications which would meet the first test, for example, "a law providing for payment of the medical costs of childbearing," and "laws establishing medical leave for childbearing." See Brief for GE at 39-40; Brief for amicus curiae for Westinghouse at 23. In the situations to which the ERA proponents referred, the classification is based not only on a unique physical characteristic (the uterus, for example), but the unique



function or feature of that characteristic is relevant to the purpose of the classification. Thus, the illustrative remarks approve pregnancy classifications which, because they relate precisely and exclusively to the reproductive function, clearly satisfy the first test.

The classifications approved in the remarks quoted by GE and its amici also satisfy the second test in that the legislation described, focused closely, directly and narrowly on maternal and infant health, serves vital public purposes. See, e.g., Roe v. Wade, 410 U.S. 113, 163 (1973) (compelling governmental interest in health of viable fetus as well as health of childbearing woman); Stanley v. Illinois, 405 U.S. 645, 652 (1972) (welfare of minor children as an overriding public concern).

If GE were a state employer subject to the ERA, its treatment of disabilities related to pregnancy and childbirth would not survive the scrutiny appropriate under the amendment. First, the necessary nexus between the classification and the unique feature of pregnancy is not present. In the context of employment, disabilities related to pregnancy and childbearing are not different from other temporary disabilities. Both involve temporary inability to work and medical expenses. These are the factors relevant in the work place. They exist to the same extent whether the disabling con-

dition is childbirth or a broken leg.[14]

Furthermore, no compelling interest justifies a pregnancy classification in this context. The state as an employer has no interest in maternal health and child health distinct from its interest in the health and well being of all employees. Thus, qua employer, the state would not be justified in treating disabilities related to pregnancy or childbirth differently from other disabilities.

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[14] GE's misconception is illustrated graphically by one of the justifications it offers for its pregnancy classification -- disabilities related to pregnancy and childbirth are excluded to insure against further imbalance between males as a group and females as a group with regard to receipt of total benefits under the plan. Brief for GE at 23, 57-59. This justification demonstrates that the uniqueness of pregnancy and childbirth has nothing to do with GE's categorical exclusion. Instead, the disability experience of individual women is attributed to women employees as a group. Such sex averaging is precisely the kind of practice that Congress intended to stop when it passed the ERA. Remarks of Sen. Stevenson, 118 Cong. Rec. 9547 (March 22, 1971).



## CONCLUSION

A contextual approach to the legislative history of the ERA reveals the superficiality of the quotation search made by GE and its amici. More careful attention to congressional purpose discloses that some pregnancy classifications were indeed intended to survive the ERA, those that deal with the special function served by pregnancy and do so to effect directly and precisely an overriding public interest. Such advertence also discloses that pregnancy classifications of the kind here at issue would not survive the ERA. Thus, the legislative history of the ERA, to the extent it sheds any light upon the issues presented by this case, supports the position of Martha Gilbert and IUE.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1589

GENERAL ELECTRIC COMPANY,

*Petitioner,*

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*

No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *et al.*,

*Petitioners,*

v.

GENERAL ELECTRIC COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF FOR COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, AS *AMICUS CURIAE*

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## BRIEF FOR COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, AS *AMICUS CURIAE*

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### Interest of the *Amicus*

The Communications Workers of America, AFL-CIO, (hereinafter "CWA") submits this brief *amicus curiae* with the consent of all parties pursuant to Supreme Court

Rule 42(2).[1] CWA is an international labor organization representing non-supervisory employees in the communications industry and other industries throughout the country. As of October, 1974, CWA represented 500,881 employees in collective bargaining units at the American Telephone & Telegraph Company and Associated Bell Companies (hereafter "Bell System"). 55% of these employees are women.

CWA is a party plaintiff in seven cases now pending in six federal district courts[2] involving the application of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* (hereafter "Title VII" or "the Act") to the denial by Bell System employers of equal rights, benefits and privileges of employment to women disabled by pregnancy. One of these cases, *Communications Workers of America, et al.* v. *American Telephone & Telegraph Company, Long Lines Department,* is presently before this Court on Petition for Writ of Certiorari filed by American Telephone & Telegraph Company, Long Lines Department (hereafter "A.T.&T.") on June 19, 1975.[3] The district court dismissed *sua sponte* CWA's complaint against A.T.&T. due to this Court's decision in *Geduldig* v.

[1] Letters of counsel for Petitioner and Respondents consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] *CWA* v. *A.T.&T., Long Lines Department, petition for cert.* filed, 43 U.S.L.W. 3684 (U.S. June 24, 1975) (No. 74-1601); *CWA* v. *Illinois Bell Tel. Co.,* No. 73-C-959 (N.D. Ill., 1973); *CWA* v. *Southern Bell Tel. & Tel.,* No. 18328 (N.D. Ga., 1973); *CWA* v. *New York Tel. Co.,* C.A. No. 73-3352 (S.D.N.Y., 1973); *CWA* v. *Southwestern Bell Telephone Co.,* Civil Action No. 74-315 (E.D. Missouri); *CWA* v. *The Pacific Tel. & Tel. Co.,* C.A. No. C-73-1739 RFP (N.D. Cal., 1973); and *CWA* v. *South Central Bell Tel. Co.,* C.A. No. 73-1771 Section A (E.D. La., 1973).

[3] No. 74-1601. Respondents' Brief in Opposition, filed September 3, 1975, indicated the reasons why certiorari might be denied, but also requested consolidation with *Wetzel* in the event certiorari was granted without summary affirmance. *Wetzel* is reported at 372 F.Supp. 1146 (W.D. Pa., 1974), *aff'd,* 511 F.2d 1199 (3d Cir. 1975).



*Aiello,* 417 U.S. 484 (1974) (*"Aiello"*) on July 11, 1974, 379 F. Supp. 697 (S.D.N.Y. 1974). The United States Court of Appeals for the Second Circuit reversed the district court on March 26, 1975 and remanded the case for further proceedings, 513 F. 2d 1024 (2d Cir. 1975). Upon this Court's granting of certiorari in *Liberty Mutual Insurance Co.* v. *Wetzel* (No. 74-1245) (*"Wetzel"*), proceedings were stayed pending action by this Court on the question presented in *Wetzel,* insofar as the Court's decision might affect further proceedings in that action.[4]

The Bell System provides its employees with an employer-funded fringe benefit in the form of a "Plan for Employees' Pension, Disability Benefits and Death Benefits" (herein "the Plan"). Any employee unable to work for more than seven days, regardless of the cause of disability, is entitled to the protection of the Plan during the disability period. This protection includes significant employment rights such as retention of service credit (seniority), wage progression credit, reinstatement priority, paid medical and hospitalization insurance premiums and weekly income protection payments based on a formula related to the salary and service credit of a disabled employee. Retention of service credit affects an employee's entitlement to pensions, vacations, transfer, promotion, continued disability protection, and guarantees job retention rights in the case of lay-offs.

Only women disabled by pregnancy are excluded from the Plan's protection. Sickness benefits afforded under the Plan established by Bell System employers are charged as operating expenses of the company "as and when paid." Payments under the Plan are made to all disabled employees except women disabled by pregnancy, regardless of the number of employees disabled in any given fiscal year. The Plan's protection is not geared to actuarial statistics, nor does it contain any limitation on the number or type

[4] The other CWA cases have, in effect, also been stayed.

of covered disabilities employees claim in any given year. Length of income protection eligibility is based upon length of service with the company. The Bell System's concept of aggregate risk protection is aimed at the risk of *disability* and is unconcerned with the type of condition or its cost or duration. No sex-unique disability other than pregnancy is denied protection.

CWA has been working to include women disabled by pregnancy within the scope of employer disability benefits plans in various companies including the Bell System for many years. It has assisted its female members in processing complaints with the Equal Employment Opportunity Commission ("EEOC") and state fair employment practices agencies implementing legislation comparable in scope and intent to Title VII, and has instituted grievance proceedings on their behalf. In April, 1972 CWA filed Charges of Discrimination with the EEOC against the Bell System on behalf of its female members and followed with the filing of the lawsuits described above.

In all of these actions, the Bell System defendants have interposed a defense to the claim of sex discrimination under Title VII which denies liability for disparate treatment of women disabled by pregnancy on the grounds that such treatment is "based upon a rational and neutral business justification under the Act." This defense, often referred to as the "business necessity" defense, includes the contention that the costs of covering pregnancy disability are too great to mandate Bell System compliance with the Act's prohibition of sex discrimination.[5] In view of the

[5] General Electric's (herein "Petitioner") brief (pp. 6-8, 27-28, 53-61) discusses the alleged costs of equal treatment of women disabled by pregnancy, alleging that they constitute rational "business considerations" which are "among the reasons for GE's adoption of the pregnancy exclusion" from disability protection (p. 60, n. 67). Petitioner disclaims reliance upon a "business necessity" defense, but cites 703(e) of the Act [42 U.S.C. 2000e-2(a)] which relates to bona fide occupational qualifications. However, as the



concerns expressed by this Court in *Aiello* over the costs of providing equal insurance coverage to women disabled by pregnancy, 417 U.S. at 495-496, CWA is anxious to have its views before the Court on the availability and applicability of the business necessity defense in this case interpreting Title VII.

## Opinions Below

The opinion of Judge Mehrige of the Eastern District of Virginia is reported at 375 F. Supp. 367. The opinion of the United States Court of Appeals for the Fourth Circuit affirming the district court in all respects (per Circuit Judge Russell and Chief Judge Haynsworth) is reported at 519 F. 2d 661.[6]

## Statute Involved

Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974) (hereinafter "Title VII"), in pertinent part provides:

> Sec. 703. (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or

Court below noted, 519 F. 2d at 667, this "single exception to [the] statutory command of non-discrimination . . . is a narrow one." The "business considerations" raised by petitioner were rejected by the Court below, 519 F. 2d at 667, n. 23.

[6] Circuit Judge Widener dissented, 519 F. 2d at 668-669, believing this Court's Fourteenth Amendment decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) precluded relief for practices challenged under Title VII.

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . .

## Question Presented

Does an employer's exclusion from coverage of pregnancy-related disabilities from an otherwise comprehensive employee disability income protection plan constitute sex discrimination proscribed by Title VII of the Civil Rights Act of 1964?

## Introductory Statement

Employment discrimination based upon stereotypical judgments about women, like minorities, has led employers to claim numerous excuses for permitting differential treatment in the job marketplace. Perhaps the most common stereotype which has plagued women who seek equal access to every aspect of employment, has been the notion that their childbearing function or potential will ultimately make them part-time or one-time employees, thereby making it wasteful or economically burdensome to hire, train, promote, or transfer them or to afford comparable fringe benefits on a par with those afforded to men. These notions about a woman's actual or potential motherhood have operated historically to exclude most women from meaningful jobs and many from any job at all.

Petitioner's denial of income protection benefits to women disabled by pregnancy, and its termination of these women are merely one aspect of the many methods used by employers, relying upon stereotypes surrounding the biological fact that women bear children, to limit or deny



equal employment rights to women.[7] It is significant that the only sex discrimination case under Title VII to come before this Court involved an employer's policy of refusing to hire women on the basis of their status as mothers of pre-school children. *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1972).

The adverse impact of the policies challenged in this action upon working women is clear. It is not mere economics which prevent employers from according equal treatment to women disabled by pregnancy; the economics merely shroud a societal stereotype of women as mothers first and workers second. The singling out of a major portion of the labor force for disparate treatment because of an immutable biological fact necessary for human survival

[7] The original challenge to General Electric's disparate treatment of women disabled by pregnancy included an attack on its policies at various plants which forced pregnant employees to leave their jobs at the sixth month, a policy subsequently invalidated by this Court in *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974); *cf. Turner* v. *Dept. of Employment Security*, 44 U.S.L.W. 3298 (*Per Curiam*, Nov. 17, 1975). Liberty Mutual Insurance Company automatically fires women disabled by pregnancy if they do not return to work within a specified time period, even though they remain disabled. In the cases of the Bell System, the denial of benefits includes loss of other employment rights such as seniority and wage progression credit. In cases such as *Satty* v. *Nashville Gas Company*, 11 FEP 1 (6th Cir. 1975), *affg.* 384 F. Supp. 765 (E.D. Tenn. 1975), *pet. for cert. filed*, No. 75-536, 44 U.S.L.W. 3254 (Oct. 17, 1975), and *Hutchison* v. *Lake Oswego School District*, Nos. 74-3181, 3182 (9th Cir. July 21, 1975), *affg. in part* 374 F. Supp. 1056 (D. Ore. 1974), employers refused to permit women disabled by pregnancy to obtain accumulated paid sick leave for pregnancy disability. In cases such as *Holthaus* v. *Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975), the employer terminated a woman so disabled, rather than permit use of accrued vacation pay and then leave without pay. The marital status of women, but not men, has been used to bar hiring or force resignation, *Sprogis* v. *United Airlines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), *cert. den.* 404 U.S. 991 (1971). Employers have refused to employ or fired unwed mothers, but not unwed fathers, *Doe* v. *Osteopathic Hospital of Wichita*, 333 F. Supp. 1357 (D. Kan. 1971); *Drake* v. *Covington County Board of Education*, 371 F. Supp. 974 (M.D. Ala. 1974).

is wrong.[8] To achieve the full equality for all required by Title VII, we must afford equal rights to all. As Judge Mehrige recognized, 375 F. Supp. at 383:

> If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's biologically more burdensome place in the scheme of human existence. An industrial policy which does not account for this fails in providing such sexual equality as is within its power to produce.

The adverse impact of the policies challenged here and elsewhere upon women is major and irremediable unless Title VII's proscription of disparate treatment is upheld by this Court.

## Summary of Argument

1. The Court below correctly found that an employment policy which fails to treat women disabled by pregnancy in the same manner as all other disabled employees dis-

[8] This distortion of the unique role women play in the reproductive process into a defense for barring them from the productive process of full employment has been the subject of intensive study and analysis. See, e.g., Hayden, *Punishing Pregnancy: Discrimination in Education, Employment and Credit*, American Civil Liberties Union: Women's Rights Project, October, 1973, pp. 21-63; Citizens' Advisory Council on the Status of Women (herein "CACSW"), "A Statement of Principles with Respect to Job Related Maternity Benefits," *Women in 1970* (G.P.O. 1971); Comment, "Loves Labors Lost: New Conceptions of Maternity Leaves," 7 *Harvard Civil Rights—Civil Liberties Rev.* 260 (1972); Koontz, "Childbirth and Child Rearing Leave: Job Related Benefits," 17 *New York Law Forum* 481 (1971); President's Commission on the Status of Women, "Report of the Committee on Social Insurance and Taxes," p. 57 (Oct. 1963); Comment, *"Geduldig* v. *Aiello:* Pregnancy Classifications and the Definition of Sex Discrimination," 75 *Columbia Law Review* 440, 456-461 (1975) (herein "Pregnancy Classifications"); Cary, "Pregnancy Without Penalty," 1 *Civ. Lib. Rev.* 31 (1974); Johnston, "Sex Discrimination and the Supreme Court," 49 *New York University Law Rev.* 617, 642-661, 673-688 (1974).



criminates on the basis of sex in violation of Title VII of the Civil Rights Act. The Court properly held that this Court's Equal Protection Clause analysis of a state social welfare decision in *Aiello* had no application to the statutory analysis required under *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Petitioner's disability policies single out a group of women protected by Title VII for disparate treatment of a disability they alone suffer by relying upon stereotyped notions of the childbearing function of women and the place they occupy in the job market. Petitioner's disability program is not grounded on equalized actuarial factors. It insures employees against the risks attendant to inability to work, not against particular conditions. Thus, it does not provide "aggregate risk protection" to men and women alike.

Employer denial of protection to women disabled by pregnancy aggravates existing salary, hiring and promotional discrimination, and limits their full enjoyment of employment rights available to all other employees. The objectives of employer disability benefits programs are related to employee loyalty, morale and productivity. Exclusion of a statistically predictable number of women from their coverage does not serve these objectives. The operation of these policies denies equal employment benefits to women in an arbitrary and unnecessary manner condemned by Title VII.

2. The Court below correctly rejected Petitioner's claims of "business considerations," including costs, as a defense to its exclusion of women disabled by pregnancy from its disability program. Costs are not a defense to discriminatory treatment of protected groups under Title VII and are insufficient to constitute the type of "business necessity" which could excuse such discrimination. Neither the courts, nor the Equal Employment Opportunity Commission Guidelines implementing Title VII, permit claimed costs to justify disparate treatment. Petitioner has failed to meet the stringent test of "business necessity" by failing to dem-

onstrate that its policies are necessary in order for it to remain in business, that exclusion of pregnancy is related to its fringe benefit objectives, and that no acceptable alternative exists which would accomplish the objectives of disability protection with a lesser differential impact.

The public policy of eliminating all vestiges of discrimination, as expressed by Congress in Title VII, precludes the defense of costs as an excuse for failing to comply with the law. The fact that it is less profitable to do business in a lawful manner has been rejected as a defense in many areas of the law, both in the area of racial discrimination and in other areas, such as antitrust violations. The rejection of the costs defense is not inconsistent with this Court's holding in *Aiello,* because the motives of an employer in establishing fringe benefits have self-serving ends, in contrast to the altruistic objectives of states in establishing social welfare programs to assist their citizens under the police power. The differing objectives of employers are a further indication that mere finances cannot excuse discrimination against a substantial segment of its female employees.

3. Petitioner did not provide any objective data to show that the costs it claims would be incurred in granting protection to women disabled by pregnancy are either accurate or relevant to business necessity standards. Statistics introduced at trial by an actuary regarding insurance industry practice and experience, as well as data submitted by various *amici curiae* and relied upon by Petitioner, fail to show that women presently benefit disproportionately from benefits programs or that the coverage of pregnancy-related disability will prove too great. Petitioner claims that its disability income protection plan was established "in accordance with insurance concepts"; however, General Electric is self-insured. The statistics presented by the insurance industry, upon which Petitioner rests its arguments, as well as data from other self-insured employers,



fail to include relevant factors other than sex which affect disability frequency and severity. This data is limited by age and scope, as well as impermissible stereotypes about women. It also excludes the impact that past and present discrimination has had upon working women. Neutral studies of projected disability costs, on the other hand, indicate that protecting women disabled by pregnancy will increase employer costs by a mere fraction of their total wage and salary costs. This conclusion is supported by the fact that Congress, federal agencies, numerous private employers, many states and most other nations have elected to protect women from this risk of disability without any of the disastrous consequences predicted by Petitioner and *Amici.*

## ARGUMENT

### I.

### The Courts Below Were Correct in Finding Prohibited Sex Discrimination Under Title VII.

The Courts below found General Electric's exclusion of pregnancy disability from benefit protection to be in violation of Title VII and the EEOC Guidelines on Sex Discrimination interpreting the Act, 29 C.F.R. §1604.10.[9] The Fourth Circuit found this court's Equal Protection Clause analysis in *Aiello* to have no application to the statutory question of whether the employer had engaged in sex discrimination prohibited by Title VII, 519 F. 2d at 665-667. The majority held that

> the issue is not whether the exclusion of pregnancy benefits under a social welfare program is "rationally supportable" or "invidious" but whether Title VII, the

[9] See, 519 F. 2d at 664-665 and 375 F. Supp. at 380-381. Amicus understands that other briefs *amicus curiae* will address the correctness of these Guidelines and the courts' deference to them.

> Congressional statute, in language and intent, prohibits such exclusion. . . . To satisfy constitutional Equal Protection standards, a discrimination need only be "rationally supportable" and that was the situation in *Aiello,* as well as in *Reed* and *Frontiero.* The test in those cases was legislative reasonableness. Title VII, however, authorizes no such "rationality" test in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in the conditions of employment. (519 F. 2d at 667)

The Court relied upon the Third Circuit's decision in *Wetzel* which, in turn, relied upon the direct interpretation of Title VII expressed in *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431 (*"Griggs"*) holding that employment practices which treat a protected class of persons in a disparate manner, despite the appearance of neutrality, are forbidden.[10]

**A. Petitioner's Policies Are Not Related to Its Fringe Benefit Objectives**

Petitioner contends that "employee benefits, which relate, not to job or promotion opportunities, but rather to the incidents of the job" are "less significant" to Title VII's

[10] This Court interpreted Title VII in *Griggs* as barring "neutral" practices which "operate invidiously to discriminate on the basis of racial or other impermissible classifications," 401 U.S. at 431. Even assuming that the exception in *Aiello's* footnote 20 of pretexts for invidious discrimination could properly be applied beyond the factual and legal context of that case, it must be assumed that, under Title VII, Petitioner's policies cannot stand since they *operate* in a discriminatory manner. Pretexts for invidious discrimination under the Fourteenth Amendment involve questions of motive, but motive is irrelevant under Title VII. *Local 189, United Papermakers & Paperworkers* v. *United States,* 416 F. 2d 980, 996 (5th Cir. 1969), *cert. den.* 397 U.S. 919 (1970). The discriminatory *operation* of these challenged policies is the key to the invalidity under the Act.



non-discrimination objectives (Pet. Br., pp. 21-22, 53-54). The Court below properly rejected General Electric's contention that fringe benefits are somehow incidental, "marginal personnel policies" (Pet. Br., p. 53) rather than important terms and conditions of employment, noting that General Electric's 1966 Annual Report interpreted compensation "broadly to include not only monetary returns but also the value of benefit programs," 519 F. 2d at 663-664.

The employer's decision to make fringe benefits available to its work force plays a critical role in the employee's decision to accept a job and to remain in that work force and seek better and more responsible positions within it. Vacations, sick leave, disability protection, insurance coverage and retirement programs may often be more attractive to a potential employee than the actual wages she or he receives. As the Fifth Circuit noted in *Rogers* v. *Equal Employment Opportunity Commission,* 454 F. 2d 234, 238 (5th Cir. 1971), *cert. den.,* 406 U.S. 957 (1972):

> As wages and hours of employment take subordinate roles in management-labor relationships, the modern employee makes ever-increasing demands in the nature of intangible fringe benefits. Recognizing the importance of these benefits, we should neither ignore their need for protection, nor blind ourselves to their potential misuse.[11]

Employers afford fringe benefits to increase work-force loyalty, morale and productivity, as well as to obtain favor-

[11] The EEOC Guidelines, 29 C.F.R. § 1604.9, clearly prohibit discrimination between men and women with regard to fringe benefits. Terms and conditions of employment, as used in the Act, have repeatedly been held to include disability benefits programs, pension plans and retirement benefits. See, e.g., *Rosen* v. *Public Service Elec. and Gas Co.,* 477 F.2d 90, 95 (3d Cir. 1973). To equate these critical employment benefits which form an integral part of an employee's compensation and working environment with "marginal" or "incidental" practices such as dress codes (Pet. Br. 53-54) demonstrates a startling lack of concern for or interest in the needs and well-being of employees in the 1970's.

able tax treatment by deducting such fringes as an operating expense. See, generally, Allen, *Fringe Benefits: Wages or Social Obligation* (1964), pp. 37-42. Many of the self-serving justifications offered by Petitioner herein for denying such benefits to a significant group of its female employees, such as costs and non-return rates (Pet. Br., pp. 6-10, 22-23, 55-57), lose their significance when viewed in the light of such apparently neutral objectives. Since any added costs of equalizing fringe benefits amount to additional tax advantages to the employer, and where non-return rates are a function of employee morale and loyalty generated by benefit availability,[12] it is clear that General Electric's present policies are *not* neutral, but rather are a clear example of stereotypical judgments about women and pregnancy which place a barrier to equal employment opportunity before a protected group under the Act in an "artificial, arbitrary and unnecessary" fashion, *Griggs, supra,* 401 U.S. 431.

**B. Discriminatory Impact on Women Generally**

The United States Department of Labor has found that over half of the women who work do so out of compelling economic necessity. Most women support both themselves and families; 22% have husbands with annual incomes of between $3,000 and $7,000. See: U.S. Department of Labor: Women's Bureau, *Why Women Work*, 1 (rev. ed. May, 1974); Murray, "Economic and Educational Inequality Based on Sex: An Overview," 5 *Valparaiso* U.L. Rev. 237, 239-241 (1971); *U.S. Department of Labor,* Bureau of Labor Statistics: "Marital and Family Characteristics of Workers, March 1969," Special Labor Force Report No. 120. In 1972, working mothers comprised 42% of the work force. Of these, approximately 38.3% had

[12] See, generally, the surveys conducted by Prentice-Hall, *Personnel Management Policies & Practices Report Bulletin,* No. 16 (1973) pointing out that return rates for disabled women following childbirth increase, often dramatically, when the employer makes disability protection available to them. See also, "Pregnancy Classifications," *supra,* 75 *Col. L. Rev.* at 478-479.



children between the ages of three and five. Minority women accounted for 50% of all women working, according to 1970 census statistics.[13]

In 1970, the annual wage of such women was 60% of that earned by men.[14] U.S. Department of Labor: Women's Bureau, *Fact Sheet on the Earnings Gap* (rev. ed. 1972). Working women heading families in 1972 had median earnings of $4,140 per year. Nearly one-third of the families headed by women are minority families, yet median earnings of these women in 1972 were $3,370, as compared to $4,460 for families headed by white women.[15] In *Kahn* v. *Shevin,* 416 U.S. 351, 353 (1974), this Court took note of the fact that "the job market is inhospitable to the woman seeking any but the lowest paid jobs." This recognition underscores the devastating impact that employer policies such as General Electric's have upon women who become disabled by pregnancy by adding additional burdens to existing economic inequities they already face.

Not only are women paid less than men, but their opportunities for advancement are far less, and they are substantially more likely than men to be underutilized in the jobs they hold.[16] A study of Bell System employment

[13] These statistics appear in Hunt, Report and Recommendations for the Office of the Secretary, Department of Health, Education & Welfare: "Occupational Health Problems of Pregnant Women" (April 30, 1975), p. 9. 43% of the total American female population was working in 1970.

[14] This disparity has not diminished in more recent years. The median income of men working full time in 1973 was $11,468, compared to $6,488 for women. See U.S. Department of Commerce, "Consumer Income," Series P-60 No. 93 (July, 1974), Table 2.

[15] These statistics appear in Hayghe, "Marital and Family Characteristics of the Labor Force in March 1973," *Monthly Labor Review* (April 1974), p. 21, 24-27. Minority women hold a greater percentage of low-skilled, low-paying jobs than white women and have an unemployment rate more than twice as high.

[16] See, generally, U.S. Department of Labor: Women's Bureau, *Underutilization of Women Workers* (rev. ed. 1971). Waldman & McEaddy, "Where Women Work—An Analysis By Industries and Occupation," *Monthly Labor Review,* May 1973, p. 3.

practices conducted in 1971[17] indicated that 80% of its female employees held job classifications with a basic annual wage of less than $7,000, as compared to only 4% of its male employees. On the other end of the wage scale, only 3% of the System's women earned $13,000 per year or above. It found that "Bell's incumbent female employees, given their age, education and experience, are paid an aggregate of $500 million per year less than males with comparable personal characteristics." Copus Report, pp. 174-176.

**C. Discriminatory Impact on Women in the Bell System**

The operation of Bell System policies which deny employment benefits and rights to women disabled by pregnancy demonstrates the broad impact of such policies upon the employment rights of female employees.

Women disabled by pregnancy within the Bell System have their employment rights limited in the following ways, not experienced by any other disabled employee:

1. They receive no income protection under the Plan during any part of their disability period. Unlike other disabled employees, a non-pregnancy-related disability (such as a broken leg) which occurs during the disability absence is not covered. A male disabled for any reason receives protection for the second disability.[18]

2. They do not accrue service credit (seniority) beyond 30 days, regardless of the length of actual disability. They

[17] Equal Employment Opportunity Commission Report, "A Unique Competence: A Study of Equal Employment Opportunity in the Bell System" (1971) (herein "Copus Report"), pp. 59-60.

[18] Failure to make any payments whatsoever to female employees absent due to pregnancy disability must be contrasted to the Bell System policy of making differential payments (as well as granting seniority) to employees (generally male) absent for military service. Whether or not such a policy is desirable, it shows an employer's willingness to accommodate probable exigencies in lives of working men, while refusing to accommodate a predictable exigency in the lives of working women.



accrue no wage progression credit (credit toward promotion and advancement). Even if a disability arises during leave which would otherwise be covered under the Plan, no service credit is given.

Retention of service credit has great significance to a Long Lines employee: seniority affects pension plan rights, entitlement to permanent promotion, vacation eligibility, transfer opportunities, susceptibility to lay-offs or termination, as well as the amount of disability benefits an employee receives for a covered disability. Seniority even affects eligibility for inclusion in the company's Upgrade and Transfer Plan adopted pursuant to the Consent Decree entered into between EEOC and Bell System employers to correct some of its discriminatory practices against women and minorities. See, *E.E.O.C.* v. *A.T.&T. Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973), *mod. o. o. g.* 506 F. 2d 735 (3d Cir. 1975); Copus Report, *supra.*

3. They must pay the cost of remaining within the company's Basic Medical Expenses Plan during the period on maternity leave.

4. They must obtain an Application for Leave of Absence at least sixty days prior to the date when termination of active employment appears desirable, although notice of disability protected by the Plan need only be given at time of absence. At least nine companies or departments required pregnant employees to leave work at the seventh month of pregnancy until 1971. The requirements that application for leave be made by the seventh month may continue, in effect, a substantially mandatory leave date at the end of the seventh month, regardless of the woman's ability and desire to continue to work.

5. A Bell System policy existed at least until June, 1971 which did not assure re-employment following maternity leave, and, moreover, required the woman to agree

that her application for leave be considered a voluntary termination of employment in the event that she was not re-employed. Reinstatement is assured to other disabled employees. See, generally, Copus Report, pp. 148-150.

6. The Bell System, unlike General Electric, claims to cover complications of pregnancy (i.e., toxemia, ectopic pregnancy and pre-eclampsia) under the Plan. However, these disabling conditions qualify for coverage *only* if the employee has not already left her job. Once classified as "inactive" by the employer, no complication of pregnancy, however serious or life-threatening it may be, is covered. In view of the fact that at least ten percent of all pregnancies will encounter disabling complications, 375 F. Supp. at 376-377, neither General Electric nor the Bell System are conforming to the mandate of law in this area. *Cf. Aiello,* 417 U.S. 489-490.[19]

In short, women *are* disabled by normal pregnancy and childbirth and may be additionally disabled by complications of pregnancy, in the same manner as men are disabled by other conditions. To justify disparate treatment of pregnancy-related disabilities because pregnancy is a condition unique to women, may satisfy Fourteenth Amendment standards of reasonableness in construing a State's social welfare programs, but it cannot be said to justify an employer's fringe benefit policies where other "unique" conditions, inextricably linked to race, sex or national origin, are covered. Refusal to cover the race-unique condition of sickle-cell anemia would amount to effecting a

[19] General Electric defends its exclusion of complications of pregnancy by arguing that it is a "*de minimus* matter" which is not an "important" consideration since few major complications require hospitalization (Pet. Br. pp. 24-25). However, income protection for Petitioner's disabled employees is not conditioned upon whether or not they receive hospital treatment, but simply upon whether they are unable to work. Further, as Petitioner concedes, other "*de minimus*" problems are covered, such as cosmetic surgery (Pet. Br. p. 25).



"pretext for invidious discrimination." The Court below correctly found that discrimination which is inextricably linked "in consequences and result" to characteristics of protected groups violates the Act, 519 F. 2d at 664.

**D. Exclusion of Pregnancy From Employment Programs Fails to Provide Aggregate Risk Protection**

The discriminatory operation of Petitioner's disability benefits program not only fails to meet the Title VII analysis of *Griggs,* but also fails to provide aggregate risk protection found to exist in *Aiello.* General Electric contends that its disability income protection plan does not differentiate on the basis of sex in terms of "aggregate risk protection" because each employee is "protected from the same risks." However, it has established a program of employee benefits which insures them against the risks of *disability,* not the risks attendant to particular conditions. Like the Bell System, Liberty Mutual and other employers whose exclusion of pregnancy from disability protection programs is being challenged under Title VII, the relevant aggregate risk insured is *inability to work* and the resulting need for financial assistance and job protection during that period of time.

General Electric contends that it covers only disabilities resulting from sickness or accidents,[20] and that men and

[20] Petitioner concedes (Pet. Br. p. 62, n. 69) that the term "disability" is not specifically defined in the plan as limited only to those arising from sickness or accident. In operation, General Electric's plan clearly covers disabilities which arise for reasons other than sickness or accident: vasectomies, cosmetic surgery, drug addiction. As the Courts below found, General Electric provides disability benefits to its male employees for *all* disabilities, whether or not they originate from sickness or accident or some other cause. 375 F. Supp. at 381. "Whatever facile plausibility there might be to the argument that its plan does not cover 'voluntary' disabilities accordingly disappears in the fact of the manner in which [Petitioner] itself has construed and applied its plan." 519 F.2d at 665.

women are equally protected from risks attendant to such disabilities. Since pregnancy is neither a sickness nor an accident, however, General Electric claims that this sex-unique condition may lawfully be excluded from protection (Pet. Br. pp. 10-13, 62-66). However, it is the elimination of a disability suffered exclusively by women which triggers the Title VII inquiry. As the Court below noted:

> A disability program which, while granting disability benefits generally, denies such benefits expressly for disability arising out of pregnancy, a disability possible only among women, is manifestly one which can result in a less comprehensive program of employee compensation and benefits for women employees than for men employees; and would do so on the basis of sex. (519 F. 2d at 664)

Disabilities caused by pregnancy and childbirth are not only unique to women, but constitute a fairly predictable number of disability absences during a given period. General Electric's exclusion of these disabilities from its benefits program burdens its female employees alone with diminished employment benefits because of characteristics peculiar to their sex.

In *Aiello,* this Court found that equal aggregate risk protection meant that the fiscal and actuarial benefits of the program accrued to members of both sexes. 417 U.S. at 496-497, n. 20. General Electric has made no showing that the actuarial benefits of its present program accrue to women equally with men. Like the Bell System, no evidence is offered as to *present* costs or dollar benefits of the program, although a substantial amount of attention is given to the claimed differences between men and women in terms of the percentage of benefit claims made compared to their percentage in the work force. *Cf. Aiello,* 417 U.S. at 497, n. 21.

The trial court found that Petitioner had failed to show that the actuarial value of its disability coverage was equal-



ized between men and women, 375 F. Supp. at 382-383, noting that "it would have to be shown that absent pregnancy disability provisions, the effects of the balance of [General Electric's] disability program were in fact equalized. Merely showing . . . that in two previous years the coverage given women's per capita disabilities has cost somewhat more is insufficient especially in light of the myriad of factors which might have and undoubtedly did contribute to such a result." As will be shown in Point III, B *infra,* Petitioner's attempt to ground its discriminatory policies upon "insurance concepts" (Pet. Br., pp. 7-8, 26-29, 67-68) is not only misleading, in view of the fact that it bears the costs of disability protection directly, but also subject to the same vulnerability as insurance industry figures which are based upon an impermissible, discriminatory rate structure.

As distinguished from *Aiello,* the disability benefits plan herein arises directly out of the relationship between an employer and its employees where the critical concern is what happens to an employee—loss of his or her income, ability to obtain hospitalization and medical coverage and protection of job rights such as seniority—when he or she is unable to work. Given this purpose, acknowledged by the Court below, 519 F.2d at 663-664, excluding a substantial group of employees—all women—does not serve the needs or objectives of the program. Because of their inferior economic status, women are more likely to need the protection of a disability income protection program than men. In this context of an employer's decision to protect its disabled employees from the risks attendant to their inability to work, General Electric does not provide aggregate risk protection. Such a program similarly does not serve the needs or objectives of Title VII which is aimed at insuring that women are not disfavored in benefits or other terms and conditions of employment.

## II.

### The Mere Invocation of Costs Cannot Be a Defense to Failure to Afford Equal Benefits to Women Disabled by Pregnancy.

#### A. The Title VII Defense of Business Necessity Does Not Include the Defense That an Increase in Costs Will Justify a Policy Which Discriminates Against a Protected Group.

The Courts below found that costs of providing equal benefits to women disabled by pregnancy were not a defense under Title VII.[21] Indeed, although this Court in *Aiello* found that the State's concern for the fiscal integrity of its insurance program provided a sufficiently reasonable[22] justification for its decision to exclude pregnancy coverage, the fact is that Title VII's direct and positive focus on problems of employment discrimination does not permit fiscal concerns to carry such justification weight.

As this Court noted in *Griggs*, Title VII's "touchstone" in determining whether to sustain discriminatory practices

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[21] 375 F. Supp. at 382; 519 F.2d at 663-664, 667. EEOC Guidelines, 29 C.F.R. 1604.9 (e), specifically provide that employers may not defend discriminatory fringe benefits policies by claiming that "the costs of such benefits is greater with respect to one sex than the other." Other courts have also relied upon these guidelines in holding that disparate treatment of pregnancy violates the Act. See, e.g., *Wetzel, supra*, 511 F.2d at 206; *Communications Workers of America* v. *A.T.&T. Long Lines, supra*, 513 F.2d at 1030; *Polston* v. *Metropolitan Life Ins. Co.*, —— F. Supp. ——, 11 FEP Cases 380, 382-383 (W.D. Ky. 1975); *Zichy* v. *City of Philadelphia*, 392 F. Supp. 338, 345 (E.D. Pa. 1975); *Dessenberg* v. *American Metal Forming Co.*, 8 FEP Cases 290, 292-293 (N.D. Ohio 1973).

[22] The presumptions of validity and deference to police power decisions which attach to legislative judgments under Fourteenth Amendment jurisprudence [e.g., *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)] do not exist under Title VII which imposes far more stringent burdens on employers and pays little thought to motives. The court below recognized this critical distinction, 511 F. 2d at 203. See also *Communications Workers of America* v. *A.T.&T. Long Lines, supra*, 513 F.2d at 1031.



is "business necessity," 401 U.S. at 431. This defense was described by the Second Circuit in *U.S.* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (2nd Cir. 1971), as meaning more than simply serving "legitimate management functions." In *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 796-800 (4th Cir. 1971), *cert. dism.* 404 U.S. 1006 (1971), the test was framed as requiring a three-step analysis: (a) the business purpose must be "sufficiently compelling" to override the impact on a protected group; (b) the present policy must, in fact, carry out the purpose it is claimed to foster; (c) there must be *no* acceptable alternative policy which would better accomplish the purpose, or accomplish it equally well with a lesser disparate impact.[23]

General Electric, like Liberty Mutual and the Bell System, has a business purpose in helping its employees through financially difficult times caused by disability. Such a purpose is not served by excluding a definable group of women from such help. Petitioner failed to show either that an alternative policy could not accomplish this purpose in a non-discriminatory fashion, or that increased costs would be "sufficiently compelling" to excuse them from doing so. Accordingly, costs should not be accepted as a defense to these policies.[24]

The EEOC, along with various state fair employment practices agencies, has thus declared that mere finances

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[23] See also, *Local 189, United Papermakers & Paperworkers* v. *United States, supra*, 416 F.2d at 989; *Sprogis* v. *United Air Lines, supra*, 444 F.2d at 1201; *Wetzel, supra*, 511 F.2d at 205-207; *Polston* v. *Metropolitan Life Ins. Co., supra*, 11 FEP Cases at 386-387.

[24] The same analysis applies to General Electric's attempt to justify its maternity leave policies on the basis of a claim that most women do not return to work following childbirth. As this is based upon "stereotyped characterizations" of women which makes "no provision for considering individual capabilities," the court below correctly rejected it, 375 F. Supp. at 373, 379; 519 F.2d at 667, n. 22; *cf. Cleveland Board of Education* v. *La Fleur, supra; Wetzel, supra*, 511 F.2d at 208; *cf. Turner* v. *Dept. of Employment Security, supra.*

will not excuse discrimination, 29 C.F.R. §1604.9(e). The guideline clearly furthers Congressional intent in ordering the elimination of stereotyped generalizations about protected groups which operate as a barrier to full employment. Identical guidelines govern comparable state legislation. See, e.g., New York Division of Human Rights Rulings on Inquiries §16.G, p. 29; Maryland Sex Discrimination Guidelines, 820.08(e).

If the mere assertion of expensiveness could be used to avoid compliance with the Act, few discriminatory practices would ever be struck down.[25] General Electric did not sustain the full burden of proof imposed in establishing the business necessity defense; costs alone are thus insufficient to uphold these challenged practices.[26] Failing to do so, the courts below correctly rejected Petitioner's claimed defense.

**B. The Public Policy of Non-Discrimination Precludes Justifying Discriminatory Practices in Terms of Costs.**

As the court below, noted, the "legislative purpose behind Title VII was to protect employees from any form of disparate treatment because of race, color, religion, sex or national origin," 519 F.2d at 663. The policy of this nation has thus been set by Congress, acting through its Commerce Clause power. That policy make it unlawful to do business in a manner which discriminates against women, as surely as against minorities. As in many other areas of

[25] The trial court correctly held that the costs of equal treatment of pregnancy disability, whatever they may be, are insufficient to save discriminatory policies, particularly where the employer has not even considered alternative methods of coverage, 375 F. Supp. at 367.

[26] It obviously increases employer expenses to outfit women with police uniforms and equipment, but no court would uphold exclusion of women from law enforcement agencies on such grounds. Similarly, testing validation, restroom facilities and training programs may cost more, but refusals to provide these items for women would violate the Act, notwithstanding.



the law, the financial burdens of doing business in a legal manner are often far greater than those involved in shading or avoiding legal obligations, but public policy precludes that excuse.[27] This is particularly true where the policy furthered is one of eliminating discrimination.

**1. *Discrimination***

Courts have firmly rejected arguments of costs in defense of racially discriminatory practices of all kinds. In the area of public accommodations, it is cleary established that the cost of conforming to law cannot be a defense to racial discrimination. In *U.S. by Katzenbach* v. *Gulf State Theatres, Inc.*, 256 F. Supp. 549, 552 (D.C. Miss., 1966) a theatre owner argued that excluding Negroes was "purely economic, i.e. Negroes are unacceptable to the non-Negro patrons upon whose continued support the business depend[ed]." However, the court found the only pertinent issue to be the fact that "Negroes are admittedly excluded" and since this "the law forbids", the discriminatory practices were enjoined. This Court reached the same conclusion in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 260 (1964), interpreting 42 U.S.C. 2000a, holding that a claim that economic loss would occur if blacks were allowed to rent rooms in the motel, was "of no consequence since this Court has specifically held that the fact that a 'member of the class which is regulated may suffer economic losses not shared by others . . . has never been a barrier' to such legislation." The defense of increased costs as a rationalization for practices which perpetuate racial inequality has also been properly rejected in the area of public education. See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 306 F.Supp. 1299, 1312 (W.D. N.C. 1969); *Goss* v. *Board of Education, City of Knoxville, Tenn.*, 482 F.2d 1044, 1046 (6th Cir. 1973), *cert. den.* 414

[27] *Cf. Potlatch Forests, Inc.* v. *Hays*, 318 F. Supp. 1368, 1375 (E.D. Ark. 1970), *affd.* 465 F. 2d 1081 (8th Cir. 1972): "federal labor legislation enacted over the last thirty odd years has placed many onerous burdens on employers."

U.S. 1171 (1974); *Cato* v. *Parham*, 297 F. Supp. 403, 411 (E.D. Ark. 1969).

This court, construing the Equal Pay Act, 29 U.S.C. §206(d) in *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), found no justification for base pay differentials between women on a day shift and men on a night shift, despite the fact that the employer saved money:

> [t]he differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which *Corning* could pay women less than men for the same work. *That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.*[28] (Emphasis added.)

[28] Although in the context of damages, courts awarding back pay for discrimination under Title VII do so without regard to an employer's good faith or economic situation. See, e.g., *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1377, n.37, 1380 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211 (5th Cir. 1974); *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L.Ed. 2d 280, 296-297 (1975). "Parties who operate an unlawful hiring arrangement or practice do so at their peril," *Yuba* v. *Consolidated Industries, Inc.*, 136 N.L.R.B. 683, 688 (1962). This concept includes claims of fiscal considerations. This Court should take notice of the impact which sex discrimination has had upon the role of women in the economic marketplace. Employers save substantial sums of money by discriminating in terms of hiring, salaries, and promotions, as well as in differential fringe benefits. At the trial, General Electric's Labor Relations Counsel testified that the 1973 annual wage paid to males was between $9,200 and $10,000, depending upon overtime; the annual wage to females ranged from $7,200 to $7,750, depending upon overtime. Liberty Mutual was found to have engaged in massive sex discrimination over the years. See, e.g., *Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir. 1975), and *Wetzel, supra*, 372 F. Supp. at 1149-1155. The Bell System was estimated to have saved over $500 million dollars each year due to its sexually discriminatory employment practices. Copus Report, pp. 175-176. All such employer claims of fiscal inconvenience must be viewed in light of and balanced against the monies they have saved in the past by violating the Act.



If it costs more to provide fringe benefits to employees without regard to their sex,[29] then that is simply the price which the law exacts to eradicate discrimination from the marketplace.

**2. *Other Areas of Law***

Just as our commitment to equal rights precludes justifying discriminatory practices on the basis of the financial convenience of those who discriminate, our policies in other areas have rejected fiscal defenses, or ordered compliance with the law despite economic hardships. For example, in the area of antitrust, courts have put the Congressional goal of protecting free business competition from the unlawful restraints of trade above arguments that the specifics of such enforcement will be too costly. This Court has affirmed this basic principle many times. See, e.g., *United States* v. *Crescent Amusement Co.*, 373 U.S. 173, 189 (1944): "[D]issolution of the combination will be ordered. . . . Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." See also *International Boxing Club* v. *United States*, 358 U.S. 242, pp. 256-260 (1959).

In *U.S.* v. *E.I. DuPont & Co.*, 366 U.S. 316 (1961), a partial divestiture order of the district court was reversed, which had focused on "economically oppressive", harsh income tax consequences to shareholders of DuPont and General Motors, and possible capital financing problems, *U.S.* v. *E.I. DuPont de Nemours*, 177 F. Supp. 1, 17-18, 35 (D.Ill. 1959). This court found that "[T]he key to the

[29] The trial court recognized that "at the core of any suit alleging discriminatory 'compensation, terms, conditions or privileges of employment' are dollars and cents," 375 F. Supp. at 382, but declined to find this a viable defense. This result has been reached in other cases involving fringe benefits unrelated to pregnancy disability. See, e.g., *Rosen* v. *Public Service Elec. & Gas Co., supra,* (pension benefits); *cf. Bowe* v. *Colgate-Palmolive* (Christmas bonuses and vacation pay), 489 F.2d 896 (7th Cir. 1969).

whole question of an antitrust remedy is . . . the discovery of measures effective to restore competition" and that "courts . . . are required to decree relief effective to redress the violations whatever the adverse effect of such a decree on private interests." 366 U.S. 316, *supra,* at 326. Thus, where drastic remedies, including that of divestiture, are needed to effectuate antitrust policies, such relief will not be denied because economic hardship, no matter how severe, will result. See also, *United States* v. *Corn Products Ref. Co.,* 234 F. 964 (S.D. N.Y. 1916) *app. dism.* 249 U.S. 261 (1919); *United States* v. *E.I. DuPont de Nemours & Co.,* 188 F. 127 (D.Del. 1911); *In re Crown Zellerbach Corp.,* CCH Trade Reg. Rep. 1957-1958 Paragraph 26, 923, at p. 36, 462 (FTC 1958). *Cf. Commonwealth Edison Co.* v. *Allis-Chalmers Manufacturing Co.,* 245 F. Supp. 889, 943 (N.D. Ill. 1965), rejecting as immaterial the defense of "economic coercion", noting that such a defense "reduced to its essentials, is a contention that if [a business] can grow by violating the antitrust laws, then it has the right to violate those laws and injured customers be damned."

**C. The Cost Defense Is Irrelevant in Light of Employer Motives for Affording Disability or Other Fringe Benefits.**

This Court in *Aiello* found that California's objective in establishing the contributory insurance program was to insure most risks by distributing available resources in a way which assured solvency and "permitted low income employees to participate with minimum personal sacrifice." 417 U.S. at 494. In short, fiscal needs were at the heart of the legislative judgment involved. In the employment context, employer motives are very different. Cost claims are merely excuses for differential treatment, not the rationale of fringe benefit availability, nor a limiting aspect of altruistic intentions.

General Electric has completely failed to produce any concrete evidence to explain its policies except to claim that its expenses of doing business will increase. This Court



should apply the same salutary rules to such a claim as it has to similar claims in other areas of the law.[30]

The claim that *Aiello* holds that increased costs of providing such benefits are a sufficient reason to justify removing one group of employees[31] from coverage is thus misplaced. The courts which have rejected the employers' cost claims, found that "employers offer disability insurance plans to their employees to alleviate the economic burdens caused by the loss of income and the incurrence of medical expenses that arise from inability to work." See, e.g., *Wetzel, supra,* 511 F.2d at 207. However, as noted at pp. 12-13, *supra,* employers gain substantial advantages from affording this protection, by attracting competent employees, instilling loyalty and building morale, thereby increasing productivity, and, hence, profits. These selfish interests expose the real flaw in all employer cost defenses.

A state's decision to protect disabled workers by administering a contributory insurance plan (or providing welfare aid to poverty-line families) has no selfish motives of this type. Thus, the *Aiello* decision's concern with State fiscal objectives cannot be compared to the decisions below. States do not establish social welfare programs in a competitive setting with other states to attract recipients. The

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[30] See, e.g., *Goldberg* v. *Kelly,* 397 U.S. 254, 266 (1970); *Bowles* v. *Willingham,* 321 U.S. 503, 518 (1944); *cf. Weinberger* v. *Weisenfeld,* —— U.S. ——, 43 L. Ed.2d 514 (1975), holding that 42 U.S.C. 402(g) unlawfully deprived female wage earners of equal Social Security Act death benefit protection for their families. The added costs to the Government in equalizing such protection are clear. See also *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969); *cf. James* v. *Strange,* 407 U.S. 128 (1972).

[31] *Aiello's* Footnote 20, 417 U.S. at 496-497, notwithstanding, General Electric has not set up a program which distinguishes non-pregnant and pregnant persons. It has excluded from benefits a sub-class of women who are similarly situated, i.e., *disabled,* to those receiving benefits. *Cf. Phillips* v. *Martin-Marietta Corp., supra.* The Court below so found, 519 F.2d at 664-665.

origin and purpose of employer fringe benefits programs, however, is a direct function of economic competition with other employers for the labors of qualified and loyal employees. See Allen, *Fringe Benefits, supra.* Thus, it may have been appropriate under Fourteenth Amendment standards of review, for the *Aiello* decision to focus on California's possible costs, because the costs of the insurance program were central to its objectives of keeping contributions at a minimum to aid those workers at the low end of the income scale, 417 U.S. 496. However, employer objectives in providing fringe benefit coverage are unrelated to costs and the assertion of costs as a defense must be rejected.

## III.

**Objective Statistics Demonstrate That Probable Costs of Providing Equal Benefits to Women Disabled by Pregnancy Are Not as Great as Claimed and Would Not Be Sufficient to Satisfy Title VII Business Necessity Standards.**

General Electric's failure to provide equal employment benefits to women disabled by pregnancy is a direct function of the amount of money claimed to be necessary to do so. Petitioner places great reliance upon briefs of *amici* and other materials which are alleged to show that costs are prohibitive. However, data regarding probable costs has been prepared by more objective sources which shows that any increase would be a negligible percentage of an employer's total compensation costs and thus inadequate under the business necessity standards discussed in Point II, *supra.* Further, the decision of many private employers to cover women so disabled, underscored by similar decisions by Congress, federal agencies and other nations, demonstrates that costs cannot be as substantial as Petitioner claims.



### A. The Bell System Statistics

The Bell System has presented to the Court a study submitted to the Office of Federal Contract Compliance in opposition to its proposed Guidelines on Sex Discrimination, 41 C.F.R. §60-20.3, which include a requirement for equal treatment of women disabled by pregnancy which is identical to the EEOC Guidelines, 29 C.F.R. 1604.10. This study is alleged to represent the experience of the Bell System under its Plan, suggesting (1) that women already receive a disproportionate percentage of the benefits conferred under the Plan compared to their numerical representation in the work force; (2) that coverage of pregnancy disability will increase this disparity; and (3) that enormous expenses will result from such coverage.

In reciting the present "disproportionate benefits advantage" received by Bell System women, due to claimed rates of frequency and severity of female disability absences, no mention is ever made of the present costs of such coverage. Such an omission is startling, particularly where the study contains estimates of how much it would cost to cover pregnancy disability.[32] It is apparent that the Bell System is in a position to make such calculations; thus, it may be presumed that it has done so, and that the costs presently paid to men and women disabled under the Plan do not bear out the disproportionate advantage argument. Indeed, some commentators have suggested that if employers were asked to provide definitive data on costs

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[32] The estimate of between $15 and $19 million dollars for coverage of pregnancy is based upon an assumed disability period of eight weeks, computed on the basis of the average seniority and salary of women taking maternity leave in one company (Br. p. 7, App. 8a-9a). No statistics are present from which it can be inferred that the average seniority of child-bearing age women is two-to-five years system wide. Further, Xerox Corporation has found that no correlation exists between seniority or age and duration of pregnancy disability. See Hutchinson & Wright, "Pregnancy Disability—Time Duration and Disability Benefit Cost" (Xerox Corp. 1974), pp. 3, 7, 10.

of their expenditures for employee fringe benefits, including disability benefits, these costs would be equal or greater for male employees than for female.[33] Absent any statistics on Bell System's present costs of providing disability income protection to men and women, this Court should reject the "disproportionate advantage" arguments presented here to support the exclusion of pregnancy disability as a non-discriminatory employer judgment.

In addition, substantial evidence exists to show that frequency and severity of disability is not related to sex, but is related to the nature and type of job one holds. Thus, individuals holding low-paying, less skilled or responsible positions, or "dead-end" jobs are far more likely to be absent from work than other employees. See, e.g., U.S. Department of Health, Education and Welfare, "Time Lost From Work Among the Currently Employed Population, United States—1968", Vital and Health Statistics, Series 10, No. 71, Table B, pp. 5-7. Where employers have traditionally relegated women to such jobs, the rates at which they are absent from work may not be claimed to be due to their sex. This is particularly true of the Bell System's utilization of such an argument, where it has made no showing that these higher frequency and severity rates are not related to the low status and salary received by women in its employ.[34] Xerox Corporation found, for example,

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[33] See CACSW, Letter of J. Gutwillig, Chairman to Secretary of Labor, June 27, 1974, p. 2: "There is a strong possibility that if an employer's costs for [fringe benefits] were computed on the basis of actual per capita expenditures in behalf of male and in behalf of female employees that the expenditures for female employees would be less than for male employes."

[34] The Copus Report found, for example, that "the most realistic expectation for women [in the Bell System] is a career that begins and ends in the Operator job. Women with 20, 30 or even 50 years of Bell System service are often still in the entry-level position of Operator." p. 126. See also the findings of the district court regarding Liberty Mutual's disparity in promotional practices, 372 F. Supp. at 1154-1155, *aff'd.*, 508 F. 2d at 257-259.



that its lower paid female employees tended to have longer disability periods. Hutchinson & Wright, p. 7. A survey of incidence and length of hospitalization for Metropolitan Life Insurance Company employees in 1973 showed that men had a greater incidence and length than women. See Gutwillig Letter, *supra,* and annexed Statistical Bulletin Tables. On a nation-wide basis, it has been concluded that days lost by men and women due to disability are roughly equivalent. CACSW, "Women in 1971", *supra,* p. 55. Consequently, the claimed "disproportionate advantage" to women at present is not supported by any competent evidence whatsoever.

The same is true for the argument that a substantial number of women disabled by pregnancy will fail to return to work following the end of the disability period (See Pet. Br., pp. 6, 9-10, 56-57; Bell System Br., p. 8), thereby making coverage of this disability a form of severance pay.[35] It is questionable that the experience of only one Bell System employer in 1972 possesses any current system-wide accuracy. Even assuming *arguendo* that it does, its report that 48% of the women who took maternity leaves failed to return makes no assessment of the obvious relationship between that fact and the Bell System's policy of denying reinstatement rights to all women returning from such leaves. Clearly such a policy serves to encourage women not to return to work.[36] In fact, employers such

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[35] Stipulations of fact presented to the trial court, included the fact that "[o]n many occasions an employee who had received [the maximum payments for 26 weeks] thereafter failed to return to work, either because of death, continuing disability, retirement, or, in relatively few cases, because of quitting." No. 33, 375 F. Supp. at 372-373. As the trial judge noted, "the termination pay problem exists with *all* workers who do not return to work following sickness or accident," 375 F. Supp. at 379. This argument has been soundly rejected by other courts as well. See, e.g., *Polston* v. *Metropolitan Life Ins. Co., supra,* 11 FEP Cases at 388.

[36] Bell System statistics fail to include any updating following 1972, a time when it is claimed that such policies ceased; again,

as General Electric or the Bell System which perpetuate forced maternity leave policies, unrelated to actual disability, force women to seek employment elsewhere even prior to childbirth since they must support themselves and their families by some means. Nation-wide, statistics have shown that women are less likely than men to quit their jobs. Armknect & Early, "Manufacturing Quit Rates Revisited: Secular Changes and Women's Quits," *Monthly Labor Review,* December, 1973, p. 56.

It is clear that an employer's benefit policies and reinstatement guarantees will have a substantial impact upon an employee's decision to return following disability absence. Studies of employer treatment of women disabled by pregnancy conducted by Prentice-Hall, for example, demonstrated that rates of return for women disabled by pregnancy increased dramatically when employers began treating that disability equally with others.[37] Prentice-Hall Report Bulletin No. 25, June 6, 1972, p. 463.

An employee who knows that her employment rights (such as seniority, accrual of wage progression credit, pension credit) are being denied or limited during disability, while routinely granted to all other disabled employees, is hardly encouraged to make a special effort to return to her previous employer, especially where her hopes of promotion and advancement are already minimal.

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the absence of more recent statistics may be presumed to be due to the fact that they are not supportive of this argument. Further, the System offers no indication of the number of quits annually by all employees, or the number of women generally who quit due to the absence of any incentive to remain in low-paying dead-end jobs. See, e.g., Copus Report, *supra,* pp. 126-127, which found that 69% of all terminating service representatives in 1970 were dissatisfied with their chances for promotion.

[37] A woman's link to her job often results in a decrease in the length of her disability claim. Thus, in New Jersey, working women were found to claim less benefits than non-working women insured under the statute. See Gutwillig, Address to American Hospital Assn. Inst., Key Biscayne, Florida (July 27, 1972).



As noted in "Pregnancy Classification", *supra,* 75 *Col. L. Rev.* at 476:

> One way to keep mothers at home is to treat them like temporary or less important labor. This can be accomplished in part by excluding them from sick pay, disability benefits for childbirth or both, and then by complicating their reentry into the job market through reductions in their seniority or the provision of unacceptable substitutes for the positions they were forced to leave. Furthermore, women who are 'expected' to leave their jobs when they become pregnant can be encouraged to do so by paying them lower salaries and giving them dead-end jobs.

The statistics introduced by the Bell System, and relied upon by General Electric in justification of its refusal to cover women disabled by pregnancy, must therefore be discounted as an accurate or reasonable forecast of fiscal problems claimed to accompany this aspect of equal employment rights for women.

**B. Insurance Company Statistics**

Petitioner, along with several *amici* representing its position herein, argues that insurance company statistics should be utilized in assessing the allegedly prohibitive costs of equal treatment of pregnancy disability (Pet. Br., pp. 7-9, 23-24, 26-27, 57-59). In reviewing this data, however, it is critical to keep in mind the fact that these companies are *employers* covered by Title VII. Thus, their claims of costs cannot be considered objective or neutral. Their interest in convincing this Court that Title VII should not mandate equal treatment of women disabled by pregnancy is no different from that of Petitioner, the Bell System or any other employer.

In addition, the statistics discussed by these insurance companies are not an objective measure of the actual costs

such equal benefits coverage would entail. The insurance industry has warned that data on benefit claims and duration of disability which uses sex as the classification factor does not accurately measure disability cause or occurrence. The industry has relied so heavily upon sex-stereotyping in formulating its actuarial data and rate structures that its own representatives have urged complete revision of industry practices.

### 1. *Insurance Industry Statistics Do Not Present an Accurate Picture of Present Disability Patterns*

In arguing that it costs one and one-half times as much to cover disabled women than disabled men, the American Life Insurance Association (ALIA, Br., p. 29) places great reliance upon reports issued by the Society of Actuaries in 1962, 1971 and 1973.[38] All of these Reports rely upon indemnity tabulars prepared for the years *1947-1949*. This fact alone justifies dismissal of these statistics. It is hardly necessary to point out that nearly 30 years ago, the entire economic picture of this country was vastly different from today. Few women worked out of need or otherwise; those who had held jobs during World War II were eliminated from the job market as men returned from the war and reclaimed their positions. The post-war baby boom, the post-war economic boom, and the very different social mores and values which dominated that era in our history form no basis whatsoever for reliable statistics regarding costs, birth rates, claim patterns or employment needs of today's working women.

Further, use of these 30-year old tables as an indicator of present claim patterns is misplaced insofar as factors other than gender are not included within them. Thus, in *Transactions* 1962, p. 79, the Society of Actuaries' Report-

[38] These "Reports of Mortality and Morbidity Experience", will be referred to as "*Transactions*" for each respective year. Many *amici* base their cost estimates almost exclusively upon these reports.



ing Committee cautioned that its tabular ratio charts should be evaluated with "caution" because

> the presentation of Group Accident and Health experience in the form of ratios of actual to tabular claims *is still in the experimental state, with many factors affecting experience not reflected by the tabulars.* For example, the tabulars do not contemplate a variation caused by the age distribution or the geographic location of the employees. (emphasis added)

Actual to tabular ratios (the amount of "standard" [neither high or low risk] indemnity insurance coverage for total covered weekly payroll compared to amount of disability claims actually paid) contained in the 1947-1949 tables are further restricted by reference to employers of an "exposure size group" of $40,000 weekly payrolls.[39] It is clear that employers of the size of General Electric, the Bell System, or Liberty Mutual would have substantially different and lower costs of disability insurance coverage. The 1962 Report notes that the small exposure size group was used "to minimize the effect that jumbo groups might have upon the ratio of actual to tabular claims." *Transactions* 1962, p. 78.

Change in the nature of the working population and the quality of working conditions over the past thirty years has obviously affected frequency and severity of claims in a major way. The Reports take note of nationwide disability statistics which show a negligible difference between men and women in days of disability per thousand,[40] and concede flatly that the tabular ratios "may not reflect current claim patterns." *Transactions* 1971, p.

[39] It is difficult to assess the impact of such a $40,000 weekly payroll limitation upon today's economy and money market figures.

[40] See, generally, "Report of Proceedings of Hearings on Economic Problems of Women," *"Joint Economic Committee of Congress,"* Vol. 3 (July 12, 1973), (herein "Report—Economic Problems"), Statement of Barbara Schack, p. 178.

190. Additionally, they note that "maternity tabulars *do not reflect the substantial decline in birth rates in recent years.*" (*Id.*, emphasis added.)

In 1973 the Society reported that age distribution, industry classification and size of particular cases, admittedly relevant factors in determining actual disability experience, were all excluded from these ratios. *Transactions* 1973, p. 271; see also *Transactions* 1971, p. 190.

The statistics relied upon by the insurance companies show merely that when disability costs are analyzed solely in terms of gender, which is concededly not the relevant or proper analytical measure of actual experience, they will show a higher percentage of claims by women for a period thirty years behind us in history. This Court should take into account the significant time differential, as well as the industry's own cautionary remarks, when assessing Petitioners reliance upon such statistics.

### 2. *Sex-Based Insurance Classifications Are Actuarially Suspect*

Experts within the insurance industry have repeatedly warned against reliance upon sex-based classifications in determining valid costs of insurance coverage. The "Opinion and Report" of the New York State Superintendent of Insurance (January 28, 1975) (herein "New York Report") found that "insurance companies have engaged in underwriting practices that make numerous distinctions based on the sex of the applicant or policyholder," and that *"such underwriting distinctions emanate from unjustified subjective views of the role of women in our society"* which "are *not derived from objective data.*" New York Report, pp. 2-3, 4 (emphasis added). Pennsylvania's Commissioner of Insurance, testifying before Congress regarding the economic problems faced by women, noted that sex-based classifications were made by the insurance industry as a matter of "convenience", a "homogenous classification of women" which he found to be lacking in meaning in the



face of women's present economic position. He urged the "re-evaluat[ion] of all sex-classifications in the insurance business." [41]

Despite evidence which indicates that age, income level and type of job are far more significant actuarial factors than sex in predicting the amount of benefits employees will claim,[42] Reports of the Society of Actuaries fail to note that their statistics are based upon inaccurate, albeit "convenient", misconceptions about the role of women in the marketplace. The 1962 Report does not, for example, take into account the lower wages paid in largely female industries, nor the relationship of salary and job classification to claims made. Absence of such data is a direct result of industry stereotypes. Pennsylvania's Commissioner testified that most insurance companies "seem to assume that women don't need or want to work, so that disability pay would just be extra income for some women who would really prefer to stay home with the house and children." [43] Their rate differentials are structured accordingly.[44] Despite the negligible difference between men and women in disability days per thousand, for example, the Guardian Life Insurance Company charges women almost three times the premium rate charged men for identical disability insurance. "Report—Economic Problems", *supra*, p. 178. Available coverage is also dispensed to women on a differ-

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[41] "Report—Economic Problems", p. 159. The Commissioner also stated that "[N]onetheless, there are some convenient bases for classification which the insurance industry does not now use. One is color. Although blacks have a shorter life expectancy than whites, no classification based on color is used. Such a classification is considered to be unacceptable from a public policy standpoint."

[42] See California Assembly, Joint Committee on Unemployment Compensation Disability Insurance, Final Report 43 (1966).

[43] "Report—Economic Problems", *supra*, p. 178.

[44] See, e.g., Manual of North American Reassurance Company, stating that "women's role in the commercial world [is] a provisional one." *Id.*, p. 174.

ential basis. See *Stern* v. *Massachusetts Indemnity and Life Insurance Co.*, 365 F.Supp. 433 (1973). Many companies restrict women to a two-to-five year benefit period, while offering coverage to men in identical occupational classifications through age 65, or for life. "Report-Economic Problems," *supra*, p. 160. Many companies charge increased premiums to employers with higher percentages of women in the work force regardless of actual disability experience, or age, job classification or salary factors. *Id.*, p. 174.

Petitioner, as well as *amici* such as ALIA, argue that this Court should accept insurance costs estimates based upon grossly inflated figures, as well as upon inadequate and stereotypical data. Thus, ALIA argues that its actuaries project a disability costs disparity in coverage for women of 2½ times that for men, if pregnancy disability is given equal treatment (ALIA Br., p. 30). This "estimate" was predicated upon a 15-week duration of pregnancy disability and a 21% increase in number of female claims. Such statistical offerings fail to provide any insight into the basis for such assumptions. The trial court found, after hearing comprehensive medical testimony, that the average duration of pregnancy disability is between six and eight weeks, 375 F. Supp. at 377; *Cf. Turner* v. *Dept. of Employment Security, supra*, 44 U.S.L.W. at 3299. This Court may take judicial notice of the declining birth rate in this country, particularly among working women. *Cf.* 375 F. Supp. at 386, Appendix A.

Sex-stereotyping for the convenience of the insurance industry's rate structures must not be permitted to stand as the basis for assessing real costs of disability coverage for women whether for pregnancy disability or otherwise. As noted by Thomas J. Gilhooly, General Counsel of HIAA:

> Any studies which can lead to a more sophisticated classifications of risks which would at least minimize the sex factor should be encouraged. Certainly, in disability coverage the trend should be toward underwriting the job and not the sex. *The old stereotyped distinctions whether in benefits, underwriting or rating are no longer valid.*
>
> ("Equal Rights and Insurance", *Chartered Life Insurance Underwriters*, Vol. 29, 1975, p. 41; emphasis added.)



In view of the self-serving and generalized nature of their data, to excuse disparate treatment of women in an area as critical as equal employment opportunity because the insurance industry says it will cost more to comply with the law, without evaluating the basis upon which that claim is made, does incalculable harm to millions of working women who need and want the rights and privileges of employment on the same terms as men. Until the insurance industry can provide cost statistics which accurately measure disability experience of working men and women, and reflect the true picture of women in the job market, their present statistics point out only one thing —it costs more because they say so.[45] This is no basis for restricting the mandate of Title VII.

### C. Objective Statistics and Actual Private Employer Experience Show That Anticipated Costs Will Not Be as Great as Petitioner Claims

Whatever the costs of equal treatment of pregnancy disability, the fact is that a substantial number of private employers are able to cover it on the same terms as other disabilities without jeopardizing their business.

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[45] Much of the allegedly supportive statistical-cost data relied upon by the *amici* insurance associations is not even available to the public for analysis. Counsel for CWA requested material cited in these briefs from *amici*, but was told that it was "confidential" and could not be released. This Court should reject data shrouded in claims of secrecy as unsupportive, just as surely as that available for scrutiny which reveals inaccurate and anachronistic methodology.

In 1972, a detailed study of the practical cost impact of implementing the 1972 EEOC Guidelines was undertaken, using the Federal Reserve Bank of Boston, Massachusetts as the subject employer.[46] This study concludes that alleged cost claims such as those made by Petitioner and its *amici* do not stand up under realistic analyses of relevant employer wage costs.

The Bank was selected because it contained a number of factors considered significant in determining probable costs to the average employer of liberalized benefits: it had a large, fairly young female staff, and extremely generous sick leave policies. Greenwald, *supra,* p. 15. The study found that the labor costs of covering women disabled by pregnancy would have risen only by approximately ½ cent per hour in 1971, and ¼ cent per hour in 1972. Greenwald, *supra,* p. 17. Payroll costs were estimated, for ten weeks of pregnancy disability protection, to add $16,945 to disability costs if all the Bank's women disabled by pregnancy in 1971 had been covered.[47] The study concluded that its "examination of the costs of implementing the new EEOC guidelines clearly indicates that the costs would have a negligible impact on overall labor costs." *Id.,* p. 18.

The Greenwald study supports statistics gathered by the United States Department of Labor which indicate that, at the end of 1971, total costs of *all* health insurance and disability compensation for employee disability absence was only 5.5% of total employer wage and salary costs, and show that the costs of covering pregnancy disability are a "fraction of a percent of total wage and salary costs."[48]

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[46] Greenwald, "Maternity Leave Policy," *New England Economic Review,* January, 1973, p. 13 (herein "Greenwald").

[47] The study also showed the impact of the declining birth rate. For eight months in 1972, costs of such coverage dropped to $6,907. Similarly, pregnancy accounted for only 4.5% of the Bank's turnover among its female staff in 1972, compared to 12% in 1971.

[48] CACSW, Remarks of J. Gutwillig, Chairman, before American Hospital Association Institute, July 27, 1972, pp. 9-10. Chairman Gutwillig also noted that estimated premiums for a typical hospital employer show that cost of pregnancy disability coverage (prior to deductions for large employers) would be less than $1.50 per month per employee.



Statistics introduced in the trial court, showed that overall employee fringe benefits amounted to 34% of base pay, while disability benefits were 1.8% of base pay. Based upon the number of disabled female employees in 1971-1972, and a projected six week disability period, it was estimated that covering women so disabled would have amounted to 7% of 1.8% of base pay in 1970 and 4% of 1.8% of base pay in 1971. Even using the Bell System estimate of $19 million dollars to cover women disabled by pregnancy, CWA has found that such a sum in fact amounts to slightly more than one cent per hour and less than one fifth of one percent of the total compensation (wages and fringe benefits) presently paid to all its employees.[49]

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[49] These figures are obtained as follows: At the end of 1973, the Bell System employed 818,000 persons. As of June, 1975, the average number of hours worked per week was 38.7. In the 1974 collective bargaining negotiations between the Bell System and CWA, 52.2 weeks per year was agreed to constitute the number of paid weeks of compensation per year (including vacation, holidays and disability). Multipling the number of paid weeks by the number of hours worked (52.2 x 38.7) equals 2009.7 (2010) as the total annual paid hours per employee. CWA estimates that hourly estimated compensation (salary and fringe benefits) for each employee in the 1975 contract year is $7.50. Multiplying paid hours per year by $7.50 (2010 x $7.50) yields $15,075 as total annual compensation paid by the Bell System per employee. Multiplying the annual paid employee compensation by number of employees ($15,075 x 818,000) amounts to total annual compensation paid by the Bell System (including fringe benefits) to all its employees of $12,331,350,000. The total compensated hours of all employees (number of employees x total paid hours paid per employee per year) equals 1,664,180,000 hours. By dividing the Bell System's claimed $19,000,000 figure for costs of pregnancy disability coverage by total number of compensated hours per employee per year, extension of disability coverage to women disabled by pregnancy amounts to an increase of slightly more than one cent ($.01^{16}/_{100}$) per hour in hourly compensation paid to Bell System employees. Dividing the alleged cost of maternity benefits by the total compensation presently paid by the System to all em-

These percentages are *not* significant in terms of total employer expenses, and thus fail to qualify as a proper business necessity defense. See Point II, *supra.*

Further, the fact that a significant number of private employers do provide disability coverage to women disabled by pregnancy demonstrates that an employer's fiscal soundness is not jeopardized by doing so. Surveys conducted by the Department of Labor show that nearly half of the employer disability plans analyzed provided some form of disability coverage for pregnancy, most of which are totally employer-funded. Other sources have reached the same conclusion.[50] There is simply no private employer data which supports Petitioner's contention that it cannot protect the statistically predictable number of women in the labor force who become disabled by pregnancy.

**D. Congress, Federal Agencies, States and Other Countries Have Determined to Provide Disability Protection to Women Disabled by Pregnancy**

The decision of the Courts below that unsupported claims of costs could not be a defense to Petitioner's policies, 375 F. Supp. at 382-383; 519 F.2d at 664, and n. 12, is consistent with the intention of Congress which has rejected such defenses, both directly and indirectly. By requiring specific protection for pregnancy disability in the only tem-

ployees ($12,331,350,000) demonstrates that provision of pregnancy disability benefits amounts to .15 percent, less than one-fifth of one percent, of the total amount of yearly compensation paid by the Bell System to all its employees. Statistics on contract negotiations are obtained from an internal CWA *Report on Major Improvements and Changes Agreed Upon By CWA and A.T.&T. and its Subsidiaries* (August 5, 1974). Statistics on hours worked are reported in U. S. Department of Labor, Bureau of Labor Statistics, "Employment and Earnings," Vol. 22, No. 2, p. 91, August 1975.

[50] U.S. Department of Labor, *Digest of Health Insurance Plans,* Vol. II (1974 ed.; 1975 supplement). See also, Hutchison and Wright, *supra;* Prentice-Hall Report Bulletin No. 24 (March 26, 1974), p. 459; Society of Actuaries, *Transactions* 1972, No. 2, June, 1972 (190-202); CACSW, Item 20-N (July 2, 1971).



porary disability legislation it has enacted, 45 U.S.C. 351 (k) (2) of the Railroad Unemployment Insurance Act, and by acquiescence in recent Guidelines issued by the Department of Health, Education & Welfare, which are virtually identical to the EEOC Guidelines, mandating equal treatment by employer disability plans of women disabled by pregnancy,[51] Congress has expressed its intention that working women receive equal employment disability benefits. The Civil Service Commission does not provide disability benefits to disabled employees but does mandate that pregnancy disability be treated the same as other disabilities for purposes of sick leave, 5 C.F.R. § 630.401(b). See, generally, Federal Personnel Manual, Supplement 990-2, Sub-chapter S 13 (1974). *Cf. Satty* v. *Nashville Gas Co., supra.*

Similarly, a substantial number of states either have disability coverage for pregnancy under disability insurance or unemployment benefits programs, or require its coverage under state fair employment statutes. In New York, the Human Rights Law, Executive Law, § 297 *et seq.,* was recently construed by a unanimous Court of Appeals as requiring equal treatment of pregnancy disability.[52] See, *Union Free School District No. 6* v. *New York Human Rights Appeal Board,* 35 N.Y. 2d 371 (1974), *rearg. den.* 36 N.Y. 2d 807 (1975). See, generally, "Pregnancy Classifications", *supra,* 75 Col. L. Rev. at 470 n. 155 and 471;

[51] Vol. 40 *Fed. Register* No. 108, § 86.57 (June 4, 1975). Congress was empowered to reject these proposed guidelines under the General Education Provisions Act, 20 U.S.C. § 1232, but did not do so. The proposed Office of Federal Contract Compliance Guidelines, *supra,* are identical to HEW Guidelines.

[52] That Court specifically stated that neither *Aiello* nor any adverse Title VII decision in a case such as that at bar would affect an interpretation of this State statute, 35 N.Y.2d at 377, n. 1. This position disposes of the Petitioner's argument that it would be "incongruous" to require private employers to meet a standard of equality that states as insurers may not be required to meet under *Aiello* (Pet. Br., pp. 19, 33). The real anomaly would occur if this Court were to find Title VII more restricted than state fair employment laws.

Hickey, "Changes in State Unemployment Insurance Legislation," *Monthly Labor Review,* January, 1974, pp. 39, 43-44.

The lack of viability of the costs argument is also aptly demonstrated by the fact that disability programs which provide benefits to women disabled by pregnancy have been established in every industrialized nation except the United States.[53] At least 70 countries, with far less resources than the United States, have thus determined that economics do not justify limiting the rights or restricting the employment needs of working women.

## CONCLUSION

The decision below is in accord with those of five other Circuits and numerous district courts,[54] finding that Title VII's ban on sex discrimination in employment does not

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[53] See, e.g., U.S. Department of Labor: Women's Bureau, Bulletin No. 240, "Maternity Protection of Employed Women"; U.S. Department of Health, Education and Welfare, "Social Security Programs Throughout the World, 1971," Research Report No. 40 (1971); Mead & Kaplan, *American Women* (1965), p. 63.

[54] *Communications Workers of America* v. *A.T.&T., Long Lines Dept., supra* (2d Cir.); *Wetzel* v. *Liberty Mutual Ins. Co., supra,* (3d Cir.); *Satty* v. *Nashville Gas Co., supra,* (6th Cir.); *Farkas* v. *South Western City School District,* 8 FEP Cases 288 (S.D. Ohio 1974), *affd.* 506 F.2d 1400 (6th Cir. 1974); *Holthaus* v. *Compton & Sons, supra* (8th Cir.); *Sale* v. *Waverly-Shell Rock Board of Educ.,* 390 F. Supp. 784 (N.D. Iowa 1975), *leave to app. den.,* —— F.2d —— (8th Cir. Jan. 31, 1975), Misc. No. 75-8088); *Hutchison* v. *Lake Oswego School Dist., supra* (9th Cir.); *cf. Cedar Rapids School Dist.* v. *Parr,* 6 FEP Cases 101 (D.Iowa 1973); *Dessenberg* v. *American Metal Forming Co., supra; cf. Lillo* v. *Plymouth Board of Education,* 8 FEP Cases 21 (N.D. Ohio 1973); *Scott* v. *Opelika City Schools,* 63 F.R.D. 144 (M.D. Ala. 1974); *Vineyard* v. *Hollister Elementary School Dist.,* 64 F.R.D. 580 (N.D. Cal. 1974); *Zichy* v. *City of Philadelphia, supra; Polston* v. *Metropolitan Life Ins. Co., supra; Teachers* v. *Oakland School Dist.,* —— F. Supp. ——, 11 FEP Cases 262 (N.D. Calif. 1975); *Liss* v. *School Dist.,* 396 F. Supp. 1035 (E.D. Mo. 1975).



end when working women become pregnant. This Court should affirm the Court below in all respects. By so ruling, the Court has a unique opportunity to end stereotypical judgments about the fundamental role which women play in our society. This Court should firmly reject the argument that compliance with our national commitment to equal rights in employment may be excused simply because it *may* cost more to provide men and women with equal terms and conditions of employment. The Court should set aside unfounded or biased claims of employer cost and take note of objective statistics which show that protection of women disabled by pregnancy is a *fraction* of overall employer compensation costs. The Court should examine employer objectives served by the establishment of fringe benefit programs, and review these policies in light of such objectives. Employers should be reminded that the business necessity defense to practices challenged under Title VII requires that such practices be substantially related to these objectives, *not* to mere fiscal or management preferences, and to proof that *no* alternative exists which would serve these objectives without effecting a disparate impact upon groups protected by the Act.

In light of employer fringe benefit objectives, excluding women disabled by pregnancy from the scope of benefits programs designed to protect all disabled employees fails to provide aggregate risk protection to women. The experience of private employers who do protect women so disabled, as well as the policies of numerous states, nations, Congress and federal agencies, demonstrates that we need not deprive working women of an equal share of the rights, benefits and privileges of employment. This Court should firmly hold that it is sex discrimination to exclude women from this equal share, and that Congress has forbidden such exclusion by its enactment of Title VII.

The judgment below should be affirmed.

Dated: New York, New York
December 24, 1975

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* *Amicus* appreciates the assistance of Margaret M. Brown, J.D. Rutgers Law School, 1975, in the preparation of this Brief.

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FOR ARGUMENT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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No. 74-1589

GENERAL ELECTRIC COMPANY,
*Petitioner,*
v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.

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No. 74-1590

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**On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## SUPPLEMENTAL BRIEF FOR PETITIONER, GENERAL ELECTRIC COMPANY, ON REARGUMENT

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## SUPPLEMENTAL BRIEF FOR PETITIONER, GENERAL ELECTRIC COMPANY, ON REARGUMENT

---

General Electric Company ("GE") submits this supplemental brief on reargument principally to show that the Court's decision in *Washington* v. *Davis*, —— U.S. ——, 96 S.Ct. 2040 (No. 74-1492, decided June 7, 1976), does not control the disposition of this case, and to bring to the Court's attention certain statistical information, most of which was not available when GE filed its original brief in November 1975.

## I. NEITHER THE RATIONALE NOR THE HOLDING OF *WASHINGTON* v. *DAVIS* SHOULD AFFECT THE DISPOSITION OF THIS CASE.

We anticipate that Petitioners Gilbert, et al., will argue that the Court's decision in *Washington* v. *Davis* has precedential significance in this case. For the reasons set forth below, such an argument, we submit, would have no merit.

### A. The Court's Holding In *Geduldig* v. *Aiello* Forecloses The Applicability of *Washington* v. *Davis*.

GE maintained in its original brief, pp. 26-34, and here reiterates, that the exclusion of pregnancy-related disabilities from a temporary disability plan does not constitute sex-based discrimination, and that, accordingly, the sex discrimination interdiction of Title VII is here inapplicable. GE predicated this position on the Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), wherein the Court stated (417 U.S. at 496-497):

> There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of aggregate risk protection derived by that group or class from the



> program. *There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not* [emphasis supplied; footnotes omitted].

and further that (417 U.S. at 496-497, n. 20):

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition —pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups —pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[1]

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[1] The matter of pregnancy exclusions from employer-sponsored disability plans is discussed at length in Larson, *Employment Discrimination*, § 38.00-38.21 (Matthew Bender, 1975) (hereinafter cited as "Larson")—a treatise which was not available when GE's original brief was filed with the Court. Professor Larson, who is James B. Duke Professor of Law at Duke University and former Under Secretary of Labor, states with respect to the Court's pronouncement in *Geduldig's* footnote 20 that the Court found that a pregnancy exclusion from a disability plan is not discrimination on the basis of sex (Larson, § 38-21, p. 8-25):

> What the Court is evidently struggling to convey is rather that pregnancy, while obviously gender-linked in that only one sex is capable of it, is such a special kind of

The Court in *Geduldig* did, however, warn (417 U.S. at 496-497, n. 20) that discrimination based on gender could indeed be present where there is "a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other"—a showing which, as we demonstrated in our original brief, pp. 53-61, cannot be sustained in this case.[2]

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disabling condition, with such "unique characteristics," that it does not necessarily have to be lumped with the usual array of illnesses and injuries covered by disability plans.

See also the following law review articles which appear to agree substantially with GE's interpretation of *Geduldig*: Note, *Pregnancy and Sex-Based Discrimination in Employment: A Post-Aiello Analysis*, 44 U. of Cinn. L. Rev. 57, 71 (1975) (hereinafter cited as "*A Post-Aiello Analysis*") (citing with approval the analysis of the dissenting opinion in *Communications Workers* v. *American Telephone and Telegraph Co.*, 513 F.2d 1024 (2d Cir. 1975): "The court's analysis of footnote 20 is correct. If there is no sex discrimination at all, Title VII does not apply to pregnancy . . . ."); Note, *Discrimination Against Pregnancy is not Sex Discrimination*, 1975 Brigham Young U. L. Rev. 171 (*Geduldig* interpreted to mean that "disparate treatment of pregnant persons vis à vis nonpregnant persons was not sex discrimination [footnote omtited]."); Note, *Sex Discrimination in Employee Fringe Benefits*, 17 Wm. & Mary L. Rev. 109, 123-129 (1975).

[2] GE submits that this Court's decision in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), is entirely consistent with its approach in *Geduldig* and, indeed, supportive of GE's view herein. Contrary to the analysis of several commentators (see, e.g., *A Post-Aiello Analysis*, *supra*, n. 1 at 73) and as previously noted by GE in its original brief at p. 30, n. 21, *Phillips* did not proscribe disparate treatment on the basis of a sex-unique characteristic and, to this extent, is distinguishable from the facts herein. For, although only women can be



The holding of *Geduldig*—that a pregnancy exclusion is not sex discrimination—is, we contend, dispositive of the statutory[3] issue presented in this case, i.e., whether GE's pregnancy exclusion constitutes sex discrimination within the meaning of Title VII.

In like manner, *Geduldig's* holding renders inapposite *Washington* v. *Davis's* constitutional inquiry and holding. *Washington* v. *Davis* involved the validity of a qualifying test given to applicants for positions

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mothers of pre-school age children, persons of either sex can be parents. Accordingly, while men and women may be similarly situated as parents (as they were in *Phillips*), pregnancy, as this Court recognized in *Geduldig*, is *sui generis*.

[3] It is arguable, we note, that on equal protection grounds, Congress may be constitutionally precluded from enacting a statutory provision which mandates that pregnancy-related disabilities be covered under an employee disability income protection plan. For such a provision would create a classification in favor of pregnant women, as against the class of nonpregnant persons (both men and women); and, as it would extend to a situation not involving sex discrimination, *Geduldig*, *supra*, thus arguably would not be rationally related to Title VII's purpose of eliminating sex discrimination concerning employment opportunities.

Moreover, it is also arguable that in view of the Court's decision in *Geduldig*, Congress may lack the power to compel a pregnancy *inclusion* insofar as the states are concerned. See the suggestion to this effect as set forth at pp. 22-23 of the Transcript of Oral Argument before the Court in *Fitzpatrick* v. *Bitzer*, —— U.S. ——, 96 S.Ct. 2666 (No. 75-251, decided June 25, 1976). If Congress is indeed thus restricted, and as Title VII now applies uniformly to states and private employers alike, see *Bitzer*, *supra*, 96 S.Ct. 2668, n. 2, the limitation on Congress's power on the basis of *Geduldig* would also extend to private employers.

as police officers by the District of Columbia Metropolitan Police Department. Plaintiffs alleged that the test was racially discriminatory in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. The allegtion was predicated, not on the ground that the test was intentionally or purposely designed to cause discrimination, but rather on the ground that the test had a substantially disparate impact on applicants who were Negroes and bore no relation to job performance. The District Court directed summary judgment for the defendant Police Department. 348 F. Supp. 15 (D.D.C. 1972).

The Court of Appeals reversed, holding that the statutory Title VII standards enunciated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), were controlling. The Court of Appeals declared that lack of discriminatory intent in designing and administering the test was irrelevant, and that a showing of disproportionate impact, of itself, was sufficient to establish a prima facie constitutional violation. This Court, in turn, reversed on the narrow basis that the Court of Appeals had erroneously "applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it. . . ." 96 S.Ct. at 2046. The Court emphasized that in the context of invidious race discrimination the constitutional standard and the statutory standard were not the same, saying (96 S.Ct. at 2047):

> . . . our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact [emphasis in original].



In addition, the Court held that the personnel test in question established "a racially neutral qualification for employment," 96 S.Ct. at 2050, and that on the facts of the case the disproportionate impact that the test had on Negro applicants did not warrant the conclusion that the test was "a purposeful device" to discriminate against Negroes, 96 S.Ct. at 2051. The Court further held that the personnel test complied with all applicable statutory requirements, including those obtaining under Title VII, in that the test was directly related to the police training course regimen. 96 S.Ct. at 2052-2054.

In sum, the crux of GE's position here is that *Geduldig* makes clear that, irrespective of whether Title VII or constitutional standards of construction are applied, the exclusion of pregnancy from temporary disability programs is not sex discrimination, absent a showing of pretext intended to bring about invidious sex discrimination.[4] Accordingly, the constitutional-statutory distinction drawn by the Court in *Washington* v. *Davis* has no relevance whatever to this case. For whether the constitutional standard is a narrow one of purpose and whether

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[4] At page 31 of our original brief, we thus phrased the point:

> As Judge Widener noted in his dissent below (Supp. Br. Jt. Pet. 12a-13a), because *Geduldig* establishes that a pregnancy exclusion is not sex discrimination, it is irrelevant whether or not Title VII has a broader sweep than does the equal protection clause.

To be sure, we then went on to argue (Original Br. 32-33) based on the now-overruled language of the Court of Appeals in *Davis* v. *Washington*, 512 F.2d 956, 958, n. 2 (D.C. Cir. 1975), and other cited authorities, that the constitutional and Title VII standards of construction are the same.

the Title VII standard is the broader one of effect (disproportionate impact), the question of which standard is applicable and controlling in this case need never be addressed. Thus, the premise of *Geduldig*—that discrimination based on gender does not result from the pregnancy exclusion with which this case is concerned—renders irrelevant all questions and arguments pertaining to the applicable standards of construction either under the Constitution or under Title VII, including specifically the contention of plaintiffs Gilbert, et al., as phrased by the Solicitor General, that under Title VII a practice which is neutral on its face and is neither irrational nor a pretext for discrimination is nevertheless discriminatory if it has a substantial disparate effect on a protected class. See p. 20 of *Amicus Curiae* brief filed by the Solicitor General in this case.[5]

[5] The Solicitor General's position in this case is that *Geduldig* is not controlling, and that GE's pregnancy exclusion constitutes a prima facie violation of Title VII. Sol. Gen. Br. 19-22. Significantly, however, Deputy Solicitor General Lawrence G. Wallace appears to disagree with the Solicitor General's position. Thus, in the course of the oral argument on April 21, 1976, in *Fitzpatrick* v. *Bitzer, supra*, 96 S.Ct. 2666, Mr. Wallace stated to the Court (Tr. of Oral Argument, pp. 22-23):

> MR. WALLACE: Now, this type of complaint [in *Bitzer*] seems to us to be very dissimilar to the situation that was before the Court in the case adverted to yesterday, *Geduldig* v. *Iello* [sic] in 417 U.S. at page 484. There both males and femals [sic] had identical coverage for the disabilities that were covered by the insurance program, and the case presented the more complex question of whether the failure to include pregnancy among the disabilities covered constituted a discrimination on the basis of sex.

[Footnote continued on page 9]



[5] [Continued]

> And in holding that it did not, the Court pointed out, in Footnote 20 of that opinion, the dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed* and *Frontiero* v. *Richardson*, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender, but merely removes one physical condition, pregnancy, from the list of compensable disabilities.
>
> QUESTION: Mr. Wallace, do you think Congress could now say that, under Section 5 of the Fourteenth Amendment, California could not employ the type of health benefit program that was held to be constitutional in *Geduldig?*
>
> MR. WALLACE: Well, possibly so, but that would present a *Katzenbach* v. *Morgan* type of question, which—
>
> QUESTION: Or *Oregon* v. *Mitchell?*
>
> MR. WALLACE: Or *Oregon* v. *Mitchell*, which in my view is not what's involved here. Because in order for *Geduldig* to be comparable to this case, you would have had to have a situation in *Geduldig* in which men and women were paid differently for appendicitis, even though they were, in all respects, identically situated with respect to the contributions they had made to the retirement program. And the cases adverted to in that Footnote 20 seem to me to be the comparable cases here.
>
> The complaint and the finding here fully fit the test which this Court set forth in *Reed* v. *Reed*, by providing dissimilar treatment for men and women who are thuse [sic] similarly situated. The challenged section violates the Equal Protection Clause.

In thus distinguishing *Geduldig* from *Bitzer* (which involved a Connecticut pension statute on its face discriminatory against males), Mr. Wallace appears not only to have been in accord with GE's position that the exclusion of pregnancy from disability coverage is not *per se* sex discrimination, but also, it is submitted, to have lessened the weight to be accorded the position set forth in the Solicitor General's earlier brief *Amicus Curiae* in this case.

**B. The Testing Procedure Involved in *Washington* v. *Davis* Goes To The Essence Of Title VII, And Serves To Differentiate That Case.**

*Washington* v. *Davis* is also distinguishable in that it was concerned with a testing procedure to which applicants for employment were forced to submit. As pointed out in our original brief, pp. 53-54, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429, makes clear that the provisions of Title VII are aimed essentially at practices, procedures and policies which serve to deny employment opportunities—i.e., jobs themselves, and job promotions; contrariwise, the provisions of Title VII are not targeted at personnel practices which do not relate to job opportunities, but are merely incidents of a job. (The pregnancy exclusion is, we submit, such an incidental personnel practice, the entire status of employment *benefits* under Title VII being "one of degree." [6] See *Dodge* v. *Giant*

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[6] The sickness and accident insurance which GE provides (from which pregnancy is excluded) is but one of the benefits that GE presently provides to all its employees. These benefits include the following:

PENSION PLAN

—Provides for normal, early and disability retirement income for all employees.

—Career average benefit formula with guaranteed minimum pension of up to $12 per month per year of service.

—10-year vesting.

INSURANCE PLAN

—Provides life insurance coverage to all employees of two times annual pay.

[Footnote continued on page 11]



[6] [Continued]

—Accidental death coverage of additional one times annual pay; plus coverage for accidental dismemberment.

—Comprehensive medical expense coverage for hospital, surgical, physician, nursing and other expenses in hospital, at home or elsewhere, for employee and dependents—lifetime maximum coverage $250,000.

—Weekly Sickness and Accident coverage of 60% of pay to a maximum of $150 per week for up to 26 weeks.

SAVINGS AND SECURITY PROGRAM

—Enables all employees to invest up to 7% of pay with Company matching payment of 50% of employee contribution.

PERSONAL ACCIDENT INSURANCE

—Enables any employee to purchase, at group rates, accidental death coverage of up to the higher of $500,000 or 5 times pay.

LONG TERM DISABILITY INSURANCE

—Enables any employee to provide, at group rates, income protection after Weekly Sickness and Accident coverage is completed, after 26 weeks, to age 65.

DEPENDENT LIFE INSURANCE

—Enables any employee to provide, at group rates, $5,000 life insurance coverage for the spouse and $1,000 for each dependent child.

INCOME EXTENSION AID PLAN

—Provides all employees with one week's pay for each year of service in the event of layoff or plant closing.

—Amount can be paid in a lump sum or used to supplement income to 60% of former pay while employee draws state UC benefits.

INDIVIDUAL DEVELOPMENT PROGRAM

—Provides employees with up to $400 per year of tuition reimbursement for approved work-related or career-related courses.

[Footnote continued on page 12]

[6] [Continued]

EMERGENCY AID PLAN

—Provides for employee and pensioner loans or grants of up to $500 in the event of financial emergency.

MEDICAL CARE PLAN FOR PENSIONERS

—Provided to all retirees with 10 years of service after Insurance Plan coverage ceases at age 65.

—Provides for hospital and surgical coverage up to $11,000 lifetime.

PENSIONERS' HOSPITAL INDEMNITY PLAN

—Enables retired employees over age 65 to provide additional hospitalization coverage at group rates of $20,000 for self and spouse.

VACATION PLAN

—Provides employees vacations with pay of one to six weeks depending on length of service.

HOLIDAYS

—10 paid holidays provided.

SICK AND PERSONAL PAY

—Provides two to five days of paid time per year to cover incidental absences.

DEATH IN FAMILY

—Provides three paid days for the death of covered relatives.

JURY AND WITNESS DUTY

—Provides the difference between GE pay and jury pay for all days spent on jury or witness duty.

MILITARY DUTY ALLOWANCE

—Provides for up to 17 days of pay differential for employees required to attend summer encampments.

—Provides one month's pay for employees entering active duty with the Armed Forces.

(See Plaintiffs' Exhibits 4-11, inclusive, which have not been reproduced in the printed Single Appendix.)



*Foods, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973), discussed in our original brief at pp. 53-54.)[7] Thus it is important to note that the sole matter addressed in *Washington* v. *Davis* was a testing procedure that clearly impacted an important question concerning employment opportunities of applicants for police jobs, and that the case presented no question concerning peripheral job benefits or incidents such as the pregnancy benefit here involved.[8] Accordingly, to

[7] See also the following cases upholding employers' grooming standards against charges of sex discrimination: *Willingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975); *Fagan* v. *National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973); *Knott* v. *Missouri Pacific R. R. Co.*, 527 F.2d 1249 (8th Cir. 1975); *Baker* v. *California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *Earwood* v. *Continental Southeastern Lines, Inc.*, —— F.2d —— (4th Cir. 1976) (No. 75-2221, decided Aug. 25, 1976).

In *Willingham, supra*, at 1090, the Fifth Circuit cautioned that judicial temperance must be exercised in interpreting the Title VII sex discrimination proscription so as not to expand impermissibly the narrow statutory scope:

> We find the legislative history [regarding sex discrimination] inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.

[8] Commenting on the District Court's statement in this case (375 F. Supp. 367, 381; Jt. Pet. 29a) that ". . . under GE's policy the consequence of a female employee exercising her innate right to bear a child may well result in economic dis-

the extent that the Court's opinion in *Washington* v. *Davis* can be read as endorsing an "effects" test under Title VII, the opinion should also be read, narrowly, as one dealing with employment opportunities alone.

aster . . . . Thus, women are required to undergo the economic hardship of the disability which arises from their participation in the procreative experience," Professor Larson has said (Larson, § 38.21, pp. 8-29, 8-30):

> This type of argument . . . is appropriate and even decisive in the kind of case involving firing women for pregnancy without the option of unpaid leave, but it may be questioned whether it is in place in a discussion of fringe benefits. If the penalty for pregnancy is to be fired, it can well be argued that public policy is being seriously offended, since complete loss of a job means loss of the right to work and earn the basic means of subsistence. . . . But there is no such exalted constitutional or inherent right to be paid while temporarily not working, much less to be paid hospital and medical benefits, no matter what the reason for the nonworking status may be. As stated earlier, an employer would be completely within his rights if he provided no sick pay of any kind, as many still do not to this day. Such a policy could not be challenged as a disincentive to human survival. Procreation has managed to flourish satisfactorily quite apart from paid maternity leaves in the past. It is one thing to say to a female employee: there are two fundamental rights—to work and to procreate—but you cannot have them both. It is quite another thing to say: if you procreate, your right to work and to be paid while working and to get your job back will remain unimpaired, but you will not be paid during the weeks you are not working. In the former case a fundamental right, the right to work and earn, is at stake. In the latter case a fringe benefit is at stake, and the ponderous weight of the arguments based on the public policy recognizing the need for the human race to survive seems out of place [footnotes omitted].



### C. The Racial Context Of *Washington* v. *Davis* Is A Further Distinguishing Factor.

That *Washington* v. *Davis* concerned a question of race, and not sex, discrimination is further reason for limiting the thrust of the Court's opinion therein. Thus, whether issues of constitutional interpretation or of statutory construction, or of both, were involved in the case, the fact that it did not involve sex discrimination is, we submit, an important distinction insofar as this case is concerned. In this regard, it is significant that a Court majority has never held that sex classifications are, like race classifications, inherently suspect. See *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Kahn* v. *Shevin*, 416 U.S. 351 (1974). Accordingly, to the extent that the opinion in *Washington* v. *Davis* can be read as approving a more stringent "effects" test under Title VII than is applicable under equal protection concepts, the opinion's thrust, we further submit, must be narrowed by the fact that it was concerned, not with discrimination on the basis of sex, but rather, and solely, with a matter of alleged racial, or suspect, discrimination. Thus limiting the "effects" pronouncement of *Washington* v. *Davis* (and indirectly, of course, of *Griggs* v. *Duke Power Co.*, *supra* [9]) to instances of racial discrimination is, we

[9] Reporting to the Annual Convention of the American Bar Association's Labor Law Section on the "Labor Law Decisions of the Supreme Court, 1975-76 Term," Professor Benjamin

submit, in accord with the "BFOQ" line drawn by Congress, for Title VII provides in Section 703(e)(1) that discrimination on the basis of religion, sex, or national origin is not illegal "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Most significantly, however, such limitation is not paralleled by any limitation with respect to race.[10]

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Aaron, in discussing *Washington* v. *Davis*, suggested that the latter case may presage a loosening of the *Griggs* standard. Professor Aaron said (92 LRR 311 at 334, August 16, 1976):

> On the other hand, Congress may not have fully appreciated, as the Court is belatedly beginning to understand, that the EEOC testing guidelines are so rigorous that literal compliance with them is virtually impossible. . . . [T]he readiness of the Court to grant certiorari in such a procedurally confused case [*Washington* v. *Davis*], suggests that the majority is uneasy about the exuberance of its rhetoric concerning testing in the *Griggs* and *Albemarle* [*Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975)] decisions and is disposed to loosen the required validation standards. If that is so, *Washington* presages a new round of litigation involving testing in private employment.
>
> Perhaps the Court will eventually conclude that the statutory standard should be no more rigorous than the constitutional standard elucidated in *Washington* . . . [italics added].

[10] Section 703(e) of Title VII, 42 U.S.C. 2000e-2(e), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .



It follows from all of the foregoing reasons that *Washington* v. *Davis* is not a precedent affecting the disposition of this case.

## II. RECENTLY PUBLISHED STATISTICAL MATERIALS FURTHER SUPPORT GE'S POSITION THAT THE ELIMINATION OF THE PREGNANCY EXCLUSION WOULD ACCENTUATE THE PRESENT INSURANCE COST IMBALANCE BETWEEN MALE AND FEMALE EMPLOYEES.

In our original brief, at pp. 55-61, we set forth the sound business considerations underlying the pregnancy exclusion in issue before the Court. These business considerations support GE's position that the payment of a pregnancy benefit would not be a rational and prudent use of benefit money. In this connection we pointed out that GE's female employees already receive a substantially greater proportion of sickness and accident benefits than do male employees, and that, accordingly, the inclusion of a pregnancy benefit would further heighten the existing imbalance. See GE's original brief, n. 5, p. 6; n. 62, p. 56. A report on the cost of sickness and accident insurance published subsequent to GE's sub-

mission of its original brief,[11] and a comparison of male-female mortality rates since 1910, further support GE's position.

### A. New York State Insurance Department Study And Report

Recently, under date of June 1976, the New York State Department of Insurance reported the results of a study it conducted with respect to the respective costs to insurers of providing disability income insurance to males and females in the State of New York.[12] Data utilized in the compilation of the study was obtained from 21 insurance

[11] At the first oral argument in this case, the Chief Justice inquired as to whether the record herein contained information about "the ratio of disability insurance generally as between men and women." See p. 15 of the Transcript of Argument (January 19, 1976). The New York Insurance Department Study and Report commented upon in the text, *infra*, contains statistical information bearing on the Chief Justice's inquiry.

The Chief Justice also inquired about the comparative cost of life annuities for women as compared with men. Transcript of Argument, p. 11. The relative mortality experience of men and women adverted to in the text, *infra*, pp. 22-24, bears on the latter inquiry.

[12] Selected excerpts from the report are reproduced in Appendix A to this Supplemental Brief. Printed copies of the report, procured from the New York State Department of Insurance, have been lodged with the Clerk of the Court. References herein to the report are to Appendix A hereto, as "App. A hereto p. ——;" or to the report as printed, as "Report p. ——;" or to both.

An article in *The Wall Street Journal*, August 25, 1976, entitled "Insurance Fee Study Backs Higher Rates Charged To Women," discusses the study and report.



companies licensed by the State and included over 57,500 female claims for disability benefits (App. A hereto p. 10a; Report p. 31). The basic purpose of the study was to determine whether, and to what extent, sex is a factor in the cost of disability insurance; and, if sex is a cost factor, to determine if there are significant variations between female and male costs based on age, occupation, cause of disability, benefit structure, and type of renewal guarantee (App. A hereto p. 5a; Report pp. 2-3). In accordance with the historical insurance industry practice, the disability benefit programs analyzed in the study uniformly excluded pregnancy benefit coverage (Report pp. 6, 18, 27, 44-45, 46-47, 52, 53, 55).[13]

Among the conclusions of the Insurance Department are these (App. A hereto pp. 7a-8a; Report p. 27):

> 1. Sex is a major factor affecting the cost of disability income insurance.
> 2. For accident and sickness benefits, female claim costs are consistently higher than male claim costs up to age 60 after which they fall below male costs. The highest relative differential in claim costs appears in the age group 30-39.[14]
>
> * * * *

[13] The methodology underlying the study is meticulously set out in Appendices to the report—a fact which enhances the reliability of the study's results.

[14] The study showed that the female-male cost ratios are larger for nonhazardous occupations than for the hazardous occupations, which is a consequence of the fact that in the labor force as a whole a larger proportion of men are engaged

7. There is no evidence of significant change in female-male claim cost ratios during the years 1968-73, i.e., the ratios by sex and by age have remained relatively stable.
8. A review of social security disability benefit experience exhibits a pattern of claim cost ratios not inconsistent with those derived from commercial disability income insurance experience.[15]

As a result of its study, the Insurance Department is recommending that its Regulation 62 be amended to conform with the study's findings. Report p. 28. Among other matters, the latter regulation deals with formulas for developing premium charges for accident and health insurance, based in part upon claim costs. To arrive at annual claim costs for females, the Department recommends that male claim costs be multiplied by ratios determined by the study, as follows (App. A hereto pp. 8a-9a; Report p. 27):

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in hazardous occupations (App. A hereto p. 6a; Report pp. 24-25). Concerning this fact, the report states (App. A hereto p. 6a; Report pp. 25-26): "Comparing the experience of women with that of men on an aggregate unclassified basis with respect to occupation is similar to comparing the average risk of disability of five men: a teacher, an executive, a factory worker exposed to high risk, a telephone linesman, and a quarryman; with the average risk of disability of five women: a teacher, a technician, a secretary, a sales clerk, and a factory worker doing light assembly work at a bench."

[15] Concerning the social security disability benefit experience, the report concludes (App. A hereto p. 7a; Report p. 26): ". . . if it were possible to obtain truly homogeneous occupational groups so that the factor of occupation could be held constant, the female-male claim cost ratios by age disclosed by the social security data would be reasonably comparable to those disclosed by the Department study of commercial disability income insurance."



| | Attained Age | | | | |
|---|---|---|---|---|---|
| | 20-29 | 30-39 | 40-49 | 50-59 | 60-69 |
| Accident and Sickness Insurance | 1.43 | 2.22 | 1.90 | 1.31 | 0.98 |

In sum, the Insurance Department study provides sound statistical evidence that the overall cost of disability benefits, which exclude pregnancy-related benefits, is significantly higher for females than that for males similarly situated. The study and report clearly is consistent with the record evidence herein that the cost per unit of benefit for a female employee under existing insurance coverage where no pregnancy benefit is provided is 170 percent of that for a male employee.[16] See GE's original brief, p. 57; II App. 536. Moreover, an application of the male-female claim cost ratios by age brackets (as set forth in the New York Insurance Department's Report) to GE's female employee complement as of December 31, 1975, shows an average claim cost ratio of 1.66 for such female group.[17] This is the same as saying

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[16] The 170 percent figure, according to the record evidence, would rise to 210 percent were a six weeks maternity benefit to be provided, and to 300-330 percent were full maternity coverage to be provided. See GE's original brief p. 58; II App. 536.

[17] We show in Appendix B hereto the statistics and methodology used in computing the 1.66 average claim cost ratio for GE female employees set forth in the text. As set forth in the latter Appendix, the computation is based on the number of GE female employees, in various age groups, as of December 31, 1975. These numbers, although not included in the record herein, reflect the most recent GE end-of-year employment figures; they are, moreover, substantially similar to those set forth in the record which pertain to GE employment as of December 31, 1971. See I App. 233, 236.

that on the average under the GE sickness and accident disability insurance plan (which, of course, excludes coverage for pregnancy), the female employees' coverage should be expected to cost 166 percent of the male employees' coverage on the basis of the New York Insurance Department recommended ratios.

**B. Male-Female Mortality Experience.**

An examination of the relative mortality experience of men and women in the United States since 1910 indicates that females are subject to a significantly different mortality hazard than are males. The table below sets forth at three typical ages the ratios of female mortality rates to male mortality rates taken from the U. S. Censuses of 1910, 1940, and 1970. The table shows that variations in male and female mortality experience existed in a significant degree in 1910, and that the difference has been widening rapidly over subsequent decades. Thus, for example, while female mortality at age 20 was about 7/8ths of male mortality in 1910 and about 3/4ths of male mortality in 1940, it is now only about 1/3rd of male mortality. The table further shows that similar dramatic changes have also occurred at other ages as well.



Ratio of Female Mortality to Male Mortality in U.S. Census Tables

| Item | 1910 | 1940 | 1970 |
|---|---|---|---|
| | **Age 20** | | |
| Male Rate | 5.03[18] | 2.46[20] | 2.12[22] |
| Female Rate | 4.35[19] | 1.90[21] | .72[23] |
| Ratio | .86 | .77 | .34 |
| | **Age 40** | | |
| Male Rate | 10.46[18] | 5.95[20] | 4.01[22] |
| Female Rate | 8.25[19] | 4.52[21] | 2.33[23] |
| Ratio | .79 | .76 | .58 |
| | **Age 60** | | |
| Male Rate | 31.04[18] | 26.47[20] | 23.39[22] |
| Female Rate | 26.13[19] | 18.37[21] | 11.13[23] |
| Ratio | .84 | .69 | .48 |

The lower mortality rates for females mean that pension cost is considerably more for a female than for a male employee, although the exact relationship

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[18] Table 4 Life Table for Males 1910, pp. 58-59, U.S. Life Tables, J. W. Glover, Government Printing Office, Washington 1921.

[19] Table 6 Life Table for Females 1910, *Id.*, pp. 62-63.

[20] Table 2 Life Table for Total Males, pp. 28-29, Sixteenth Census of the U.S. 1940; U.S. Life Tables and Actuarial Tables by T.N.E. Greville, U.S. Government Printing Office, Washington 1946.

[21] Table 3 Life Table for Total Females, *Id.*, pp. 30-31.

[22] Table 2 Life Table for Males, pp. 8-9, Vol. 1, U.S. Life Tables 1969-71, DHEW Publication No. (HRA) 75-1150.

[23] Table 3 Life Table for Females, *Id.*, pp. 10-11.

depends in part on the rate of interest used. Thus at 5 percent interest and at typical employee ages, it costs approximately 25 percent more to provide a female employee with a given level of pension benefit than it does for a male employee. Of course, the lower mortality for females also means that the cost of providing group life insurance for female employees is less than for male employees since fewer females can be expected to die in the course of a given year. Total costs for group life insurance programs, however, average only 1/10th to 2/10ths the cost of company pension plans,[24] so that the cost savings in the case of life insurance programs are relatively small.

We submit that although substantial differences by sex in pension and life insurance costs may not appear to have a significant bearing on the cost of disability insurance, the fact that there is a substantial body of incontrovertible evidence showing, for so long a period of time, a significant difference in mortality rates between men and women means that the selection of sex as a distinguishing factor for costing purposes cannot be ascribed to mere sexism or whimsey. The statistical evidence is simply too all-pervasive and the differences too great to ignore.

In sum, the statistical material set forth above fully substantiates the information we have previously supplied to the Court to the effect that the overall cost of providing disability benefits to females, as a group, is significantly greater than that for male employees. Further the substantial differ-

[24] Study: "Employee Benefits 1973," Chamber of Commerce of the United States, Tables 4 and 13, pp. 8, 18.



ences in disability rates between the sexes, together with the differences in mortality rates, provide ample rational justification for considering sex as an operative factor in the claim costs that should be expected to emerge from a given benefit program. Thus, with total disability costs already greater for female employees, any requirement to add disability benefits for pregnancy (clearly sex-biased so far as claim costs are concerned) would necessarily increase the existing cost differentials between male and female employees.

## III. THE ESTABLISHED INSURANCE INDUSTRY PRACTICE SHOULD NOT BE OVERTURNED ON THE BASIS OF AN UNCLEAR STATUTORY DIRECTIVE AND A VACILLATING EEOC POSITION.

It is uncontroverted that when, prior to its enactment in 1964, Title VII was being considered by Congress, the prevailing insurance industry practice with regard to temporary disability plans was to exclude pregnancy-related disabilities from coverage.[25] This practice is based upon a basic insurance

[25] As set forth in GE's original brief, pp. 7-8, only approximately 40 percent of the work force in the United States under age 55, or some 32,000,000 employees, are covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 percent of the plans provide for 13 weeks benefit coverage; 50 percent provide coverage for 26 weeks; and only 5 percent provide coverage for 52 weeks. Only 40 percent of these plans, covering about 12,800,000 employees, provide a pregnancy benefit, and such coverage is almost always limited to six weeks (II App. 528-529; GE Exh. 42; III App. 846-847).

Moreover, sickness and accident policies written for individuals always exclude pregnancy from coverage (II App. 528).

principle—that insurance protects against the unexpected, and not against happenings which are within the control of the insured, such as childbirth and suicide. See II App. 526-527, 546-547. GE's temporary disability plan is based upon the standard insurance industry practice which historically, and currently, does not pay benefits for absences resulting from pregnancy.[26]

At pages 35-37 of our original brief, we commented upon the absence of interpretive legislative history concerning the meaning of Title VII's sex discrimination prohibition.[27] As noted, if there is anything of significance in that history, it is the statement of Senator Humphrey, the effective manager of the pending Senate bill, explaining the Bennett Amendment [28] to the Senate bill (now part of Sec. 703(h) of Title VII, 42 U.S.C. Sec. 2000e-2(h)), the purpose of which was to avoid conflicts between the sex discrimination prohibition of Title VII and the Equal Pay Act. In this regard, Senator Humphrey stressed that the latter prohibition would not repeal sex-based differentials in existing employee benefit plans, saying: [29]

---

[26] Thus, during the trial, Mr. Hilbert, Labor Relations Counsel for GE, testified that the GE disability benefits program was structured according to standard insurance practice which traditionally has excluded pregnancy (II App. 595). See also, GE's original brief, p. 57.

[27] The more significant subsequent congressional legislative history underlying the proposed Equal Rights Amendment is discussed at pp. 37-41 of GE's original brief.

[28] See 110 Cong. Rec. 13647 (1964).

[29] 110 Cong. Rec. 13663-13664 (1964).



> . . . differences of treatment in industrial benefit plans including earlier retirement options for women, may continue in operation under this bill if it becomes law.

Senator Humphrey's statement shows, we submit, that Congress was aware when it enacted Title VII that it was the current industry practice to treat men and women differently in the pension benefits area, and that Congress, by its failure to express its disapproval, approved the practice. That Congress approved the "differences of treatment" with respect to pension benefits of which Senator Humphrey spoke, is, we urge, compelling reason why this Court should not now, in the absence of an express legislative direction, declare that the failure to treat pregnancy as a compensable disability constitutes sex discrimination within Title VII's meaning. For, the holding of *Geduldig*, *supra*, aside, to the extent that the latter exclusion may be said to result in a "difference of treatment" of men and women, that difference also obtains in the benefits area which only peripherally affects the employment relationship, and concerning which Congress, as shown, appears to have indicated that the sexes may be dealt with dissimilarly.

Although there is no explicit showing that when the EEOC first sanctioned the exclusion of pregnancy from disability insurance coverage in 1966 the Commission was then aware of the insurance industry practice concerning the exclusion, it is unlikely that its decision to sanction the exclusion was made without an inquiry into insurance practices.[30] Thus

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[30] At pages 13-15 and 42-53 of GE's original brief, the EEOC's historic and "waffling" position concerning the pregnancy exclusion is set forth and discussed.

Charles Duncan, the EEOC's General Counsel in 1965-1966, testified that the Commission's initial policy and position concerning the pregnancy exclusion was arrived at after thorough discussion and consideration (II App. 661).[31] As we have set forth (GE original brief pp. 13, 42), the EEOC's initial position sanctioning the pregnancy exclusion was continued for some six years until April 1972 when, without explanation or hearing, the EEOC suddenly reversed itself and announced that pregnancy was to be covered under disability insurance plans. We have also pointed out (GE original brief pp. 48-53) why, under these circumstances, no weight should be given to the EEOC's current interpretative guideline.[32]

[31] Mr. Duncan's testimony on the matter is as follows (II App. 661):

> Q. Now, how thoroughly was this matter discussed within the Commission? A. I would have to answer you this way. The whole question of sex discrimination occupied a good deal of the Commission's attention during the first year.
>
> Pregnancy, maternity leave was one aspect of the sex discrimination.
>
> It was also one of the problems that I think baffled the Commission the most. So I would say that this aspect of sex discrimination certainly as well as the broader problem of other aspects of sex discrimination were thoroughly discussed by the Commission.

[32] Professor Larson has pointed out that the current EEOC guideline regarding pregnancy reflects an unrealistic notion concerning collective bargaining and the cost of employee benefits (Larson, § 38.21, pp. 8-32, 8-33):

> To a person familiar with the everyday realities of fringe benefit plans in modern industrial society, the



Significantly, the EEOC's status as interpreter of Federal equal employment opportunity law has recently been called into question again—this time by the action of other Federal agencies. Thus, with respect to two matters considered in 1976 by the Equal Employment Opportunity Coordinating Council ("the EEOCC")[33] the EEOC's position has twice been re-

> EEOC rule and the court opinions embracing it have a sort of "never-never-land" quality about them. They all seem to begin with a mental picture of an employer who unilaterally and arbitrarily makes a sexist decision to withhold maternity benefits from female employees. This, of course, is not what happens at all. Instead, in any typical contemporary labor setting, what happens is that the unions and the employer, by hard bargaining, arrive at an agreed "package" of wage and fringe benefits. At some point in the negotiations it may be agreed that the new contract will include wage and fringe benefits equivalent to, say, a dollar an hour. The next question is how that dollar is to be spread around. . . . [P]rivate negotiators of a fringe benefit plan also begin with a fixed available resource within which, since it cannot possibly provide all possible desirable benefits, priorities have to be established. In other words, the decision on how to divide up the one dollar increase in the private negotiation is essentially the same as the decision on how to divide up the one percent payroll tax [as was present in *Geduldig*].

Similar views were expressed in GE's original brief, pp. 55, 67.

[33] The EEOCC, which is composed of the Department of Labor, the EEOC, the Civil Rights Commission, the Civil Service Commission, and the Department of Justice, is charged by law (Sec. 715 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-14) to eliminate inconsistency among the operations of the agencies and departments responsible for enforcement of the Federal equal employment opportunity law.

jected publicly by the other Council members. In the first instance, the EEOC disagreed with the view of all other Council members concerning the substance of a draft dealing with uniform guidelines on employee selection procedures (testing), and voiced the sole agency opposition to the publication of the draft for comment.[34] In the second instance, the EEOC again disagreed with the other Council members, and on this occasion with the Department of Health, Education and Welfare as well, concerning the scope of a recommendation to the President regarding the equalization of periodic pension benefits for men and women. All agencies, including the EEOC, were in agreement that the benefits should be equalized;[35] but the EEOC, in disagreement with the others and relying on its own interpretation of Title VII, asserted that the equalization should extend to joint and survivor options as well.[36]

Finally, we point out that Congress has shown itself wary of agency regulation which overturns well-

[34] See 41 Fed. Reg. 29016 (July 14, 1976); 92 LRR 186-187; BNA, *Daily Labor Report*, No. 121, p. A-18 (June 22, 1976).

[35] Significantly, the Council's recommendation was that equalization be achieved through the enactment of new legislation "[b]ecause Congress has not made this position completely clear in existing statutes." So here, in view of the lack of clarity as to Title VII's meaning, the goal of Petitioners Gilbert, et al., it is submitted, should be sought through congressional, and not judicial, action.

[36] See BNA, *Daily Labor Report*, No. 122, pp. A16-17, E1-3 (June 23, 1976); BNA *Pension Reporter*, No. 85, p. A-18 (May 10, 1976).



established custom under the guise of achieving equality between the sexes. On August 26, 1976, the Senat voted, 88-0, further to amend the sex discrimination provisions of Title IX of Pub. L. 92-318, as amended, 20 U.S.C. §§ 1681, *et seq.*, to exempt fatherson or mother-daughter activities sponsored by an educational institution from Title IX's coverage. 122 Cong. Rec. 14643-14652 (daily ed. August 26, 1976). The amendment was in swift and direct response to an HEW guideline which banned such activities as sexually discriminatory. In the course of the debate on the matter, Senator Dole said the amendment was "necessary to express the sense of Congress that these traditional activities be allowed to continue without becoming embroiled in further disputes with a well-meaning, but over-zealous bureaucracy . . ." (*Id.* at 14644); and Senator Thurmond said, "[i]f it were not for the misguided and senseless application of these regulations, Congress would not have to concern itself with this corrective legislation" (*Id.* at 14644).[37]

We respectfully urge the Court to be equally wary in upsetting the established insurance industry practice of excluding pregnancy from coverage under disability insurance plans.

[37] A summary of the action on this Senate amendment was reported in *The Washington Post* on August 27, 1976.

## CONCLUSION

For the foregoing reasons and for all the reasons set forth in our original brief, we again urge that the judgment of the court below be reversed.

Respectfully submitted,

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Dated: September 15, 1976

# APPENDICES

APPENDIX A

State of New York
Insurance Department

# DISABILITY INCOME INSURANCE COST DIFFERENTIALS BETWEEN MEN AND WOMEN

[Emblem]

June 1976

THOMAS A. HARNETT
Superintendent of Insurance

[1] INTRODUCTION

Traditionally insurance companies have charged higher premium rates to women than to men for medical and hospital coverage and for disability income insurance. In addition to premium rate differentials, insurance companies have applied, in the past, more restrictive underwriting requirements for female applicants for insurance than for male applicants, particularly for disability income insurance. Underwriting restrictions applicable to women have included refusal to issue coverage in certain occupations, limitations on the amount of coverage and offering more limited types of insurance plans.

These restrictions prevented many women from obtaining the disability income coverage they desired and clearly represented unfair discrimination by insurers on the basis of sex. Discriminatory treatment of women with regard to the availability of disability income insurance prompted legal action in early 1974 by some women directly affected by such discrimination. A lawsuit was filed against the Superintendent of Insurance, requesting certain declaratory and injunctive relief to eliminate alleged sex discrimination in both the underwriting and rating of disability income insurance.

While this lawsuit was pending, in November 1974 the Insurance Department cited all insurers licensed to do business in New York to appear at a public hearing to show cause why the Superintendent should not:

1. make a written report concluding that any underwriting practice based on sex constitutes an unfair act or practice in the conduct of the business of insurance in the state; and
2. adopt and promulgate a regulation which would prohibit such sex discrimination.



Following the public hearing, the Insurance Department issued an *Opinion and Decision* and promulgated Regulation No. 75 on January 28, 1975. The *Opinion and Decision* concluded that unfair underwriting practices existed. The Regulation prohibited all insurers, effective June 1, 1975, from refusing to issue any policy, declining to renew or cancelling a policy because of the sex of the applicant or policyholder. In effect, no insurer licensed to do business in this State could thereafter offer or renew a policy to men that they did not offer or renew to women.

During the Legislative Session last year, Section 40-e was added to the New York Insurance Law as follows:

[2] § 40-e. Discrimination because of sex or marital status.

No association, corporation, firm, fund, individual, group, order, organization, society or trust shall refuse to issue any policy of insurance, or shall cancel or decline to renew such policy because of the sex or marital status of the applicant or policyholder.

Section 40-e, which became effective September 1, 1975, had the effect of expanding the Regulation so that in addition to the prohibition of sex discrimination, there is a prohibition of discrimination on the basis of marital status.

It should be noted that the Department Regulation and Section 40-e did not relate to the issue of premium rates to be charged for men and women for various types of insurance. In the *Opinion and Decision*, issued with Regulation 75, the Department committed itself to an in-depth review of available statistical data in an effort to determine if valid actuarial data existed to support different rates for men and women, and, if not, to compile up-dated data with respect to accident and health claim cost experience.

Credible statistical data already existed in hospital and medical insurance coverage. However, for individual disability income insurance, the available experience data on insured lives by sex was limited and often inconclusive. The scarcity of claims experience data on disability income insurance coverage for women can in part be attributed to the past reluctance or refusal of insurers to sell this type of coverage to women. In addition, a compilation of experience data from all of the major writers of disability income insurance coverage in New York State had never been attempted and thus a considerable volume of credible experience, while available in company records, had never been compiled and analyzed. Studies based on limited samples had appeared in actuarial journals.

It was also apparent that an up-dated study was essential because of the changing life style of women in the recent decades. More women have been pursuing professional and other careers on a permanent basis and an increasing number of women have become the sole or principal family wage earners, underscoring their need for adequate loss of income protection. As a consequence, their insurance needs are becoming more comparable to those of men.



In May 1975, the Insurance Department issued a call for the available disability income experience from 26 leading companies licensed to write this coverage in New York State. The objectives of the Department's study are:

[3] 1. To determine if sex is a factor in the cost of disability income insurance.

2. If sex is a factor, to determine to what extent this one characteristic affects the cost of disability income insurance as between otherwise similar risks.

3. If sex is a factor, to determine if there are significant variations in the female to male costs because of age, occupation, cause of disability (accident or sickness), benefit structure (elimination period and maximum benefit period), and type of renewal guarantee (guaranteed renewable to age 60 or 65 or renewable at option of the insurance company).

4. To determine if the influence of the sex factor on the cost of disability income insurance has changed during a recent six-year period (1968-1973).

5. To compare cost patterns by sex as determined by this study of individually underwritten disability income insurance with patterns exhibited by other related health statistics.

* * * *

[24] If the female-male claim cost ratios for all occupations (Table 11)* are compared with the ratios for non-hazardous occupations (Table 12)* it is apparent that the ratios are larger for the non-hazardous occupations, a consequence of the fact that in the labor force as a whole (as reflected by Table 11), a larger proportion of [25] men are engaged in hazardous occupations, thereby bringing their claim costs up relative to female claim costs, at all ages.

Comparing the experience of women with that of men on an aggregate unclassified basis with respect to occupation is similar to comparing the average risk of disability of five men: a teacher, an executive, a factory worker exposed to high risk, a telephone linesman, and a quarryman; with the average risk of disability of five women: a [26] teacher, a technician, a secretary, a sales clerk, and a factory worker doing light assembly work at a bench. The Department's analysis of insurance data and of the social security data, insofar as available occupational subdivisions permitted, indicate that when men and women in occupations of equal risk are compared, a higher incidence of disability is evident among women, especially at ages 30-50.

* * * *

It was not feasible to match claims with exposures in occupations other than those included among either "non-hazardous" or "hazardous." The remaining occupations were therefore grouped together in an "all other" category. For men, the "all other" claim costs lie between the non-hazardous and the hazardous in every age group as would be expected (see Appendix

* Tables and graphs omitted.



M). For women, however, the "all other" category produced higher claim costs than either of the other two groupings except for age groups 50-54 and 60-64. This confirms the above conclusion that women in hazardous industries are generally doing non-hazardous work.

All of this evidence suggests that if it were possible to obtain truly homogeneous occupational groups so that the factor of occupation could be held constant, the female-male claim cost ratios by age disclosed by the social security data would be reasonably comparable to those disclosed by the Department study of commercial disability income insurance.

* * * *

[27]

## CONCLUSIONS

1. Sex is a major factor affecting the cost of disability income insurance.
2. For accident and sickness benefits, female claim costs are consistently higher than male claim costs up to age 60 after which they fall below male costs. The highest relative differential in claim costs appears in the age group 30-39.
3. For accident-only benefits, female claim costs are generally less than male claim costs below age 30 and show ratios which increase with advancing age. Thus, cause of disability affects claim-cost ratios.
4. Where reliable homogeneous occupational data are available, differences between occupations reflect differences in degree of hazard and therefore affect costs.

5. Where male and female workers are properly grouped in the same occupation class, claim-cost differentials are attributable to sex and age and not to occupation.

6. Benefit structure features such as elimination periods and maximum benefit periods or type of renewal guarantee provision (such as guaranteed renewable or optionally renewable by the company), while they affect claim costs overall, are not significant factors affecting relative female to male costs.

7. There is no evidence of significant change in female-male claim cost ratios during the years 1968-1973; *i.e.*, the ratios by sex and by age have remained relatively stable.

8. A review of social security disability benefit experience exhibits a pattern of claim cost ratios not inconsistent with those derived from commercial disability income insurance experience.

## GENERAL RECOMMENDATIONS

### Annual Claim Costs for Accident and Sickness Benefits

Annual claim costs for accident and sickness benefits with the same elimination periods should first be calculated for men. To arrive at the annual female claim costs, the male claim cost should be multiplied by the individual ratios presented in Table 1 of this study as follows:



| | Attained Age | | | | |
|---|---|---|---|---|---|
| | 20-29 | 30-39 | 40-49 | 50-59 | 60-69 |
| Accident and Sickness Insurance[a] | 1.43 | 2.22 | 1.90 | 1.31 | 0.98 |

[a] Elimination period same for accidents as for sickness. Maternity excluded.

* * * *

[31]

## Appendix A

### CONTRIBUTING COMPANIES AND NUMBER OF FEMALE CLAIMS

| Company | Number of Female Claims |
|---|---|
| Bankers Life Company | 577 |
| Continental Assurance Company | 232 |
| Continental Casualty Company | 378 |
| Continental Insurance Company | 28 |
| Guardian Life Insurance Company of America | 190 |
| John Hancock Mutual Life Insurance Company | 2,768 |
| Loyal Protective Life Insurance Company | 1,341 |
| Massachusetts Casualty Insurance Company | 358 |
| Massachusetts Indemnity and Life Insurance Company | 924 |
| Metropolitan Life Insurance Company | 4,164 |
| Monarch Life Insurance Company | 1,883 |
| Mutual Life Insurance Company of New York | 2,414 |
| Mutual of Omaha Insurance Company | 14,313 |
| New York Life Insurance Company | 3,909 |
| Paul Revere Life Insurance Company | 8,418 |
| Provident Life and Casualty Insurance Company | 953 |
| Provident Mutual Life Insurance Company of Philadelphia | 142 |
| Prudential Insurance Company of America | 5,711 |
| State Mutual Life Assurance Company of America | 536 |
| Travelers Insurance Company | 7,838 |
| Union Mutual Life Insurance Company | 464 |
| Total | 57,541 |



## APPENDIX B

### Table I

General Electric Female Employment in Certain Age Groupings as of December 31, 1975

| Age Group | Female Hourly * | Female Salaried * | Total Female | Percentage |
|---|---|---|---|---|
| 20-24 | 5,394 | 3,251 | — | |
| 25-29 | 6,788 | 5,070 | — | |
| Total 20-29 | | | 20,503 | 24% |
| 30-34 | 6,130 | 3,126 | — | |
| 35-39 | 5,775 | 2,946 | — | |
| Total 30-39 | | | 17,977 | 21 |
| 40-44 | 6,466 | 3,100 | — | |
| 45-49 | 7,455 | 3,619 | — | |
| Total 40-49 | | | 20,640 | 24 |
| 50-54 | 8,319 | 4,260 | — | |
| 55-59 | 6,425 | 3,086 | — | |
| Total 50-59 | | | 22,090 | 26 |
| 60-64 | 2,678 | 1,408 | — | |
| 65-69 | 138 | 124 | — | |
| Total 60-69 | | | 4,348 | 5 |
| Grand Total | 55,568 | 29,990 | 85,558 | 100% |

* Source: Summary of Certain Valuation Statistics by Age Group from Official Actuarial Valuation of G.E. Pension Plan as of 12/31/75.

Note: 149 hourly and 100 salaried listed as under 20 excluded from totals above since N.Y. Study had no "under 20" classifications. Thus of 85,817 total G.E. female employees, 85,558 were in age brackets as above or 99.7% of total female employment.

## Table II

### Computation of Weighted Average Claim Cost

| Attained Age | Ratio from N.Y. Study | Proportion of G.E. Females | Corresponding Male Claims (2) x (3) |
|---|---|---|---|
| (1) | (2) | (3) | (4) |
| 20-29 | 1.43 | .24 | .3432 |
| 30-39 | 2.22 | .21 | .4662 |
| 40-49 | 1.90 | .24 | .4560 |
| 50-59 | 1.31 | .26 | .3406 |
| 60-69 | 0.98 | .05 | .0490 |
| Total | N.A. | 1.00 | 1.6550 |

Weighted Average = 1.6550 rounded to 166%

FOR ARGUMENT

Supreme Court, U. S.
FILED
SEP 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-1589

GENERAL ELECTRIC COMPANY,

*Petitioner,*

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,

*Respondents.*

No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,

*Petitioners,*

v.

GENERAL ELECTRIC COMPANY,

*Respondent.*

**On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## Supplemental Brief for Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al., Respondents in No. 74-1589 and Petitioners in No. 74-1590 on Reargument

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-1589

GENERAL ELECTRIC COMPANY,

*Petitioner,*

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,

*Respondents.*

No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,

*Petitioners,*

v.

GENERAL ELECTRIC COMPANY,

*Respondent.*

**On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## Supplemental Brief for Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al., Respondents in No. 74-1589 and Petitioners in No. 74-1590 on Reargument

### INTRODUCTORY STATEMENT

We welcome the opportunity to update our earlier brief [1] and to analyze in greater depth the various

[1] We attach as Appendix A, pp. 1a-5a, a current list of court decisions and arbitration awards applying Title VII to issues of income maintenance during pregnancy-related disabilities, together with a list of law review comments and conforming collective bargaining agreements.

principles of non-discrimination which support the judgment below and provide the answers to the wide ranging challenges advanced by GE and *amici curiae*.

These challenges raise important issues which are only now coming to the fore in the rapidly developing law of discrimination because of race, sex, nationality or religion. One issue is whether, or the extent to which, an irrational response to physical differences, as for instance sickle cell anemia in an employee, constitutes discrimination because of race.[2] Another issue is whether differences in pensions based on differences in longevity between black and white, which is equal to differences in longevity between male and female,[3] is prohibited by Title VII. In handling these problems, courts are beginning to develop principles with respect to "sex averaging" or "race averaging",

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[2] *Smith* v. *Olin Mathieson*, 535 F.2d 862 (5th Cir. 1976), revs'g in part and reman'g 10 FEP Cases 62 (USDCWD La. 1974). Cf. *Woods* v. *Safeway Stores*, 13 FEP Cases 114 (U.S.D.C.E.D. Va., 1976) holding that discharge of a black employee who grew a beard on the advice of his dermatologist in the treatment of a condition of pseudofolliculitis barbae ("PFB") which afflicts, almost exclusively, males of the black race, did not violate Title VII.

[3] Compare, *Peters* v. *Missouri-Pacific RR Co.*, 483 F.2d 490, 492 (5th Cir. 1973), cert. den. sub. nom.; *Missouri Pacific RR Co.* v. *Peters*, 414 U.S. 1002 (1973), holding that mandatory retirement of black firemen at age 65, or whites at 70, discriminated against black firemen in violation of Title VII, with *Fillinger* v. *East Ohio Gas Co.*, 4 FEP Cases 73 (U.S.D.C.N.D. Oh. 1971), parallel holding respecting females. The average lifespan in the United States in 1968 was 71.1 years for whites, 63.7 for non-whites, 74.0 for females, 66.6 for males. U.S. Department of Commerce, Social and Economic Statistics Administration, Bureau of the Census, Current Population Reports, Special Studies, Series P-23, No. 49, issued May 1974, p. 44, Table 2.17, Estimated Average Length of Life (Years) by Race and Sex: United States 1900 to 1969.



"overly categorized distinctions",[4] "sex-plus" or "race plus", and the duty of an employer to differentiate between stereotyped notions and true fact in making decisions affecting the economic life of employees. We have collected and attempted to arrange the principles as they are now emerging from the decisions of the courts, legislative histories, and law review commentators. The tremendous importance of the law which develops with respect to these problems has led us to stress the facts of the instant case and the finding of discriminatory motivation (see Gilbert original brief pp. 86-100) which warrant an affirmance without the need to define the reach of the various aspects of law which touch upon the issues raised by GE.

We therefore do wish to emphasize that this is not a class suit presenting the validity of all exclusions of pregnancy disability from disability plans in the United States, as GE and its supporting *amici* are attempting to make it. Although, admittedly, there are large numbers of cases involving employers pending before the courts and before administrative agencies, many of which are being held inactive awaiting the decision of this Court in this case,[5] each of these cases will be afforded its own day in court.

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[4] *Wetzel* v. *Liberty Mutual*, 511 F.2d 199, 208 (3d Cir. 1975), vacated 96 S.Ct. 1202 (1976).

[5] Two district courts, although noting in their opinions that this Court had granted certiorari on this issue, have refused to delay decision pending a ruling by this Court and have ruled on the merits and enjoined continued denial of benefits. *Payne* v. *Travenol Laboratories Inc.*, 12 FEP Cases 770 (USDCND Miss. 1976); *Guse* v. *J. C. Penney Co.*, 409 F. Supp. 28, 12 FEP Cases 9, 13-15 (E.D. Wis. 1976). The Courts of appeals, similarly, after noting the grant of certiorari by this Court have continued to affirm judgments based on findings that denial of benefits violates Title

## I.

**Washington v. Davis held that the constitutional standards of equal protection differ from the statutory standards of Title VII in that a "rational" basis suffices to validate, under the constitution, but not under Title VII, class neutral practices which have a disparate impact on a disadvantaged class but are not purposefully discriminatory. This holding renders Geduldig v. Aiello inapplicable, and sustains the determination that GE's denial of disability benefits violated Title VII.**

This Court, in *Washington* v. *Davis*, 96 S.Ct. 2040 (1976), ruled that the constitutional standards for determining discrimination under the equal protection constitutional guarantee are different from the statutory standards for determining discrimination under Title VII. This Court stated (at p. 2047):

> "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."

The statutory standard was characterized as "more rigorous" (96 S.Ct. at 2051). The role of courts in enforcing Title VII was described as involving "a more probing judicial review of, and less deference to, the *seemingly reasonable acts*" of employers "than is appropriate under the Constitution" where disparate

VII. *Hutchinson* v. *Lake Oswego School District*, 519 F.2d 961 (9th Cir. 1975) pet. for cert. pending, No. 75-568. *Berg* v. *Richmond Unified School Dist.*, 528 F. 2d 1208, 11 FEP Cases 1285 (9th Cir. 1975); pet for cert. pending No. 75-1069. Other courts have decided the merits in favor of the female class but withheld entry of an injunction pending decision by this Court. *Polston* v. *Metropolitan Life Ins. Co.*, 11 FEP Cases 380, 388 (USDCWD Ky. 1975).



impact upon a disadvantaged class "without discriminatory purpose, is claimed" (96 S.Ct. at 2051, emphasis supplied). A "rational" basis, this Court ruled in *Davis* v. *Washington*, will overcome a constitutional challenge to legislation and official acts which are not purposefully discriminatory but which have such disparate impact. However, it will not overcome a statutory challenge under Title VII. Speaking to the constitutional standard, this Court stated that it had never "held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because" of disproportionate impact upon some persons protected by that clause (96 S.Ct. at 2049). But this Court was equally emphatic in speaking to the statutory standard for challenges to employer practices having a disproportionate impact upon a protected class. This Court stated:

> "Under Title VII, Congress provided that * * * discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices."

96 S.Ct. at 2051).

In the context of the testing program involved in *Washington* v. *Davis*, the existence of a "rational" basis for the tests foreclosed the constitutional challenge, whereas a "rational" basis would not have been a defense under Title VII. Rather, under Title VII, tests with a discriminatory impact could survive challenge only by showing the business necessity for the tests by job validation under the EEOC guidelines approved in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 465 (1975).

We believe *Washington* v. *Davis* supports affirmance in the instant case. GE's exclusion of pregnancy-related disabilities from the coverage of its otherwise all-inclusive disability benefits program had a disparate and discriminatory effect on GE's female employees—indeed only female employees suffered from the impact of the exclusion. The district court described this case as involving "disparate treatment of persons, otherwise similarly situated, on the basis of a particular condition, the peculiarity of which is both irrelevant to the purpose of the company program and ineluctably sex linked" (Jt. Pet. 37a). The finding of the district court as to the manner in which the exclusion had a disparate and discriminatory effect on females is as follows (Jt. Pet. 28a-29a):

> "While pregnancy is unique to women, parenthood is common to both sexes, yet under G.E.'s policy, it is only their female employees who must, if they wish to avoid a total loss of company induced income, forego the right and privilege of this natural state. * * * Indeed, under G.E.'s policy the consequence of a female employee exercising her innate right to bear a child may well result in economic disaster, as in the case of at least one of the witnesses who appeared before the Court.[10] No such consequences would befall a male employee who chose to subject himself to a selective operation, such as a vasectomy or cosmetic surgery. Thus, women are required to undergo the economic

" [10] This G.E. employee, who became unintentionally pregnant, worked until five weeks before the birth of her child. Being precluded from disability benefits, and without other funds, she resorted to Welfare Aid, but prior to receiving same, suffered the cessation of electric and gas service for her home, along with its attendant deprivations including loss of heat and inability to adequately provide for her family."



> hardship of the disability which arises from their participation in the procreative experience. The disability is undisputed and inextricably sex-linked. To isolate such a disability for less favorable treatment in a scheme purportedly designed to relieve the economic burden of physical incapacity is discrimination by sex.

Similarly, the Ninth Circuit in *Hutchison* v. *Lake Oswego School District No. 7*, 519 F.2d 961, 965 (9th Cir., 1975) pet. for cert. pending No. 75-568 stated:

> "Clearly, a sick leave policy which excludes from coverage absences related to pregnancy or childbirth adversely and disparately affects women with respect to employment benefits."

Under the construction placed on Title VII by this Court in *Washington* v. *Davis*, this disparate and discriminatory impact on females can be upheld only if GE can show that it meets the Title VII requirement of being essential to the conduct of its business in some way other than cost, (see Gilbert original brief, pp. 139-143). No other "rational" basis can suffice as a defense to its invalidation. But GE has never advanced any claim that the exclusion had any essential relation to its business, and obviously could not.

The court below, in deciding the instant case and distinguishing *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), applied exactly the same analysis of the difference between constitutional standards under the Equal Protection Clause and statutory standards under Title VII as this Court enunciated in *Washington* v. *Davis*. The court of appeals stated (Supp. Br. Jt. Pet. 9a-11a):

> "There is a well-recognized difference of approach in applying *constitutional* standards under

the Equal Protection Clause as in *Aiello* and in the statutory construction of the 'sex-blind' mandate of Title VII. To satisfy constitutional Equal Protection standards, a discrimination need only be 'rationally supportable' and that was the situation in *Aiello,* as well as in *Reed* and *Frontiero.* * * * Title VII, however, authorizes no such 'rationality' test in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in conditions of employment. * * * It authorizes but a single exception to this statutory command of non-discrimination and that is a narrow one which, to be upheld, requires a finding that it is 'necessary to the safe and efficient operation of the business.' *Robinson* v. *Lorillard Corporation* (4th Cir. 1971), 444 F.2d 791, 798, cert. dis. 404 U.S. 1006. The defendant makes no claim for relief under this exception. Its denial of pregnancy-related disability from the application of its employee disability benefit program, in our opinion, falls clearly within the prohibitions of Title VII and *Aiello* confers no immunity for such denial." (Emphasis the court's).

GE (Supp. Br. fn. 4) in effect concedes that *Washington* v. *Davis* establishes that GE's original brief erred (pp. 18-19, 26-34) in asserting identity of constitutional and Title VII standards to support its contention that this case is controlled by *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). GE nevertheless insists that for a variety of other reasons *Geduldig* v. *Aiello* is still controlling. There is no merit to its argument.



**A. Title VII prohibits any classification in employment which "tends to deprive", or "adversely affect", an employee because of sex. Such statutory language encompasses the effects of GE's exclusion of pregnancy benefits. This statutory requirement makes Washington v. Davis controlling here, rather than Geduldig v. Aiello, which did not even mention Title VII.**

The reach of Title VII has been clarified by the dichotomy between "purposeful" discrimination and "disparate impact" which *Washington* v. *Davis* defined. Title VII interdicts all employer practices on the basis of their effect. This Court held in *Washington* v. *Davis* (96 S.Ct. at 2051) that proving adverse effects of an employment practice on "substantially disproportionate numbers" of a disadvantaged class will establish a violation of Title VII, even though the practice is "rational" or "neutral". Such a practice can be defended under Title VII only by proving that it is a "business necessity."

Title VII's inclusive language, in Section 703(a), read in the context of an effects test, emphasized by *Washington* v. *Davis,* prohibits the conduct which causes the effects of GE's pregnancy exclusion upon GE's female employees. The language of Title VII is not limited to discrimination. While Section 703(a)(1) makes it unlawful to impose "discrimination * * * with respect to * * * compensation, terms, conditions or privileges of employment, because of * * * sex," Section 703(a)(2) does not use the word "discriminate" or "discrimination". Its reach is broader. An employer may not "*limit,* segregate or classify * * * *in any way* which would deprive or *tend* to deprive * * * or otherwise adversely affect * * * because of * * * sex" (Emphasis supplied).

*Washington* v. *Davis* demonstrates that this Court has never regarded the constitutional equal protection guarantee, even as applied under the "strict scrutiny" test in racial discrimination cases, as invalidating any non-purposeful disparate effect which is within the broad reach of Section 703(a)(2). Read in the clarifying light of *Washington* v. *Davis,* it is apparent that *Geduldig* v. *Aiello* did not negative a statutory construction of Title VII which prohibits the pregnancy exclusion because of its disparate effect upon compensation, terms and conditions of employment. Indeed, it bears repetition to point out that the Court's opinion in *Geduldig* v. *Aiello* did not even mention Title VII, but simply held that the Equal Protection Clause did not invalidate California's pregnancy exclusion in its disability insurance law.

The many ways in which GE's disability plan adversely affects females, as compared with males, shows that the pregnancy exclusion has a disparate impact within the ordinary and plain meaning of Section 703(a). The exclusion adversely affects GE female employees in the following ways:

1. Viewing disability benefits as compensation—as the court below (Supp. Br. Jt. Pet. 3a-4a) notes that GE regarded it (II App. 976)—and assuming that the female performs equal work at equal hourly wage rates, the exclusion means that she gets less compensation.[6] That is because the male GE employee receives not only his hourly wages, but also income protection

[6] *Hutchison* v. *Lake Oswego School District No. 7,* 519 F.2d 961, 565 (9th Cir. 1975), petition for cert. pending, No. 75-568); *Polston* v. *Metropolitan Life Ins. Co.,* 11 FEP Cases 380, 383 (U.S.D.C. Ky. 1975).



against any disability condition. A female must spend her own money to buy a personal disability policy covering pregnancy disability if she wants to be fully insured against a period of disability without income, whereas a male without extra expenditure is fully insured by GE against every period of disability. One court characterized these effects on women as follows:[7]

> "The practice of excluding pregnancy-related disabilities from the disability insurance income plan denies women the opportunity to enter the job market free from subjection to disparate treatment on account of their sex."

2. The female GE employee is under economic pressure to hide her disability and continue to work even if hemorrhaging, nauseated, or otherwise in a condition in which she should not work, whereas a male is never under such economic pressure.[8]

3. Conversely, a female GE employee who is able and desirous to work may be sent home without pay,

[7] *Appleton Papers Division of National Cash Register Co.,* 11 EPD ¶ 10, 608 (Wis. Cir. Ct., Dane City, 1975).

[8] Illustrative is the following answer which was given by Arlene Avery, a complainant in a case before the New York State Division of Human Rights, when asked on cross examination as to why she regarded the denial of disability benefits for a pregnancy-related disability as discrimination because of sex.

> "This girl I worked with, her husband worked in the foundry. They both were drinking quite a bit. She cut him, threw a knife at him, cut his arm with a knife. He was out of work I don't know how long and he collected sick pay for this because they got in a fight at home over drinking, but here I had a legitimate thing, I was bleeding, I couldn't work and I couldn't collect my sick pay."

Transcript of hearing held June 6, 1963 in *Avery* v. *General Railway Signal Corp.,* N.Y. State Division of Human Rights, Complaint Case No. CS-27503-72, p. 81.

and denied the related disability pay, but this is not done to men.

4. A female may be, in fact, disabled and should not be working, and the company doctor may be medically correct in disqualifying her. Yet, if she has no savings, and no other source of income to get money for food, rent, or utilities, she must either go on relief or get other employment in order to eat. In many such cases she is forced to work for employers whose pay rates are so low as to attract only those unable to secure other jobs, and who require such necessitous individuals to promise they will terminate prior job attachments. These events interrupt the continuity of a woman's work life and constitute a permanent handicap in a market where seniority or continuous work record is of great importance to higher pay and advancement.[9] The denial of disability benefits for pregnancy-related disabilities thus imposes on the female employee an economic disadvantage which is not imposed on any male GE employee when disabled.

5. Any male GE employee is free to embark on any course of conduct involving either voluntary or involuntary disability, assured that 60 per cent of his compensation will be maintained for 26 weeks and that if he has not then recovered, he will receive income maintenance as long as needed, until age 65, under GE's long term disability program and then can retire on a pension (II App. 537, see Gilbert original brief, pp. 13, 19).

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[9] "92 percent of the firms stated in interviews that continuous work experience was a prime determinant of employment." Dwight F. Flanders and Peggy Engelhardt Anderson, Sex Discrimination in Employment: Theory and Practice, Industrial and Labor Relations Review, vol. 26, No. 3, April 1973, p. 938, at p. 951.



These disability payments are made to all GE male employees, whether the cause of the disability occurred while he was on vacation, or had a voluntary operation, such as a hair transplant or nose job, or inflicted the injury on himself, or engaged in an aggressive fight, or even a crime, or was drunk, or was on strike against the Company, or any other event, of any nature. Indeed, no GE disabled male employee has ever been denied disability compensation because of the nature of the cause of disability. (Gilbert original brief, pp. 15-16).

6. Women are denied protection for their families against income loss when they are temporarily disabled. Like Stephen Wiesenfeld,[10] the female plaintiffs are denied the same protection for their families that a male GE worker would receive for his family.[11]

GE asserts that its female employees must suffer these disadvantages because it would be costly to provide them disability benefits for pregnancy-related disabilities. While the courts have uniformly held that cost is not a defense (see Gilbert original brief p. 143), GE spends more for procreation by its male employees. A male GE employee can enter upon procreation, assured that GE will pay all the hospital and doctor bills, not only for himself, but also for his wife. It should be noted that male employees have many more children than do female employees. Their procreation costs, computed by the sex averaging method which we believe is illegal but which is at the core of GE's presentation to this Court (see pp.

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[10] *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975).

[11] Comment: The impact of *Geduldig* v. *Aiello* on the EEOC Guidelines on Sex Discrimination, 50 Indiana Law Journal, 592, 605 (1975).

36-43, *infra*) is much more per male employee than per female employee. Thus, GE could pay disability benefits, plus hospital and medical expenses, for all pregnant female employees, at a female per capita cost for pregnancy-related benefits that is no greater than the male per capita cost for procreation activities (see pp. 57-59, *infra*).

**B. The bona fide occupational qualification exception is so narrowly limited as to have no application to the dichotomy between constitutional standards and statutory standards.**

GE (Supp. Br. pp. 15-16) argues that *Washington* v. *Davis* does not govern because of the bona fide occupational qualification exception contained in Section 703(e)(1), which provides:

> "* * * it shall not be an unlawful employment practice for an employer to hire and employ employees * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

Though Title VII itself does not spell out "those certain instances" where differences in treatment based upon sex are beyond the reach of the prohibitions contained in Section 703(a), the legislative history of the statute, as well as the Commission's interpretative guidelines and decisions, demonstrate that Section 703(a)(1) is to receive a narrow construction. During the debate in the Senate on the bill which became the Civil Rights Act of 1964, Senators Clark and Case,



the floor managers of the bill, introduced into the Congressional Record an interpretative memorandum which contained the following (110 Cong. Rec. 7213, Col. 1, April 8, 1964):

> "* * * *but section 704* [renumbered as Section 703 prior to final passage] *creates certain limited* exceptions from these prohibitions [of Section 703(a)]. First, it would not be an unlawful employment practice to hire or employ employees of a particular * * * sex * * * in those situations where * * * sex * * * is a bona fide occupational qualification for the job. This exception must not be confused with the right which all employers would have to hire and fire on the basis of general qualifications for the job, such as skill or intelligence. *This exception is a limited right* to discriminate on the basis of * * * sex * * * where the reason for the discrimination is a bona fide occupational qualification. (Emphasis supplied).

Senator Clark also inserted in the Congressional Record (110 Cong. Rec. 7216-7218) a memorandum answering questions propounded by Senator Dirkson. One of these questions and answers contained the following explanation of the BFOQ exception (110 Cong. Rec. 7217, col. 2, April 8, 1964):

> "Question. Section 704 [renumbered as Section 703 prior to final passage] describes the employment practices which are made unlawful by this bill. Subsection (e) of that section provides certain exceptions—namely: 'where religion, sex, or national origin is a bona fide occupation qualification reasonably necessary to the normal operation of that particular business or enterprise' or where a religious educational institution wishes to hire only employees of its particular religion. But

what of other reasonable occupational qualifications? The Harlem Globe Trotters may well wish to preserve their racial identity. A movie company making an extravaganza on Africa may well decide to have hundreds of extras of a particular race or color to make the movie as authentic as possible. A religious institution which operates a hospital may have as great a desire to employ people of its own religious persuasion in the hospital as it would in its educational institution.

"Answer. Although there is no exemption in Title VII for occupations in which race might be deemed a bona fide job qualification, a director of a play or movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone with the physical appearance of a Negro —but such a person might actually be a non-Negro. Therefore, the act would not limit the director's freedom of choice."

This intent, expressed to the Senate by the floor managers of the bill, must control interpretation of the bona fide occupational qualification, because the Senate thereafter adopted the bill with this exception in the form described in the *Clark-Case* interpretative memorandum.

The narrow scope of § 704(e), as contained in the original House Bill[12] was also emphasized by the Report of the House Judiciary Committee:

> "*Section 704(e) provides for a very limited exception to the provisions of the title.* Notwithstanding any other provisions, it shall not be an unlawful employment practice for an employer to employ persons of a particular religion or national origin in *those rare situations* where religion or national origin is a bona fide occupational qualification." H.R. Rep. No. 914, 88th Cong., 1st Sess. p.27, (1963). (Emphasis supplied).

[12] Section 704(e) of that bill, with the addition of the word "sex", is identical with § 703(e)(1) of the Title as it was ultimately enacted.



Finally, the Commission through its interpretative guidelines, has viewed § 703(e)(1) as creating only a very narrow exception. Thus, the Commission has stated that it "* * * believes that the bona fide occupational exception as to sex should be interpreted narrowly." 29 C.F.R. § 1604.2(a). In this connection, the Commission has specifically noted that the application of the BFOQ exception will not be warranted in a situation where a refusal to hire a female is "* * * based on assumptions of the comparative employment characteristics of women in general", or where an individual is refused employment "* * * based on sterotyped characterizations of the sexes." The underlying rationale of these rulings is that, "The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group." 29 C.F.R. § 1604.2(a)(ii).

The Commission has also pointed out, "* * * that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle * * *" 29 C.F.R. § 1604.3(b).

The only specific illustration offered in the guidelines, is that "Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress." (29 CFR 1604.2(a)(2).

The bona fide occupational qualification does not serve to provide any statutory distinction between the sex prohibition and the race prohibition. The need for authenticity with respect to a black actor would dictate the same result in the case of race as of sex, as was noted on the floor of Congress (see pp. 15-16, *supra*).

If there is any distinction, it relates only to the hiring or selection of a person for a job. It has no application to the mandate for equality between males and females, blacks and whites, with respect to compensation, terms or conditions of employment or with respect to classifications adversely affecting an individual because of race or sex.

GE cites no cases arising under the BFOQ exception, and we know of none, which would indicate that the BFOQ exception is basis for any difference in the application of Title VII because the distinctions challenged are of gender rather than race.

**C. Sex, as a forbidden basis for disparate treatment under Title VII, stands in the same position as race and hence the statutory standard under Title VII is controlling here.**

The language of Title VII, its legislative history, and the uniform holdings thereunder establish that there is no difference in the statutory standards applicable to cases arising in the sex context than are applicable in the race context. Everywhere the word race appears in Title VII, the word sex also appears. The reverse, languagewise, occurs only twice: first, with respect to the bona fide occupational qualification, which, as discussed above (pp. 14-18, *supra*), is narrow in intent and as a practical matter differs in no respect from the "business necessity" to have black actors play certain black roles in the interest of authenticity;



second, in Section 703(h), which authorizes discrimination in wages between males and females "if such differentiation is authorized" by the Equal Pay Act, 29 U.S.C. 206(d). Neither of these exceptions applies here. Aside from these two minor differences, Title VII defines discrimination because of race and sex identically. The legislative history of Title VII shows that Congress intended that Title VII have the same broad reach when sex is at issue as when the case presents an issue of race. The legislative history of the 1972 amendments to Title VII shows that Congress repeatedly emphasized the same concern over discrimination because of race and discrimination because of sex. Both the House and the Senate Reports stated: [13]

> "Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.'

The courts have uniformly held that discrimination because of sex is as reprehensible as discrimination because of race and that Title VII applies equally to both.[14]

To the extent that there is a difference between race and sex discrimination in the dichotomy between constitutional standards and statutory standards, the difference is not because statutory standards of Title VII applicable to sex are any different from the statutory standards of Title VII applicable to race.

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[13] H.R. Rep. No. 92-238, 92d Cong., 1st Sess., 5 (1971); S.Rep. No. 92-415, 92d Cong., 1st Sess., 7-8 (1971).

[14] E.g., *Local 186, Int'l Union of Pulp, etc. Workers* v. *Minnesonta Mining & Mfg Co.*, 304 F.Supp. 1284, 1 FEP Cases 764, 767 (S.D. Ind. 1969).

The difference is on the side of the constitutional standards. Since this Court has never subjected sex discrimination to the "strict scrutiny" standard applicable to race,[15] state action which discriminates between the sexes [16] may survive constitutional challenge when state action which discriminates between the races [17] may not.

The absence of the "strict scrutiny" in the constitutional standard for sex discrimination, however, does not afford the slightest basis for applying a different construction to Title VII when the issue involves sex discrimination than when it involves race discrimination. Instead of making the Title VII and equal protection standards similar, the absence of strict scrutiny in respect to sex means that the "reasonableness" test, which is applied to even purposeful sex discrimination when considering a constitutional equal protection challenge, is not applied when considering the Title VII challenge. However the "reasonableness" test is not applied to purposeful race discrimination when considering the challenges under the equal protection clause or Title VII.

The statutory Title VII standard, enunciated in *Washington* v. *Davis,* that a reasonable purpose will not suffice to sustain discrimination under Title VII, is thus fully applicable here.

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[15] *Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *Reed* v. *Reed,* 404 U.S. 71 (1971); *Kahn* v. *Shevin,* 416 U.S. 351 (1974).

[16] *Kahn* v *.Shevin,* 416 U.S. 351 (1974).

[17] *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944).



**D. Degrees of discrimination because of sex with respect to fringe benefits are not permitted by Title VII. Thus, the controlling effect of Washington v. Davis is not lessened simply because this case involves fringe benefits instead of hiring.**

GE contends (Supp. Br. p. 10-15) that *Washington* v. *Davis* is not applicable because it involved discrimination in hiring, whereas this case involves discrimination in benefits. This contention rests on the unfounded assumption that degrees of discrimination as to benefits are permissible. This assumption flies in the face of the statutory language, the uniform decisions of the courts and logic. As the Fifth Circuit stated: [18]

> "The degree of discrimination practiced by an employer is unimportant in Title VII. Discriminations come in all sizes and all such discriminations are prohibited by the Act."

In a wide variety of fringe benefit cases the courts have held employers to the same strict adherence to nondiscrimination as is applicable to hiring. [19]

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[18] *Rowe* v. *General Motors Corp.,* 457 F.2d 348, 354 (5th Cir. 1973).

[19] *Rosen* v. *Public Service Electric & Gas Co.,* 409 F.2d 775 (3d Cir. 1969), 477 F.2d 90 (3d Cir. 1973), 11 FEP Cases 330 (USDCDNJ 1974); *Bartmess* v. *Drewrys, USA, Inc.,* 444 F.2d 1186 (7th Cir. 1971), cert. den. 404 U.S. 934; *Chastang* v. *Flynn & Emrich Co.,* 365 F.Supp. 957, 6 FEP Cases 357, 364 (USDC Md. 1973); *Ugiansky* v. *Flynn and Emrich Co.,* 337 F.Supp. 867, 870, 4 FEP Cases 336, 337 (D. Md. 1972); *Mixon* v. *Southern Bell T&T,* 324 F.Supp. 525, 4 FEP Cases 27 (N.D. Ga. 1971); *Fillinger* v. *East Ohio Gas Co.,* 4 FEP Cases 73 (USDCND Ohio 1971); *Fitzpatrick* v. *Bitzer,* 390 F. Supp. 278, 8 FEP Cases 877, 8 EPD ¶ 9685 (D.Conn. 1974), aff'd 419 F.2d 559 (2d Cir. 1975), revd. on Eleventh Amendment, 96 S.Ct. 2666; *American Finance System* v. *Pickrel,* 8 FEP Cases 1054, 7 EPD ¶ 9141, ¶ 9081 (USDCD Md. 1974); *American Fi-*

## II.

**If Washington v. Davis is not conclusive as to the inapplicability of Geduldig v. Aiello, the differences between the issues there presented and those here involved make Geduldig v. Aiello inapplicable.**

GE's main attack on the applicability of *Washington* v. *Davis* is premised on footnote 20 of *Geduldig* v. *Aiello* in which this Court stated that not "every legislative classification concerning pregnancy is a sex-based classification." This Court did not state that no classification concerning pregnancy was sex-based. The district court found that GE's exclusion of pregnancy was sex-based (Jt. Pet. 30a-33a, 37a). The exclusion was found to be neither "neutral on its face" nor "in its intent" (Jt. Pet. 63).

In view of the variety of disparate effects which the pregnancy exclusion has on women (see pp. 10-13, *supra*), and without reliance on the finding of discriminatory motivation (see Gilbert original brief, pp. 86-100), we believe this finding was correct. *Geduldig* v. *Aiello* was not concerned with the effect of an employer's exclusion on the employment relationships in its plant. Nor did *Geduldig* involve the application of a statute enacted by Congress under the Commerce Clause to reach all practices which might interrupt or impede commerce.

The courts have applied several different analyses in reaching the conclusion that the many disparate effects of excluding pregnancy-related disabilities from an otherwise all inclusive disability program came within

*nance System* v. *Harlow* (USDC Md. 1974); *Henderson* v. *Oregon*, 11 FEP Cases 1218, 10 EPD ¶ 10,583 (D. Ore. 1975); *Manhart* v. *Los Angeles*, 387 F.Supp. 980 (C.D. Calif. 1975); *Rogers* v. *Equal Employment Opportunity Commission*, 454 F.2d 234 (5th Cir.).



the prohibitions of Title VII. Four different theories, none mutually exclusive and two, three, or all of which are often adopted by the same court in the same opinion, appear from the opinions:

1. The exclusion constitutes discrimination in compensation because of sex;[20]

2. The exclusion constitutes discrimination in privileges of employment because of sex;[21]

3. Since pregnancy is sex-linked, any different treatment because of pregnancy is discrimination because of sex;[22]

4. The pregnancy exclusion, even if viewed as a neutral practice without purposeful discrimination has a disparate discriminatory impact on female employees because of sex.[23] So viewed, and applying the teaching

[20] See the Court of Appeals in the instant case (Supp. Br., Jt. Pet. 3a-4a); *Payne* v. *Travenal Laboratories, Inc.*, 12 FEP Cases 770, 783 (U.S.D.C.N.D. Mass. 1976); *Zichy* v. *City of Philadelphia*, 392 F.Supp. 339, 10 FEP Cases 853 (E.D. Pa. 1975).

[21] *Ray-O-Vac Divison of ESB* v. *Wisconsin Dept. of Industry, etc.*, 236 N.W. 2d 209, 12 FEP Cases 64 (Wis. Sup. Ct. 1975):

> "Pregnancy is undeniably a sex-related characteristic and whatever Ray-O-Vac's good motives, the effect of the plan is to discriminate against women employees, all of whom presumably have the capacity to become pregnant."

[22] The district court in this case (Jt. Pet. 29a, 37a); *Polston* v. *Metropolitan Life Ins. Co.* 11 FEP Cases 380, 383 (U.S.D.C. W.D.Ky. 1975); *Appleton Papers Division of National Cash Register* v. *Wisconsin Dept. of Labor, etc.*, 11 EPD ¶ 10,608 (Wis. State Circuit Court, Dane Cty., 1975).

[23] "Even if neutral on its face, such policy treats a protected class in a disparate manner and this is precisely what Title VII intends to strike down", *Wetzel* v. *Liberty Mutual*, 511 F.2d 199 (3d Cir. 1975), vacated 96 S.Ct. 1202 (1976; *Hutchinson* v. *Lake Oswego School District No. 7*, 519 F.2d 961, 965 (9th Cir. 1975), pet. for cert. pending No. 75-568; *Guse* v. *J.C. Penney Co., Inc.*, 11 EPD ¶ 10,626 (D.C. Wis. 1976); *Zichy* v. *City of Phila.*, 392 F. Supp. 397, 10 FEP Cases 853 (U.S.D.C.E.D.Pa. 1975); *Ray-O-Vac*

of *Washington* v. *Davis*, footnote 20 in *Geduldig* v. *Aiello* is entirely consistent with the decision below. Because the pregnancy exclusion in Geduldig lacked a discriminatory purpose and thus was considered as a sex neutral practice, it was not subject to constitutional challenge. But under Davis, its disparate impact on female employees would trigger the Title VII prohibition.

We believe the courts below correctly determined that the exclusion was sex-based (Jt. Pet. 30a-33a, 37a, Supp. Br., Jt. Pet. 4a). But even of it is considered as a sex-neutral exclusion, its disproportionate impact on women brings it within the standards of Title VII as enunciated in *Washington* v. *Davis* and renders *Geduldig* v. *Aiello* inapplicable.

## III.

### Congress has enacted several statutes which indicate its view that the denial of benefits for pregnancy-related disabilities is discrimination because of sex.

#### A. Railroad Unemployment Insurance Act

The first consideration by Congress of the payment of disability benefits during absences for pregnancy-

*Divison of ESB* v. *Wisconsin Dept. of Industry, etc.*, 236 N.W. 2d 209, 12 FEP Cases 64, 68 (Wis. Sup. Ct. 1975). "The relevant question here is whether in the light of the purposes, the effect of the benefits program is to provide disparate treatment for men and women employees"; *Zichy* v. *City of Phila.*, 392 F.Supp. 339, 10 FEP Cases 853, 857 (E.D. Pa. 1975), ("impact alone establishes liability"). The district court in the instant case found the exclusion was neither "neutral on its face" nor "in its intent" (Jt. Pet. 30a) and also constituted "disparate treatment of persons, otherwise similarly situated, on the basis of a peculiar condition, the peculiarity of which is irrelevant to the purpose" (Jt. Pet. 37a).



related disabilities which we can find occurred in 1945 in connection with the amendment of the Railroad Unemployment Insurance Act[24] to provide income maintenance for railroad employees during all temporary disabilities, including those pregnancy-related. During the hearings the chairman of the House Committee on Interstate and Foreign Commerce, who was conducting the hearings, pointed out that a precedent already existed in the practice of the United States Government to make available sick leave and annual leave during absences for pregnancy.[25]

The bill presented to and adopted by Congress was drafted by the railway labor organizations and as pro-

[24] The present version of the pertinent portions of the Railroad Unemployment Insurance Act is found in 45 USC 351(b)(2), and provides that "'a day of sickness' with respect to any employee, means a calendar day on which because of any physical, mental, psychological, or nervous injury, illness, sickness or disease he is not able to work, or, with respect to a female employee, a calendar day on which, because of pregnancy, miscarriage or the birth of a child, (i) she is unable to work or (ii) working would be injurious to her health, and with respect to which (i) no remuneration is payable or accrues to her." The first version as enacted July 31, 1946 is found in 60 Stat. 736, U.S. Code Cong. Ser. 1946, p. 702. The pertinent sections read: "Sec. 302. Subsection 1(j) is amended by substituting for the period at the end thereof a comma and adding 'maternity insurance, a sickness insurance'. Sec. 303. The first paragraph of subsection 1(k) is amended by inserting '(1)' after the phrase 'section 4 of this Act' and by substituting for the colon before the phrase "Provided, however, the following: 'and (2)a 'day of sickness' with respect to any employee, means a calendar day on which because of any physical, mental, psychological, or nervous injury, illness, sickness or disease he is not able to work or which is included in a maternity period."

[25] Hearings before the Committee on Interstate and Foreign Commerce, House, 79th Cong., 1st Sess., on H.R. 1362, p. 286 on February 2, 1945.

posed included coverage of disabilities due to pregnancy.[26] In including coverage of disabilities due to pregnancy the railway labor organizations were following the practice of unions in Europe. There the workers' organizations in establishing insurance to provide income maintenance during disabilities had made the same provision for disabilities due to childbirth and complications of pregnancy as for any other disability with only one exception, namely, providing mandatory benefits for three or four weeks for childbirth, but the same maximum benefits if the female was disabled for a longer period.[27]

Lester P. Schoene, who appeared before the Congressional Committee on behalf of the Railway Labor Executives Association and presented their proposal for the disability insurance amendment, in explaining

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[26] Hearings, op. cit. p. 38.

[27] Henry J. Harris, Workmen's Insurance in Austria, reprinted from the 24th Annual Report of the U.S. Commissioner of Labor, Washington, D. C. (Library of Congress Call Number HD7171.M3) pp. 251, 253, setting forth a model constitution for a sick fund which provided in Article II, Section 3: "3. • • • In cases of normal childbirth, the sick benefits shall be continued for four weeks; if the case continues longer, then benefits shall be paid each to the maximum above specified [20 weeks]". In Germany the codification in 1883 of rules for workers' insurance funds which followed the accepted practices established by the workers over the preceding years contained the following provision for benefits for pregnancy-related disabilities.

§ 20. The local sickness fund must grant at least

• • •

2. An equal benefit to a person with child for a period of at least three weeks after she has given birth.

Law concerning sickness insurance for workers, June 15, 1883, No. 1496, published in Reichs-Gesetzblatt 1883, No. 9, p. 73.



its provisions for the payment of benefits during maternity absences, testified as follows:[28]

> "You cannot solve the problems which maternity illness produces by merely deciding not to include them in your sickness-benefit scheme. When we were drafting these proposals we had to address ourselves to some very specific concrete problems that arise in the administration of sickness benefits. You have got to decide in the first place whether you are going to pay benefits for sickness due to maternity or whether you are not going to pay them, and if you are not going to pay them, you have to make provision for not paying them. If you make provision for not paying them, you have to set up procedures by which you will assure that you are not going to pay what you have decided not to pay.
>
> "In other words, a female employee is ill. She may or may not be pregnant. If you have decided that you are not going to pay for illness due to maternity, or pregnancy, then you have got to make sure that whenever a female employee is ill, that that illness is not due to pregnancy. So, you first have to find out whether she is pregnant, and if you find that she is pregnant, you have got to make further decisions. Are you going to bar from sickness benefits every female employee who is pregnant, or are you going to try to distinguish between these illnesses occurring during that period that are due to pregnancy and those that result from other causes? We looked over all of these problems, and we just could not face the notion of having the Railroad Retirement Board administering sickness-insurance benefits and requiring information from every ill female employee as to whether or not she was pregnant and if she was pregnant whether or not the illness was

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[28] Hearings, *op. cit.*, pp. 1112-1113. See also, pp. 38, 76-78.

due to pregnancy. That would require a great deal of administrative folderol, and when you get all through with it, what have you accomplished? You have accomplished the exclusion from payment of something which by all reasonable human standards ought to be paid anyway.

* * *

"* * * Beyond that there are matters relating to continuing the relationship of employer and employee; as a matter of fact, a great many employers, including the Federal Government, will grant leave with pay to provide for these conditions, so that the individual maintains an employee association with the employer and will return to employment when the condition permits. We say that there is ample justification on industrial grounds and on human grounds for the inclusion in this system of sickness benefits of this special feature dealing with maternity cases."

Murray W. Latimer, Chairman of the Railroad Retirement Board, testifying in support of the bill, pointed out that the purpose of coverage of pregnancy-related disabilities was the same as the purpose of paying benefits for other disabilities. One of the purposes, applicable to all income maintenance during absence from disability, but of particular importance to pregnant women, was the economic pressure they would be under to work longer than they should and return sooner than they should, and thereby injure their health.[29]

In considering the inclusion of pregnancy-related disabilities, Congress had before it figures[30] on the estimated costs, including probable number of births,

[29] Hearings, pp. 76-78.

[30] Hearings, pp. 123-127, 31-132.



and also figures on the relative number of days of disability of males compared with females, as well as of black employees as compared with white. The rate of disabling illness of 8 days or more in 1942 was 122.1 per thousand for white males, 189.3 per thousand for females, and 244.9 per thousand for Negroes.[31] The tables which Congress had before it with respect to the differences in disability between the sexes and the races showed the following:

TABLE 51.—*Estimated annual number of disabling illnesses of 8 days or more 1943-1944 for white men with railroad earnings of $150 or more in 1942*

| Age Group | Percent | Frequency Rate Per Thousand |
|---|---|---|
| Total | 99.7 | 122.1 |
| Under 25 | 20.5 | 97.5 |
| 25 to 34 | 20.7 | 105.0 |
| 35 to 44 | 21.0 | 116.5 |
| 45 to 54 | 21.2 | 129.3 |
| 55 to 64 | 13.6 | 156.7 |
| 65 + | 2.7 | 168.8 |

TABLE 52.—*Estimated annual number of disabling illnesses of 8 days or more 1943-1944 for Negro men with railroad earnings of $150 or more in 1942*

| Age Group | Percent | Frequency Rate Per Thousand |
|---|---|---|
| Total | 99.3 | 244.9 |
| Under 25 | 21.5 | 227.2 |
| 25 to 34 | 30.4 | 269.8 |
| 35 to 44 | 25.0 | 243.5 |
| 45 to 54 | 15.0 | 239.2 |
| 55 to 64 | 6.4 | 206.8 |
| 65 + | 1.0 | 226.2 |

[31] Hearings, pp. 114-116.

TABLE 54.—*Number of nonindustrial disabilities and of days of disability per 1,000 per year, by sex*

| Duration (days) | Average duration (days) | Number per 1,000 women | | | | Number per 1,000 men | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | Nonindustrial disabilities | | Days of disability | | Nonindustrial disabilities | | Days of disability | |
| | | Number [1] | Cumulated | In interval | In sub-group | Number [1] | Cumulated | In interval | In sub-group |
| All durations .... | 1 | 1,846.7 | ..... | 11,275.9 | ..... | 897.3 | ..... | 7,047.5 | ..... |
| 1 ..... | ..... | 608.1 | 1,846.7 | 608.1 | | 220.1 | 897.3 | 220.1 | |
| 2 ..... | 2 | 331.3 | 1,238.6 | 662.6 | | 132.2 | 677.2 | 264.4 | |
| 3 ..... | 2 | 287.0 | 907.3 | 861.0 | | 145.8 | 545.0 | 437.4 | |
| 4 ..... | 3 | 141.1 | 620.3 | 564.4 | 4,232.8 | 84.4 | 399.2 | 337.6 | 2,300.0 |
| 5 ..... | 4 | 101.6 | 479.2 | 508.0 | | 60.0 | 314.8 | 300.0 | |
| 6 ..... | 6 | 80.6 | 377.6 | 484.8 | | 54.7 | 254.8 | 328.2 | |
| 7 ..... | 7 | 77.7 | 296.8 | 543.9 | | 58.9 | 200.1 | 412.3 | |
| 8 to 14 ..... | 10.88 | 100.0 | 219.1 | 1,088.0 | 7,043.1 | 62.3 | 141.2 | 677.8 | 4,747.5 |
| 15 to 28 ..... | 20.27 | 45.9 | 119.1 | 930.4 | | 30.9 | 78.9 | 626.3 | |
| 29 to 49 ..... | 37.60 | 35.8 | 73.2 | 1,346.1 | | 21.5 | 48.0 | 808.4 | |
| 50 to 98 ..... | 69.70 | 24.0 | 37.4 | 1,672.8 | | 17.5 | 26.5 | 1,219.8 | |
| 99 to 189 ..... | 132.96 | 9.4 | 13.4 | 1,249.8 | | 5.1 | 9.0 | 678.1 | |
| 190 and over [2] ... | 189.00 | 4.0 | 4.0 | 756.0 | | 3.9 | 3.9 | 737.1 | |

[1] Based on study of U. S. Public Health Service, Division of Industrial Hygiene, Absenteeism, from Manual of Industrial Hygiene and Medical Services in War Industries, by Dr. Wiliam M. Gafafer, table 2.

[2] The maximum number of days of sickness in compensable registration periods.



The manner in which the average disability rate of women was figured from the foregoing table was explained as follows:[32]

> "The number of cases of illnesses of 8 days or more was estimated on the basis of the number of cases per 1,000 women in relation to the number of cases per 1,000 men for cases of 8 days or more experienced by employees of the public utility (table 54). The number of cases per 1,000 women workers was found to be 1.55 times as high as for each 1,000 men workers (219.1 as compared with 141.2). This differential was applied to the number of illnesses of like duration per 1,000 men multiplied by the number of thousands of women qualified for benefits. It was assumed that the qualified women were white (only about 4 percent of the women were Negro, one-fifth or one-sixth of 1 percent of all qualified workers). The rate of illnesses of 8 days or more for white males (table 51) was 122.1. The rate for women would be, therefore, 55 percent more, 189.3"

Congress adopted a railway disability plan which covered all disabilities and provided equal benefits at equal cost for blacks as compared with whites, and for females as compared with males. Pregnancy-related disabilities were included as a covered disability.

### B. Equal Pay Act legislative history

The contention of industry that it created an imbalance in favor of women to pay both disability benefits for pregnancy plus equal wages was twice rejected by Congress in the course of its enactment of the Equal Pay Act, 29 U.S.C. § 206(d). In hearings preceding enactment of the Equal Pay Act, there was considerable testimony by representatives of industry as to the costs to industry of disability benefits during preg-

[32] Hearings, p. 116.

nancy. They said it would be unfair to require equal pay without permitting a deduction for the extra costs involved in employing women, including the cost of covering disability benefits (see Gilbert original brief, pp. 51-54, 123-128). In supporting the Martin bill, H.R. 1936, 88th Cong. (quoted in pertinent part in Gilbert original brief, p. 124, fn. 55), representatives of industry made repeated speeches about the high respect in which they held motherhood, but that its costs could not properly be imposed on industry. Illustrative is the testimony of John G. Wayman, who appeared on behalf of numerous employers whom he represented in his law practice and who has filed an amicus brief here in support of G.E. Mr. Wayman testified:[33]

> "The [Martin] bill contains an exception called Payments Attributable to Ascertainable and Specific Added Cost Resulting From Employment of Opposite Sex * * * . The fact is, again coming back to the undeniable fact of life, women are different than men. They pose different problems in industry. They have a tendency, thank goodness, to get married and have children."

Arguing on the floor of Congress in support of the Finley Amendment, 109 Cong. Rec. 9206, (quoted in Gilbert original brief, p. 124, fn. 55) which similarly would have had the effect of permitting employers to deduct from wages the otherwise equal amounts paid for the extra costs of employing women, including premiums for disability benefits for pregnancy-related disabilities, Congressman Finley said (109 Cong. Rec. 9205):

> "Most of these extra costs arise from the indisputable fact that women are more prone to home-

[33] Hearings on H.R. 3861 and related bills before the Special Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess., March 25, 1963, p. 146.



> making and motherhood than men. No one of my acquaintance would for the world want to change this fact, but it is one that enters into personnel costs."

The failure of Congress to report out the Martin bill and the defeat on the floor of Congress of the Finley Amendment (109 Cong. Rec. 9217), establishes the Congressional understanding that paying women pregnancy-related disability benefits was not discrimination in favor of women, but rather necessary to insure equality.

### C. Title VII legislative history—rejection of "solely" because of sex amendment

The legislative history of Title VII shows that Congress intended to cover situations in which sex is not the sole distinguishing factor between the relative positions of men and women. During the debates in 1964, Senator McClellan in the Senate (110 Cong. Rec. 1837) and Representative Dowdy in the House (110 Cong. Rec. 2728) each proposed an amendment which would have inserted the word "solely" before all the categories of discrimination proscribed by the Act. This amendment was defeated in the Senate by a roll call vote and in the House by a voice vote.[34] No effort was ever made to place the limitation of "solely" upon sex apart from the effort so to limit

[34] 110 Cong. Rec. 2728, 13837-13838 (1964). Senator Case responded to the proposed McClellan amendment by stating:

> "The difficulty with this amendment is that it would render Title VII totally nugatory . . . [T]his amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless."

*Id.* at 13837.

discrimination as to all categories, including race, nationality, and religion as well as sex. Congress thus manifested its intent to prohibit "sex plus" equally with its prohibition of "race plus", "nationality plus" and religion "plus". This legislative history has been cited to hold that an employment practice is not beyond the reach of Title VII because it "adversely affects only a portion of the protected class" or is based on "physical properties possessed by one sex. *Sprogis* v. *United Airlines, Inc.,* 444 F.2d 1194, 1198 (7th Cir. 1971), *cert. denied,* 404 U.S. 991 (1971); *Polston* v. *Metropolitan Life Ins. Co.,* 11 FEP Cases 380, 387 (USDCWDKy, 1975).

**D. Title VII legislative history—intent to prohibit discrimination against women because of physiology**

The House Report on the bill which amended Title VII in 1972 stated.[35]

> "Despite the efforts of the courts and the Commission discrimination against women continues to be widespread, and is regarded by many as either morally or *physiologically* justifiable." (Emphasis supplied)

This concern over the continued discrimination against women because of their physiology was relied upon by Congress in its enactment of the 1972 amendments.

**E. Equal Rights Amendment legislative history**

Congress rejected by a roll call vote the amendment offered by Senator Erwin to exclude from the prohibi-

[35] H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 5 (1971) It is noted further that Congress had found many more complex aspects connected with sex discrimination than had been guessed before passage of the original Act. *Id.,* at 8.



tions of unequal treatment in the proposed Equal Rights Amendment "distinctions * * * based on physiological or fundamental differences between males and females." (118 Cong. Rec. 9537-9538). In the context of the debate in which opponents of the Equal Rights Amendment objected to its impact upon certain laws respecting maternity and supporters viewed this effect as desirable (Gilbert original brief, pp. 138-139), the rejection of the Erwin amendment takes on added meaning. And that added meaning is that Congress viewed discrimination because of sex as embracing discrimination because of pregnancy.

**F. HEW Regulations on non-discrimination because of sex in education under Title IX**

As set forth in our main brief (Gilbert original brief, pp. 129-130), Congressional intent here relevant is found in the approval of the Sex Discrimination Guidelines, 40 Fed. Reg. 241.44, 45 C.F.R. par. 86.57, by the Department of Health, Education and Welfare under Title IX of the Civil Rights Act of 1972, 86 Stat. 373, as amended, 20 U.S.C. (Supp. IV) 1681. The statutory authority under which the HEW Guidelines were issued provides in pertinent part that (20 U.S.C. (Supp II) 1681(a)):

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program activity receiving Federal financial assistance * * *."

The HEW Guidelines are the same as the EEOC Guidelines in all respects here material. Section

86.57(c) of the Regulations (40 Fed. Reg. 24144) adopted to implement this provision specifically states:

> "(c) *Pregnancy as temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment."

They were promulgated at the direction of Congress, see Title IX of the Education Amendments of 1972, 20 U.S.C. (Supp. II) 1681, and signed by the President. If the HEW guideline was in conflict with Congressional intent, Congress had the opportunity to so indicate by withholding its approval of the HEW guideline, for, in the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484, Congress required that any regulations implementing Title IX be submitted to both Houses for a review period of forty-five days prior to their implementation. The HEW guidelines were so submitted to Congress for approval. The pregnancy regulations were brought to the attention of the Senate by Senator Helms (121 Cong. Rec. S9714-9715 (daily ed. June 5, 1975)) and a resolution of disapproval was introduced by him, but no action was taken on the resolution.

This is further firm support for a holding that the EEOC guidelines represent the Congressional intent as to the applicability of Title VII to discrimination because of pregnancy.



## IV.

**It constitutes prohibited discrimination because of sex to deny pregnancy-related disability benefits on the ground that the average incidence and length of disability of a female employee, even without the inclusion of time lost due to pregnancy-related disabilities, exceeds that of a male employee.**

GE asserts that sickness and accident benefits are utilized more frequently by women than by men under the existing GE disability benefit program. GE contends that it is therefore justified in denying pregnancy coverage because inclusion would increase the imbalance and unduly favor women.

### A. The district court properly found that GE's evidence failed to establish that its average female employee received larger benefits from GE's existing benefit plan without pregnancy coverage than the average male

The district court found that GE relied upon the allegedly greater utilization by women as a reason for denying coverage to pregnancy related disabilities (Jt. App. 24a), but that GE had failed to prove that there was in fact greater utilization (Jt. App. 31a-32a). The district court stated (Jt. App. 31a-32a):

> "While it may * * * be theoretically argued that the adding of benefits for disabilities to which only women are subject, and which as a consequence increases their compensation, represents a discriminatory practice against men, such an argument must fail for the lack of evidentiary support."

Similarly the court stated (Jt. App. 31a):

> "[T]he Court gives no weight to the suggestion that the actuarial value of the coverage now pro-

vided is equalized as between men and women. Defenses must be bottomed on evidence, and such, in this regard, is lacking here."

In the same vein the court stated (Jt. App. 32a):

> "Simply stated it would have to be shown that absent pregnancy disability provisions, the effects of the balance of defendant's disability program were in fact equalized. Merely showing, as G.E. has, that in two previous years the coverage given women's per capita disabilities has cost somewhat more is insufficient especially in light of the myriad of factors which might have and undoubtedly did contribute to such a result."

GE's presentation to this Court of the New York State Department of Insurance Study, irrespective of how that study is evaluated (it contains much more comprehensive Social Security Department figures showing just the opposite of the figures compiled by New York with respect to incidence of disabilities between males and females, see Table 11), cannot properly serve to bolster up the evidential deficiencies of the record which GE made in the district court in this case. Figures as to the experience of insurance companies under individual disability benefit policies would not, even if introduced in the district court, have served as an adequate substitute for the evidence of GE experience over the years. And certainly such record supplementation cannot be made in this Court.

**B. Even if unequal utilization occurred, application of sex averages to deny benefits constitutes a classification because of sex in violation of Section 703(a)(2) of Title VII**

If it is assumed as a fact that either GE's female employees or women generally have a greater incidence of work disability than men, to deny women



disability benefits on this basis violates the fundamental principle of non-discrimination requiring individual rather than group treatment. The premise of GE's argument is that women would properly be entitled to disability benefits for time lost due to pregnancy disability if women as a group did not have more loss of time due to disability than men.

But any given woman who applies for disability benefits for a pregnancy related disability may never have had any other days of disability in a long work history. To hold that all men may recover disability for all disabilities because men as a group have fewer disabilities but to deny a woman pregnancy benefits on the basis that women as a group already have more days of disability than males is to prejudice that woman simply because she is a member of a group that has extensive disability.

Illustrations of the way in which GE's theory discriminates help clarify the principle involved. Mary Jones is pregnant and hemorrhaging. She continues to work because she cannot afford to have her only source of income, her pay check, cease. She feels weak and worries that continued work may endanger her life or that she may lose the baby which she is anxious to have. She has worked for GE for 10 years and personally has never had a day of disability previously. But on GE's theory she is not entitled to go home and draw disability benefits because other women had had large numbers of disability absences. John Smith who works next to her has drawn 26 weeks disability benefits a year for the past 10 years. He too begins to bleed. It is from an ulcer. He is free to stop work and go home assured of a continuance of 60 per cent of his wages.

The principle that the policy of nondiscrimination bars all use of sex averaging as a factor in awarding pay or fringe benefits was embodied by the Wage-Hour Administrator in his original Interpretation Bulletin 29 C.F.R. 800.151, Feb. 11, 1966, 31 FR 2657, issued under the Equal Pay Act, 29 USC 206(d). This Bulletin reads:

> "Section 800.151.
>
> Section 800.151.—Examples—employment cost factors.
>
> A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

For a case applying this principle under the Equal Pay Act see *Wirtz* v. *Midwest Mfg. Co.,* 18 WH Cases 556 (U.S.D.C.S.D. Ill. 1968).



For an application of this principle to hold that an employer violated Title VII by paying females lower disability benefits than males because females had a greater incidence of disability see *Taylor* v. *Goodyear Tire & Rubber Co.,* 5 EPD ¶ 85451 USDCND Ala. 1972), quoted Gilbert brief p. 152.

The principle that sex averaging violates Title VII has likewise been applied to reject the defense of greater female longevity when advanced by an employer as a justification for paying females lower pensions than males, *Henderson* v. *State of Oregon,* 11 FEP Cases 1218 (D. Ore. 1975), and for charging females higher contributions than males for equal pension benefits. *Manhart* v. *City of Los Angeles,* 387 F. Supp. 980 (C.D. Calif. 1975) pending an appeal to the 9th Cir., Docket Nos. 75-2729, 75-2807 and 75-2905. The district court in Manhart stated the principle as follows (387 F. Supp. at 980):

> In passing Title VII, Congress established a policy that each person must be treated as an individual and not on the basis of characteristics generally and often falsely, attributed to any racial, religious, or sex group. In short, under the Equal Employment Opportunity Act of 1972, all stereotype treatment of persons based on race, religion, or sex whether rational or irrational is dead. Because the Department of Water and Power's practice in question here violates these considerations by applying the general actuarial characteristic of female longevity to individual female employees who in reality may or may not outlive individual male employees, the court concludes that plaintiffs have established a case of discrimination under § 703(a)(1) of the Equal Employment Opportunity Act.

The district court in *Manhart* quoted with approval from a Harvard Law Review Comment, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 64 Harv. L. Rev. 1199, 1174, as follows:

> "Title VII, in the field of employment, requires evaluation on an individual basis rather than a prediction made on the basis of a sex-defined group" * * *
>
> "Title VII focuses on presenting each employee in an individual light, free from conclusions that may be drawn from the individual's membership in one sex or the other."

In *Henderson* v. *State of Oregon, supra,* 11 FEP Cases at 1221, n. 5, the district court noted that 84 per cent of men and women die at the same age. Thus, although women as a class live longer, the substantial majority of men and women do die at the same age. Concepts as to what women generally do cannot, under Title VII, be used as a basis for treating all women as within that generality. As the Ninth Circuit recognized in *Rosenfeld* v. *Southern Pacific Co.,* 444 F.2d 1219, 1225 (9th Cir. 1971), Congress, in enacting Title VII, established the policy that "individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious, or sex groups."

The courts have consistently held that even though it may be generally true that women as a class ("on the average") are less strong than men as a class and therefore fewer women than men may be able to lift a given weight, individual women cannot be penalized by excluding all women from a particular job requiring such lifting. E.g., *Rosenfeld* v. *Southern Pacific Co., supra; Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d



711 (7th Cir. 1969). See also *Diaz* v. *Pan American World Airways, Inc.,* 442 F.2d 385, 388 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971), where the court noted that the employer "cannot exclude *all* males [from the job of flight attendant] simply because *most* males may not perform adequately." (emphasis in original). So here the fact that women as a class may have more days of disability than men as a class does not justify denying them disability benefits for periods of disability related to pregnancy.

It is of course impossible to determine if any particular individual female will have any disability days. When a female employee who has no disability days or less than average disability days is denied benefits for pregnancy disabilities, while males with many more disability days receive benefits for any disability, and her denial is based on the disability days of other women, she is penalized by attributing to her the general characteristics of women as a class.

**C. Where sex discrimination is in any part a factor in an employer's denial of a benefit of employment, the employer has violated Title VII.**

GE in the district court explained its denial of disability benefits for pregnancy-related disabilities as justified by the allegedly greater average cost of disability benefits for females as computed by averaging the cost for all females and comparing it with a similar average cost for males. Whatever other factors may have entered into GE's decision not to cover pregnancy-related disabilities, the fact that sex averaging principles entered into GE's decision establishes a violation of Title VII. Congress explicitly rejected proposed amendments to Title VII which would have limited its prohibition against discrimination to instances

where the discrimination was based "solely" on sex. 110 Cong. Rec. 13837-38 (June 15, 1964).

GE contends (II App. 600-601, III App. 879) that many women, allegedly 40 per cent, did not return to work for GE following maternity leave in 1970 and 1971 (See Gilbert original Brief p. 91 for the defect in these figures).[36] Such contention similarly involves prohibited "sex averaging". The 60 per cent of the women who do return should not be penalized because they are members of a sex defined group of whom 40 per cent do not return.[37] The Third Circuit in *Wetzel,* 511 F.2d 199, 208, stated:

> "The legal standard articulated by the EEOC requires that women be considered on an individual basis on their own particular capabilities and not on 'characteristics generally attributed to the group.' 29 C.F.R. § 1604.2(a)(1)(ii). A policy, therefore, that is founded on generalizations, such as most women after giving birth * * * do not return to work after giving birth, is discriminatory because it makes no provision for considering individual capabilities."

[36] Xerox Corporation has had a striking increase in rate of return following inclusion of pregnancy-related disabilities under its disability benefits plan which was described in Gilbert Original Brief, Appendix S, pp. 76a-91a. The rate of return in 1973 was 46 per cent, 1974, 59 per cent, 1975, 69 per cent. See Appendix P, p. 25a, infra. During the hearings before Congress in 1946 which led to inclusion of pregnancy disabilities in the original railroad disability benefits program, supporters of the bill had testified it would benefit employers by reducing turnover. See testimony quoted, pp. 27-28, supra.

[37] See *Polston* v. *Metropolitan Life Ins. Co.,* 11 FEP Cases 380, 388 (USDCWD Ky. 1975) where the court noted the employer's contention that:

> "730 women employees of the defendant will become pregnant each year and * * * probably 30 percent of them will not return to their employment at the company, but will receive disability benefits, and hence will be unjustly enriched in this way at the expense of other employees. This argument seems to be a combination of a reverse discrimination argument and a cost argument, but whatever it may be, it has no merit in the context of a Title VII case.
>
> "Other employees who receive disability benefits can terminate their employment also if they wish to and receive the same benefits as well as the members of the plaintiff's class."



**D. The study of the New York State Life Insurance Department does not justify an assumption that females employed by GE or that females generally have a greater incidence or duration of disability than similarly situated males.**

The study of the New York State Life Insurance Department,[38] hereinafter called New York Study, sets forth as Table 11, Social Security Disability Experience which shows a markedly higher incidence rate for males than for females in every age group and a ratio of female claim cost to male claim cost showing higher male cost in five out of nine ages, with only slightly higher costs for females in age groups 32-47. This table is as follows (New York Study, p. 22):

[38] State of New York, Department of Insurance, Disability Income Insurance Differentials Between Men and Women, June 1976.

TABLE 11

*Social Security Disability Experience—All Occupations*

Incidence Rates, Annuity Values, and Net Single Premiums Based on 2.50% Interest and Experience of the Disability Insurance Program

| | Male | | | Female | | | |
|---|---|---|---|---|---|---|---|
| Central Age | Incidence Rate Per 1,000 [a] | Annuity Value $1,000/Yr. [b] | Net Single Premium (Claims Cost) Per $1,000 [c] | Incidence Rate Per 1,000 [a] | Annuity Value $1,000/Yr. [b] | Net Single Premium (Claims Cost) Per $1,000 [c] | Ratio Female Claim Cost/Male Claim Cost |
| 22 | 1.460 | $12,834 | $ 18.74 | 0.600 | $16,365 | $ 9.32 | 0.50 |
| 27 | 1.750 | 12,747 | 22.31 | 1.080 | 15,883 | 17.15 | 0.77 |
| 32 | 2.320 | 12,131 | 28.14 | 1.980 | 15,032 | 29.76 | 1.06 |
| 37 | 3.390 | 11,299 | 38.30 | 3.120 | 13,866 | 43.26 | 1.13 |
| 42 | 4.990 | 10,437 | 52.08 | 4.460 | 12,426 | 55.42 | 1.06 |
| 47 | 7.830 | 9,302 | 72.84 | 6,810 | 10,836 | 73.80 | 1.01 |
| 52 | 13.020 | 7,783 | 101.34 | 11.150 | 8,843 | 98.61 | 0.97 |
| 57 | 23.090 | 5,649 | 130.45 | 18,660 | 6,113 | 114.09 | 0.87 |
| 62 | 32.990 | 2,360 | 77.88 | 19.740 | 2,368 | 46.75 | 0.60 |

Source: Office of the Actuary, Social Security Administration, March 26, 1976.

[a] The incidence rates are based on estimated experience through 1975.

[b] The annuity value represents the present value of a continuous annuity to someone who becomes disabled at age X, has a 6.5 month waiting period, and receives payments until attainment of age 65. The 6.5 month waiting period represents the nominal five month-elimination period plus an average lag of 1.5 months before payments actually commence. The termination rates used in the calculation of the annuity values are based on 1968-74 experience.

[c] The net single premium is for a one year non-renewable term disability policy.





The New York Study explains the difference between the disabilities tabulated in the New York Study and that tabulated in the Social Security Study (p. 21):

> "The Social Security coverage is of a universal nature insuring almost the entire workforce, regardless of other disability coverage. Those persons covered by private insurance companies are selected risks who do not regard themselves as adequately insured for loss of income by government programs."

We believe that this explanation makes it apparent that the figures collected by the Social Security Study have much greater validity than those of the New York Study. Indeed, it seems evident from examining the figures collected by the New York Study from private insurance companies that the New York Study suffers from the same defect which this New York Study attributes to earlier data, namely that "the available experience data on insured lives was limited and often inconclusive" because of a "scarcity of claims experience data on disability income insurance coverage for women" attributable in part "to the past reluctance or refusal of insurers to sell this type of coverage to women" (*id.*, p. 2). The continued failure of insurance companies to write individual policies for women is strongly suggested by the low number of claims by women reported by many of the large national companies surveyed. Of the 21 companies surveyed one third had less than 500 claims apiece by women. These seven companies and the number of claims respectively reported are (*id.*, p. 31):

| | |
|---|---|
| Continental Insurance Company | 28 |
| Provident Mutual Life Insurance Company of Philadelphia | 142 |
| Grading Life Insurance Company | 190 |
| Continental Assurance Company | 232 |
| Massachusetts Casualty Insurance Company | 358 |
| Continental Casualty Company | 378 |
| Union Mutual Life Insurance Company | 464 |

Nowhere in the New York Study is there any indication of the number of male claims on which the data is based. The study compares cost of male and female, but does not disclose any cost figures for males, merely giving the cost for females allegedly computed on the same basis as male costs.

The data collected from insurance companies related only to the experience under individual policies. This is in accord with the purpose of the New York Study to establish regulations governing rates for individual policies. But in view of the historical efforts of insurance companies to sell as many policies to males as possible but to sell as few as possible to females, the female who succeeds in getting a policy, despite insurance company reluctance, represents a person who feels a much greater need for the policy than most of the males who succumb to the blandishments of the insurance salesmen.



The New York Study showed a significantly lower rate of continuation of claims of females into the second benefit year than of claims of men (*id.*, p. 16):

TABLE 7

*Continuation of Claims Through the End of Second Benefit Year* [a]

*Occupation Class I*

| Attained Age | Percent of Second Year Claims Continuing to End of Year | |
|---|---|---|
| | Male | Female |
| 20-39 | 46.6 | 37.1 |
| 40-49 | 52.1 | 46.8 |
| 50-59 | 62.7 | 47.2 |
| 60-69 | 63.9 | 62.2 |

[a] See Appendix K for detailed table from which this summary table was drawn.

**E. Other data showing higher incidence and duration for males than for females of work time lost due to disability require the conclusion that there is no difference between males and females in this respect.**

In addition to the experience of the Social Security Administration (see pp. 45-47, *supra*), data collected by various other responsible sources establish that there is no overall consistent pattern of higher incidence of work loss due to disability for females than for males.

A recently issued analysis prepared by the Metropolitan Life Insurance Company, based on the 1970 census, concluded that in every age group and every occupation women lost less time from work due to disability than men. The Metropolitan Life Statistical Bulletin, November 1975, p. 11, states:

> In every age and occupation group, fewer women reported work disability than did men; the rates ranged from approximately 20 percent less in the

case of craft workers to nearly 60 percent less for clerical workers. For all employed persons as a group, women registered a disability rate of 55 per 1,000, or about 35 percent below the 85 per 1,000 recorded by men.

The Bulletin summarizes sex differences by age and occupation as follows (pp. 9-11):

> Among males in 1970, the lowest rate of work disability was found among white collar workers—77 per 1,000—or about 10 percent less than the 85 per 1,000 recorded for all employed men as a group. Work disability rates were 84 per 1,000 among blue collar workers, 115 per 1,000 among service workers, and 121 per 1,000 among farm workers. Among women, work disability rates ranged from 43 per 1,000 among white collar workers to 85 per 1,000 among farm workers. The rate for all employed women as a group was 55 per 1,000. (See table.)
>
> In the white collar occupations, professional and technical workers had the most favorable record, with work disability rates of 61 per 1,000 for men and 38 per 1,000 for women. The poorest record for those in white collar occupations was found among males in clerical occupations and among females in sales positions. Of the blue collar workers, craftsmen had the lowest rates—78 per 1,000 for men and 63 per 1,000 for women—while laborers had the highest work disability rates.
>
> * * *
>
> The rates for men rose from 62 per 1,000 at ages 18-44 to 147 per 1,000 at ages 55-64, while the rates for women increased from 39 to 97 per 1,000.

The accompanying table, to which reference was made in the above quotation, is as follows (p. 10):



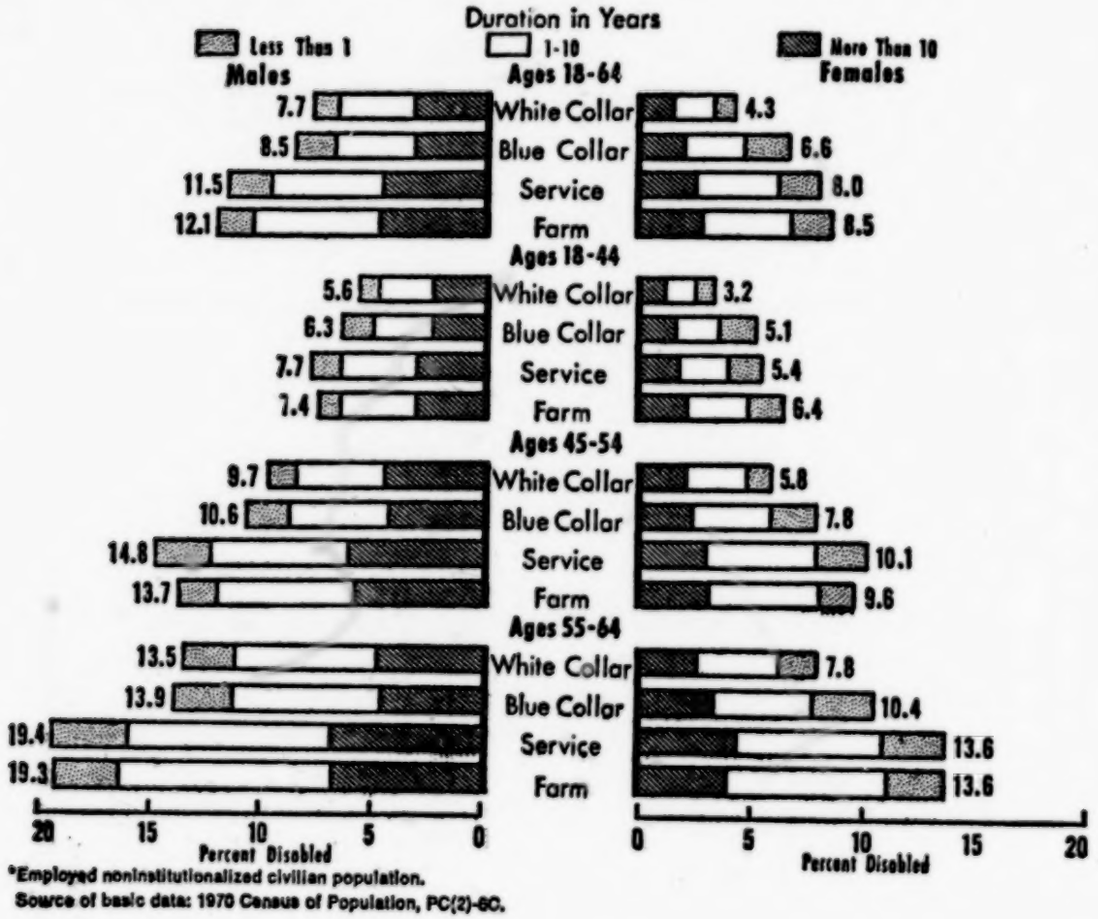
WORK DISABILITY BY OCCUPATION
United States, April 1970
Number of Persons Disabled per 1,000

| Occupation Group and Race | Males at Ages | | | Females at Ages | | | |
|---|---|---|---|---|---|---|---|
| | 18-64 | 18-44 | 45-54 | 55-64 | 18-64 | 18-44 | 45-54 | 55-64 |
| All Employed Civilians | 84.9 | 61.5 | 106.8 | 146.7 | 54.8 | 39.0 | 70.8 | 97.4 |
| White | 85.1 | 61.3 | 107.0 | 146.6 | 52.2 | 36.8 | 67.0 | 92.6 |
| Negro | 84.6 | 63.9 | 106.8 | 150.9 | 74.8 | 54.3 | 104.5 | 141.6 |
| Spanish origin | 83.8 | 68.2 | 116.0 | 149.5 | 64.7 | 53.3 | 91.0 | 124.8 |
| White Collar Workers | 76.7 | 55.8 | 97.5 | 135.4 | 43.3 | 31.6 | 57.8 | 78.0 |
| Professional and technical workers | 61.1 | 48.2 | 81.6 | 108.7 | 37.5 | 27.2 | 52.4 | 66.2 |
| Managers and administrators, except farm | 77.2 | 52.2 | 90.2 | 129.9 | 55.5 | 37.1 | 63.7 | 82.4 |
| Sales workers | 88.6 | 61.5 | 113.1 | 157.8 | 60.7 | 41.8 | 72.8 | 97.9 |
| Clerical workers | 95.3 | 71.4 | 126.0 | 163.0 | 41.3 | 31.6 | 55.4 | 77.0 |
| White | 77.2 | 56.0 | 97.7 | 135.6 | 43.9 | 30.7 | 57.1 | 77.3 |
| Negro | 69.9 | 55.4 | 99.3 | 132.0 | 48.7 | 40.6 | 73.6 | 97.5 |
| Spanish origin | 75.9 | 60.6 | 113.2 | 151.1 | 49.1 | 41.1 | 71.5 | 113.3 |
| Blue Collar Workers | 84.2 | 63.4 | 106.1 | 139.3 | 65.7 | 51.0 | 77.7 | 103.7 |
| Craftsmen | 77.8 | 55.4 | 97.6 | 132.1 | 62.9 | 48.7 | 74.8 | 93.4 |
| Operatives | 87.0 | 67.3 | 110.6 | 145.9 | 65.6 | 50.7 | 77.3 | 104.8 |
| Laborers, except farm | 97.7 | 76.1 | 129.0 | 158.0 | 73.6 | 60.0 | 91.2 | 108.6 |
| White | 84.7 | 63.3 | 107.0 | 139.4 | 65.0 | 49.8 | 75.6 | 101.5 |
| Negro | 81.0 | 63.3 | 99.4 | 141.9 | 71.0 | 57.0 | 99.1 | 133.3 |
| Spanish origin | 82.5 | 69.5 | 110.5 | 142.4 | 77.8 | 66.6 | 102.9 | 121.9 |
| Service Workers | 115.2 | 76.6 | 147.1 | 193.4 | 80.3 | 54.1 | 100.4 | 135.5 |
| White | 117.3 | 76.7 | 152.1 | 198.9 | 74.4 | 49.3 | 92.9 | 128.7 |
| Negro | 109.0 | 76.7 | 131.9 | 174.4 | 98.8 | 68.8 | 120.2 | 155.3 |
| Spanish origin | 103.9 | 82.2 | 138.5 | 165.3 | 76.3 | 59.8 | 100.9 | 136.4 |
| Farm Workers | 120.7 | 74.4 | 137.1 | 192.8 | 85.2 | 64.5 | 95.7 | 136.0 |
| White | 121.0 | 74.1 | 136.5 | 194.2 | 82.2 | 59.8 | 91.5 | 129.6 |
| Negro | 118.5 | 78.1 | 145.2 | 184.9 | 102.7 | 78.7 | 125.6 | 173.0 |
| Spanish origin | 91.1 | 63.5 | 131.9 | 157.2 | 75.6 | 66.9 | 77.5 | 159.7 |

Note: Excludes inmates of institutions.
Source of basic data: 1970 Census of Population, PC(2)-6C.

An accompanying bar graph is as follows (p. 11):

DURATION OF WORK DISABILITY BY OCCUPATION, UNITED STATES, 1970 *




*Employed noninstitutionalized civilian population.
Source of basic data: 1970 Census of Population, PC(2)-6C.



**F. To the extent that statistics show that females as compared with males have a higher loss of time at work due to disability, these statistics fail to reflect that males in the same low pay categories as females have a higher disability time work loss.**

There is a much wider disparity in extent of time lost due to disability by males in the lower pay brackets as compared with males in the higher pay brackets than the disparity between the sexes. In the main brief for Gilbert, pp. 148-150, we quoted and set forth tables from the studies of the experience under the California and New Jersey disability benefits statutes which showed a greater relation in days disabled by wage than by sex. Statistics included in the report on Time Lost From Work Among the Currently Employed Population, United States—1968, show that males with incomes of less than $3,000 lose 7.6 days from work as compared with 3.9 days for males with incomes of $15,000 or more.[39] The detailed analysis is as follows:

[39] U.S. Dept. of Health, Education and Welfare, Public Health Service, Health Services and Mental Health Administration, Vital Health Statistics, Series 10—Number 71, Series 3 (GPO 1972), p. 15.

TABLE 3. *Days lost from work and days lost from work per currently employed person per year, by family income, sex and age: United States, 1968*

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in appendix I. Definitions of terms are given in appendix II]

| Sex and age | All incomes [1] | Less than $3,000 | $3,000-$4,999 | $5,000-$6,999 | $7,000-$9,999 | $10,000-$14,999 | $15,000 or more |
|---|---|---|---|---|---|---|---|
| | Days lost from work per currently employed person per year | | | | | | |
| *Male* | | | | | | | |
| All ages 17 years and over | 5.2 | 7.6 | 7.0 | 5.3 | 5.3 | 4.2 | 3.9 |
| 17-24 years | 4.6 | 4.2 | 5.1 | 4.4 | 5.2 | 5.6 | 2.5 |
| 25-44 years | 4.3 | 6.2 | 6.0 | 5.1 | 4.6 | 3.0 | 3.0 |
| 45-64 years | 6.4 | 11.9 | 10.0 | 5.9 | 6.6 | 5.3 | 4.9 |
| 65 years and over | 5.5 | 7.1 | 6.0 | 7.2 | * | * | * |
| *Female* | | | | | | | |
| All ages 17 years and over | 5.9 | 6.4 | 6.7 | 6.1 | 5.4 | 5.6 | 5.4 |
| 17-24 years | 5.1 | 4.3 | 6.1 | 6.0 | 4.5 | 5.8 | 4.4 |
| 25-44 years | 6.0 | 9.7 | 6.4 | 6.3 | 5.7 | 4.9 | 5.4 |
| 45-64 years | 6.2 | 5.8 | 7.4 | 6.0 | 5.7 | 6.1 | 6.1 |
| 65 years and over | 6.5 | 6.0 | * | * | * | * | * |

[1] Includes unknown income.





The GE experience in 1970 and 1971 in terms of days disabled for claimant for disability benefits was 48 days for males as compared with 52 days for females in 1970, and 47 days for males as compared with 52 days for females in 1971 (I App. 244). In terms of length of disability these figures are so close that they can be regarded as showing no difference in duration. The comparable rate of incidence fluctuated widely between 1970 and 1971 and affords firm support for the district court's holding that these figures do not constitute a basis for finding that the cost of women's per capital disability was somewhat more than the males' per capita disability. (Jt. App. 32a). The number of new male claims in 1970 was 77 as compared with 99 female, in 1971 was 173 as compared with 217 female (I App. 244). The stipulated exhibit showing comparative male-female distribution in pay brackets as of December 1972, showed 43 per cent of GE's female employees below the entry level common labor grade for male employees, as compared with 6 per cent of GE's male employees (I App. 177-178, III App. 883-953). The 6 per cent of GE males in labor grades below the entry level common labor grade for males is due to male employees bumping back into traditionally female jobs rather than taking a layoff and to newly hired males who had not progressed to the entry level grade. The average pay of the GE male employee in 1973 at straight time rates was $9,200 as compared with $7,750 for females (II App. 608-609). This evidence warrants the conclusion that any higher per capita cost for disability benefits for the average female employee of GE figured by sex averaging as GE has done in computing cost (I App. 244) is the result of the disproportionate number of women in low paying jobs rather than a result of physiological sex differences.

**G. If averaging of costs by sex is in any respect relevant, the averaging should cover all fringe benefits and not merely disability benefits.**

There are numerous fringe benefits as to which the cost, calculated by GE's method of sex averaging, would be much higher for the male per capita than for the female. The most obvious instance is life insurance, where premiums for female policies are higher than for male policies because of the greater average longevity of females. Likewise with the "military pay differential" and the "military duty allowance" (I App. 208, III App. 872, 974, 975, 979, III App. 1051-1052, IV App. 1942), if the total cost for all male employees is averaged among all males and the total cost for all female employees is averaged among all female employees, the figure for males will greatly exceed that for females. The record here does not contain the data from which these averages could be furnished. The plaintiffs at the inception of the suit propounded interrogatories to GE seeking to obtain the annual cost for each of the preceding five years of all fringe benefits for all employees by sex and the average cost per employee by sex (I App. 209-210, Interrogatory 37) but GE objected on the ground of relevancy (I App. 297), failed to supply the information, and the plaintiffs did not move to compel answers.

If the extent to which the cost to employers for one sex compared with the other has any relevance to the failure of an employer to pay disability benefits for pregnancy-related disabilities, there would seem to be no basis for basing a claim of the equality of present benefits by looking at only the cost of disability benefits to the exclusion of the comparative cost of all fringe benefits.



**H. Payment by GE of disability benefits for pregnancy-related disabilities would merely equalize the per capita costs to GE of reproduction by female employees as compared with male employees.**

If sex averaging by the method proposed by GE were relevant to a determination of whether the payment of disability benefits for pregnancy-related disabilities would equalize or create an imbalance between benefits for male and female employees, it would be logical to figure the sex averages of the cost to GE of reproduction by male as compared with female employee. In 1971 GE paid hospital and medical expenses for 2,772 pregnancies by female employees, 10,279 pregnancies by wives of male employees (I App. 237, answer of GE to Interrogatory No. 36). In 1971 GE had 224,192 male employees, 84,056 female employees (I App. 236, answer of GE to Interrogatory No. 33). This amounts to 45 babies for 1,000 male employees, 32 babies for 1,000 female employees or 1⅓ more babies per male than female.

The record here does not show the cost to GE of hospital and medical expenses for pregnancy. The plaintiffs sought this information from GE by interrogatory, but GE answered that the data was not available (I App. 237). Accordingly, plaintiffs have gone outside the record to obtain information as to the cost of hospital and medical expenses for delivery period as to which the record supplies data as to number of births and average rate of disability payments. Frederick S. Jaffe, vice president of the Planned Parenthood Federation of America, testified in Hearing on National Health Insurance before the Committee on Ways and Means, U.S. House of Representatives, 93rd Cong., 2d Sess., June 28, 1974, vol. 7, p.

3158, that a study he conducted together with Professor Charlotte Muller of City University of New York showed the average cost of physicians' and hospital services for a healthy live birth in 1970-1971 was $1118. Engaging in the kind of sex averaging which GE has used to compare average disability cost per female with disability costs per male and using the above figure of $1118, physicians and hospital costs per male employee in 1971 would be $51.25, per female employee $36.75.

Thus, in 1971, GE by hiring females, saved $14.50 per female on physicians and hospital benefits for pregnancy because the birth rate of its female employee was lower than for its male employees.

The district court found that "absent complications, there is no medical reason for not allowing a woman to work to the day before delivery or for limiting her activities prior to delivery" (Jt. Pet. 19a) and that "The medical rule of thumb is that six weeks are required for recuperation from delivery." (Jt. Pet. 19a). Where there are complications the disability is due to a sickness or accident—a disease—and the payment of disability benefits can in no sense be regarded as for normal pregnancy rather than the accepted sickness and accident. We thus believe for making this comparison a six weeks figure is appropriate.

In 1971 the average sickness and accident benefits cost GE $9.97 per day or $69.79 per week per female employee, if figured by averaging only costs of females (I App. 227-228, 260, answer of GE to Interrogatory 75). The cost of six weeks' disability benefits $418.24) per female on a per capita basis (using total female employees to figure per capita) would cost GE $13.78



for each female employee. If GE paid disability benefits to female employees for pregnancy and child birth disability, the total cost per female of physician, hospital and disability benefits would have been $50.53 in 1971, or 72 cents less than the cost of hospital and physician benefits alone per male employee for each child his wife bore him.

We believe these figures emphasize the fairness of paying disability benefits to female employees who are disabled by pregnancy and child birth and establish that GE's concern about inequality or disbalance between males and females (GE Supplemental Br., pp. 17-25) is factually as well as legally unsupportable.

**I. If sex averaging or balancing of benefits between the sexes viewed as two separate groups were under any circumstances consistent with non-discrimination, the complete omission of pregnancy disabilities would still not be.**

We do not believe this case requires this Court to decide the issue now pending before the Ninth Circuit in the *Manhart* and *Henderson* cases (see pp. 40-41, *supra*), whether both costs and benefits must be equal. We believe that issue arises only in cases of insurance plans or pensions where costs and benefits are computed on an actuarial basis. While we believe that imposing on employees either unequal costs when benefits are equal or unequal benefits when costs are equal violates the right of each individual employee to be treated equally with each individual employee of the opposite sex without attributing to either the benefits or detriments of an average based on one sex as a group, this case does not present a plan with equal benefits at unequal cost to the employees or a plan with equal cost but unequal benefit. The exception to full equality which has been applied by the Wage and Hour

Administrator of the Equal Pay Act 29 USC 206(d) by the Department of Labor, Interpretive Bulletin, 29 USC § 800.116(d), quoted in GE reply brief p. 15, Section 800.116 is inconsistent with the Department of Labor's ban on sex averaging stated in Section 800.151, 29 CFR § 800.151, quoted pp. 39-40, *supra*. The Department of Labor is reconsidering this regulation in light of its conflict with the EEOC's Sex Discrimination Guidelines, 38 Fed. Reg. 35336, 35337 (December 27, 1973)[40].

However, this exception to the ban on sex averaging has been strictly limited to cases involving insurance where the dollar and cents premiums due were unequal for the equal dollar and cents benefits or the dollar and costs benefits were unequal for the equal dollar and cents premiums. It has never been applied to excluding a type of coverage and then characterizing the benefits as equal.

[40] See statement in Brief of United States Equal Employment Opportunity Commission As Amicus Curiae in *Manhart* v. *City of Los Angeles*, 9th Cir. Cases has 75-2729, 75-2807, 75-2905, at p. 28.



## V.

## GE's Policy, and the Policy of the Insurance Industry to the Extent That GE Followed It, Are Based on Stereotyped Concepts About the Propensity of Females to Malinger Which the Court Below Found Untrue. An Employment Practice Grounded on Sex Stereotypes Constitutes Prohibited Discrimination Because of Sex and Supports the Finding Below of Invidious Motivation

Before addressing ourselves to GE's heavy reliance upon alleged insurance practice, we wish again to remind the Court, as is more fully set out in our earlier brief (Gilbert original brief pp. 16-17), that there is no insurance involved in this case. GE has not insured any of its undertaking to its employees to provide them income when they are disabled from work by sickness or accident (I App. 175-176, 211, 218-219, 241). Nor does GE follow actuarial principles in its maintenance of income for its employees during periods when they are disabled. Thus GE's reliance on alleged insurance practice is by way of analogy only.

### A. Because of court decisions dating back a century holding that disabilities from childbirth constitute sickness, such disabilities are within the coverage of sickness in insurance policies unless expressly excluded.

Judicial precedent for the meaning of the word "sickness" as applied to the period a woman is disabled by childbirth dates back to *Queen* v. *Wellings*, 3 Q.B. Div. 426 (The Law Reports 1877-1878). There the deposition of the principal witness in a rape case was offered. Under the statute (11 & 12 Vict. C. 42, S. 17(1)), the deposition could only be admitted if the witness was "so ill as not to be able to travel". There was no medical evidence introduced. The husband of

the principal witness reported his wife was momentarily expecting to deliver. The argument for the prisoner was the same as the principal defense in the answer filed by GE in this case, which states, "Pregnancy and resulting childbirth are neither sicknesses or the result of accidents; they are rather normal physiologic functions" (I App. 33). The report of the case quotes the following as argument of counsel for the prisoner:

> "The case shows that nothing except pregnancy operated to prevent the deponent from attending the trial. Pregnancy is not an illness or disease, but a natural condition; therefore, although the witness may have in fact been unable to travel, such inability was not within the statute."

The decision of Lord Coleridge is reported as follows (at 428):

> "We all think this conviction should be affirmed. Pregnancy may be a source of such illness as to render the witness unable to travel and be an illness within the statute."

The above decision by Lord Coleridge was cited and followed in an early case involving the discharge of a school teacher for pregnancy. Under the statute she could not be discharged for an absence due to temporary illness. The court held the absence for pregnancy was an absence for a temporary illness and reinstated her. *People ex rel Peixotto* v. *Board of Education,* 82 Misc. 684, 144 N.Y. Supp. 87 (Sup. Ct. 1913), *rev'd.* on other grounds, 145 N.Y. Supp. 853 (App. Div. 1914). The Court stated (82 Misc. at 694, 144 N.Y. Supp. at 93):

> "It is pure sophistry to argue, as does the learned counsel for respondent in his brief, that maternity



> is an indication of health, and therefore cannot be said to cause 'serious personal illness'. The same argument was urged in the *Queen* v. *Wellings* (3 Queens Bench Division 426) by the counsel for the defendants in that case; but it was overruled by the Court of the Queen's Bench."

In view of these and other similar cases the insurance industry has drafted policies on the assumption that language which insures against losses due to sickness and accidents, whether by way of insurance against loss of income during disability or for hospital and physicians' bills, covers pregnancy-related disabilities unless expressly excluded. Similarly, GE in its Weekly Sickness and Accident Insurance Plan after assuring its employees that they would receive 60% of their income whenever they become disabled by sickness or accident (III App. 1064), in implied recognition of the fact that pregnancy-related disabilities would be covered unless excluded, wrote in an express exclusion (II App. 1066).

**B. The insurance industry has not regarded the exclusion of pregnancy-related disabilities as mandatory in disability income policies but rather optional.**

An examination of the technical literature in the field of insurance discloses that the insurance industry accepts the loss of income due to disabilities from pregnancy as an insurable risk which is properly included in a policy covering generally the risk of loss of income from sickness or accident. Exclusion of pregnancy-related disabilities is not regarded as an essential feature of a disability benefits policy. Rather it is regarded as an optional exclusion. Illustrative is

the following in the leading work on disability and health policies:[41]

> "Disability income policies customarily contain several of the following exceptions as to cause or circumstances of loss, although any of these except, perhaps, the first, may be omitted from any particular insurer's contracts:
>
> "1. War or act of work, whether declared or not.
>
> "2. Any period while the insured is in the armed forces of any country, usually coupled with a pro rata refund of premium for the period of service, and sometimes with a right to resume coverage after discharge.
>
> "3. An extended period of residence or travel abroad.
>
> * * *
>
> "4. Attempted suicide or intentionally self-inflicted injury.
>
> "5. Air travel, except as a fare-paying passenger.
>
> "6. Pregnancy, including resulting childbirth or miscarriage or complications thereof.
>
> "Some policies providing both sickness and accident coverage also list certain conditions which will be covered only under the sickness provisions of the contracts."

**C. The prevailing pattern in American industry is to provide disability benefits for pregnancy-related disabilities for six weeks.**

As set forth in our main brief (Gilbert original brief, pp. 52-53, 69) the prevailing pattern in American in-

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[41] Edwin L. Bartleson, Health Insurance Provided Through Individual Policies (published by The Society of Actuaries, 2d ed., 1961) pp. 21-22. The same optional exceptions are suggested with respect to policies covering medical expense benefits, see p. 40.



dustry is to include in temporary disability plans, coverage for pregnancy-related disabilities, the benefits to be paid in the same weekly sum as for other disabilities, but subject to a maximum duration shorter than for other disabilities, the usual maximum for pregnancy-related disabilities being six weeks, sometimes eight weeks. Sixty percent of the employees in the United States covered by disability policies have the six or eight weeks' coverage for pregnancy-related disabilities (Gilbert original brief, pp. 52-53, 69). Although the plaintiff IUE had over the years during negotiations called GE's attention to the practice of other employers in this regard, including GE's competitor GM, no change was made by GE in its refusal to pay any disability benefits for pregnancy-related disabilities (Gilbert original brief, pp. 54-55).

**D. The prevailing pattern in American industry in all fringe benefit programs, except those for pregnant employees, is to provide male and female employees equal benefits, either on a non-contributory basis or without differences in contribution based on sex.**

Ninety-five per cent of the employees in private industry are today under plans which provide all fringe benefits, except those related to pregnancy, equally to male and female employees.[42] This includes pensions,[43]

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[42] Hearings before the Office of Federal Contract Compliance, Employment Standards Administration of the U. S. Dept. of Labor, on OFCC Sex Discrimination Guidelines, Section 60.20.3(c), Washington, D. C., September 9, 1976, pp. 21-23, 25, 72-73. Pertinent excerpts are printed as Appendix B to this brief, pp. 6a-8a, *infra*.

[43] See U. S. Department of Labor, Bureau of Labor Statistics, Digest of Selected Pension Plans, 1973 ed., which summarizes the principal features of selected pension plans for office and non-

life insurance,[44] health and disability benefits.[45] Similarly, federal employees under the Civil Service Retirement System, the Federal Employee's Group Life Insurance Program and Health Benefits Program and most state employees receive sex neutral benefits.[46]

These plans use actuarial tables to figure costs but the tables are not used to affect either the contribution

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office employees in the private sector of the economy. The employers whose plans are digested are arranged alphabetically with several pages devoted to an analysis of each plan. The standard pattern in American industry is a retirement annuity computed by a formula based on years of service and earnings. This formula results in identical single annuity pensions for male and female employees with the same work experience. There have been two exceptions. The only exception now prevalent to any substantial degree is the joint survivor annuity option, when an employee elects an annuity for a surviving spouse. Under these plans the employee can elect a single annuity which is sex neutral. Only if the amount of that annuity, at the election of the employee, is used to purchase a survivor annuity, is the sex neutral principle abandoned and a sex actuarial table used. Hearings OFCC, September 9, 1976 Guidelines, pp. 21, 81-82. The second exception has been early retirement where a few plans permitted females to retire prior to the normal retirement age at full pension whereas males would be forced to take a reduced pension if they retired early. This early retirement for women at full pension is the reverse of actuarial principles. Male employees or their estates filing suits under Title VII as victims of discrimination because of sex under these plans have been uniformly successful. See the *Rosen, Chastang, Ugiansky, Mixson* and *American Finance* cases cited fn. 19, pp. 21-22, *supra*. Most plans have now been amended to provide the same ages of early retirement and the same benefits for both males and females. See also Hearings, OFCC Guidelines, September 9, 1976, pp. 22-24 printed pp. 6a-7a, *infra*.

[44] Hearings, OFCC Guidelines, September 9, 1976, pp. 25-26, printed at p. 8a, *infra*.

[45] See U. S. Dept. of Labor, Bureau of Labor Statistics, Digest of Health and Insurance Plans, 1974 ed., which parallels the Digest of Pension Plans described in fn. 43, *supra*.

[46] Hearings, OFCC Guidelines, September 10, 1976, p. 80.



or benefits of employees on a sex basis.[47] Thus, it is apparent that sex-differentiated tables do not of necessity have to lead to sex-differentiated benefits. Benefits can be designed completely independently of the tables used. In deriving the cost of a given plan, the sex composition of the group will affect the cost of the plan but will have no bearing on the amount of the benefits of such plan.

As an example of this we can point to the Civil Service Retirement System providing sex-neutral benefits. Under this plan an employee, whether male or female, receives a formula benefit at retirement. If he or she retires before age 55, the benefit is reduced by 2 per cent per year that retirement is prior to age 55. If a joint and 55 per cent survivor benefit is to be provided, the normal benefit is reduced by 2½ per cent of the first $3600 of annual benefit and 10 per cent of the excess over $3600. Survivor and children's benefits are all provided on identical bases for males and females with equal service and pay histories. The benefits are prescribed by law and are not affected by actuarial tables in use at any time.[48]

The sex neutral feature of the Civil Service Retirement System is also a feature of the Federal Employee's Group Life Insurance Program and Health Benefit Program. The benefits in all these programs are not sex-related and are therefore not affected by the actuarial factors used. Only the costs are affected by the actuarial factors used at any time.[49]

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[47] Hearings, OFCC Guidelines, September 9, 1976, p. 80.

[48] *Id.*, pp. 80.

[49] Unpublished papers prepared by Ethel C. Rubin, A.S.A., N.A.A.A., U.S. Civil Service Commission.

In private industry the most standard employer plan (about 95% of the plans) is the "fixed benefit" plan which provides monthly benefits according to formula. Sex does not enter into the determination of the normal form of benefit in this type of plan. Several examples of such plans are:

A. Fixed dollar amount per year of service

B. Percentage of salary times years of service

C. Percentage of final salary, three year average or five years average salary times years of service.

Based on the traditional sex-differentiated tables, the cost of the fixed benefit for the female is higher than for the male. This is taken into account in determining the total cost of the plan. However, it does not affect the actual monthly benefits under such a plan.[50] Most of these plans are non-contributory. Where contributory, the contributions are made on a sex neutral basis.

The sex neutral character of these plans is consistent with the basic insurance principle of spreading the risk. The principle of insurance is contingent on risk spreading. There is an inherent paradox involved in trying to relate attention to the individual with basic insurance principles. The very nature of insurance demands that predictions about the individual and assignment of risk be based on group experience. It is erroneous to assume that the division of a pool of individuals into two pools, male and female, makes insurance more individualistic, that it saves some members

[50] Hearings, OFCC Guidelines, September 9, 1976, pp. 59-60, 73.



of the group from an unfair burden of extra risk. This carried to its logical extreme would indicate the desirability of differentiating to the nth degree, trying to analyze color, family background, medical history, physical and personal habits of each individual to make a precise determination of the probability of death. But this would destroy the group risk-sharing which is the very reason for group insurance. The individual's guarantee in a pension or insurance plan comes in the form of equal treatment as a member of a larger group. The goal then is not to make blacks and whites, smokers and non-smokers, married and non-married, males and females equal to each other, but to treat all people equally without differentiation on the basis of these group characteristics. Consistent with the basic pattern of insurance should be the inclusion of disability from pregnancy.

**E. The stereotyped belief that women employees differ from male employees in that women will make unfounded claims for disability insurance if coverage in excess of six weeks is provided for pregnancy-related disabilities, is the basis on which the insurance industry has been reluctant to write such coverage.**

The insurance study which GE has presented to this Court contains the assessment of the New York State Department of Insurance, which GE describes as "prestigious," that the insurance industry has been reluctant or refused to sell disability income insurance to women (NY Study, p. 3). This statement has reference to selling women any insurance against risk of loss of income due to disability. The New York Insurance Department was not talking about writing disability income insurance policies for women but excluding pregnancy. Such reluctance or refusal to write disability income insurance for women consti-

tutes discrimination because of sex. That this discrimination is not a thing of the past in the insurance industry is evident by the token character of the writing of this insurance for women at the present time (see pp. 47-48 *supra*).

Both by testimony during the trial and in its briefing here GE has attributed its exclusion of pregnancy-related disabilities to GE's following of insurance practice. The testimony here shows that this insurance practice was based on unfounded assumptions as to the nature of women, not about pregnancy. This is apparent from the testimony produced by GE to explain the insurance practice and GE's reliance thereon.

The testimony of GE's witnesses as to the motivation of GE and the insurance industry in denying coverage shows it was based on the belief that women would malinger, not merely when they were pregnant, but when they were not.

During the trial in this case GE called as its expert witness with regard to insurance practices Paul H. Jackson, who has had a life time of experience as an actuary, having joined the Aetna Life Insurance Company in 1949 as an actuarial trainee (II App. 522). The testimony of Jackson as to the reasons of the insurance industry for denying coverage to pregnancy related disabilities shows that the insurance industry excluded on the basis of its belief that women would malinger, not merely when they were pregnant, but when they were not pregnant (II App. 529-538, 548, 550, 553).

Jackson explained the reluctance of insurance industry to cover pregnancy-related disabilities for purposes of disability income policies as due to claims abuse.



He testified that women had a "natural tendency" to want to "take it easy" before child birth and "to want to remain at home with the child as opposed to working" which would result in claims abuse (II App. 554-555). He further testified that mothers would be tired from being up nights feeding the baby, stay home and collect disability (II App. 533). Cf. *Stanton* v. *Stanton,* 421 U.S. 7, 10-14 (1974) where this Court characterized reliance on "old notions" as stereotypes manifesting sex prejudice.

The trial judge interrupted Jackson to inquire whether when he spoke of staying home he was testifying to an actual fact or just his opinion as a man (II App. 534). Jackson answered that it was his "opinion both as an actuary and as a man" (II App. 534). Pressed further as to whether he had actual figures or any statistics on malingering in connection with pregnancy Jackson replied that there was no actuarial experience with respect to pregnancy (II App. 535).

Jackson further testified that all pregnant women would file disability claims for the maximum period of coverage under 13 week policies, 23 weeks under 26 week policies and 30 weeks under 52 week plans (II App. 548-550, 554, III App. 846-847). Again he admitted that he had no experience upon which to base this testimony (II App. 549). According to Jackson five percent of the women would engage in the further claim abuse of drawing permanent disability benefits until age 65 when they would transfer to a pension (II App. 537, III 846). Jackson foresaw that all of these claims will be so unfounded that the employer will pay them in full instead of having his payments reduced by the amount of Social Security disability

benefits (II App. 533), which by the terms of GE's long term disability plan supplements the Social Security disability benefits (III App. 1073).

Jackson further testified women who were pregnant would get jobs simply to collect disability benefits (II App. 538), and that women would get pregnant just for the purpose of collecting disability benefits (II App. 532-533).

Jackson testified that one of the controls on which the insurance industry relied to prevent claims abuse would be lacking here. He explained that the traditional control of desire for career advancement which caused employees to return as soon as possible for fear of missing a merit increase or a promotion would not operate with women who were pregnant or following child birth (II App. 531).

When Jackson was questioned by the judge during this testimony (II App. 534-535, 554, 549-558, 563-564) as to what factual basis he had for these statements, Jackson admitted that he did not know of a single company that had any claim abuse problem with a maternity claim (II App. 540-541) and knew of no statistics (II App. 534-535) or experience (II App. 540-541) to support his statements. When pressed for the basis of his testimony that women abuse disability insurance in the manner in which he had described, Jackson explained that he knew because "I have had perhaps a dozen secretaries have babies and leave and I can't help but look at the situation and draw some conclusion of my own" (III App. 563).



**F. GE did not follow the insurance practice because GE did not pay any disability benefits to women employees disabled by pregnancy, but, to the extent GE relied on insurance practice, it adopted the stereotypes of the insurance industry and added further stereotypes about women. GE discriminated because of sex.**

GE's reliance upon the alleged practices of the insurance industry upon analysis turns out to be reliance upon the insurance industry's reluctance to write disability insurance for pregnancy-related disabilities which provide a maximum benefit in excess of 6 or 8 weeks. The insurance industry today has no reluctance to insure other risks dependent on the incidence of pregnancy. Both GE and industry generally carry health insurance for hospital and medical expenses of employees and their dependents which covers hospital and medical expenses for the delivery of babies of dependents of male employees as well as the babies of female employees (Gilbert original brief p. 22). Even with respect to disability benefit policies, the prevailing practice in industry is to provide some coverage for loss of income due to pregnancy.

Thomas Hilbert, GE's Labor Relations Counsel, explained GE's exclusion of pregnancy related disabilities by reliance on stereotypes. Hilbert testified (II App. 596-597):

> "We feel that the benefit would be subject to abuse, to a stretching of the time of absence.
>
> And we feel that this would occur both before and after delivery.
>
> Before delivery we feel that the *natural concern* of the mother for the fetus, for the possibility of injury to the child, plus her own discomfort, would tend to stretch the time of leaving before pregnancy earlier than it would otherwise be.

"And after the delivery we feel that the *natural affection* of the mother for the child. In some cases *the concern of the mother* for the health or well-being or psychological situation of the child, would tend to stretch the post-delivery absence time.

So we feel that this kind of coverage as contrasted with sickness or accident coverage would be subject to more abuse.

"Despite what I think one of the doctors testified we believe that doctors generally, obstetricians generally, would be sympathetic to the mother and would tend to want to give her the dates she is asking for." (Emphasis supplied.)

Again he relied on the 'normal temptation of the mother before or after delivery to extend her time of absence (II App. 597; see also II App. 634).

Both of the plaintiff's medical experts testified that malingering with respect to pregnancy would be more difficult than with other claims of disability and that in their experience women did not malinger about disabilities connected with pregnancy (I App. 337-338, 351, II App. 476, 478, 504, 519).

The trial court found that "the pregnant women would not, per se, be inclined to malinger more than other persons" (Jt. Pet. 23a).

The fact that GE conformed to historicial insurance practice does not mean that GE does not discriminate. By adopting a discriminatory insurance practice GE itself becomes guilty of discrimination.

The only testimony of Hilbert with respect to the manner in which GE decided to exclude pregnancy-related disabilities makes it evident that GE never



gave any serious consideration to the issue. Hilbert explained that GE's decision not to spend its money for disability benefits for pregnancy-related disabilities was made on the same basis as the Department of Defense acts in deciding where to spend its money, namely, GE spends its money where it will "get the biggest bang for the buck" (II App. 645). The generous character of GE's payment of disability benefits for absences due to hair transplants for males, nose jobs and repair of trick football knees, shows that GE's notion of where it got the "biggest bang for its buck" did not include females.

Further Hilbert's own testimony revealed all the usual stereotyped notions about women. When they have babies they do not need income from their employer because obviously they have a husband to support them. Hilbert revealed this underlying premise with his remark that GE never contemplated when it placed Sherrie O'Steen on unpaid leave that she might have to go on welfare and in the meantime live with her two year old daughter in an unheated house without light, cooking or refrigeration facilities (II App. 444-449). Hilbert testified (II App. 610):

"She was listed as a married employee and in that situation we don't anticipate or look for financial disasters."

This Court in *Stanton* v. *Stanton*, 421 US 7 (1975) held that state action based on this stereotype constituted discrimination because of sex which did not survive close scrutiny under constitutional equal protection standards.

Hilbert's testimony reveals that other equally gross stereotypes were substantial ingredients in GE's preg-

nancy exclusion. He testified that the length of time a female was absent because of a disability from pregnancy would be lengthened in a manner which he obviously but erroneously assumed would not apply when other workers were disabled. He testified that other workers who were in the same incentive pay group with a pregnant employee would resent her presence because she would lower their wages by not doing her fair share of the work (II App. 604). Hilbert based this conclusion on "just my impression of life in the GE Company" (II App. 643). He knew of no facts to support this conclusion. He didn't know whether there had ever been any grievance raising any issue arising from the presence of a pregnant employee at work. He had no recollection of anyone complaining about such a problem (II App. 643).

The cross-examination of Hilbert on this point is as follows (II App. 643-644):

> "Q. What has been your experience about employee attitudes toward a pregnant women in the plant? A. Well, I would say ambivalent, some are protective, chivalrous, helpful protective. * * * Others, I think, are unhappy, frustrated, annoyed. Some others I would assume in any American group, whether a working group or elsewhere, would have probably some problems concerning matters of personal decorum.
>
> "Q. What facts do you have on which you base these statements? A. *Just my impression of life in the GE Company.*
>
> "Q. You have no specifics? A. As you know, we are a company that has many, many plants in different parts of the country. Some urban and some rural. Some even potentially suburban. All kinds of mores from A to Z.
>
> "Q. How much experience have you had in what plants and what years would lead you to this



impression that you have expressed here? A. Oh, *I couldn't pick specifics.* I review periodically grievance matters that our people bring to me. I get phone call from our lawyers, from our employee relations people in the field. I have tried arbitration cases involving things like group incentive matters.

"Q. Do you remember any phone call that reflected an attitude about pregnancy from anyone? A. I would say not specifically, no.

"Q. Do you remember any grievance that raised an attitude about pregnancy from anyone? A. No, not at this moment.

I would, I suppose if I looked back through the files I might find some.

"Q. You don't know whether you would or not? A. Well, I think I would, but I can't be sure.

"Q. You never looked? A. I never looked, no, for this purpose.

"Q. Do you have an impression as the attitude of management in the local plants in regard to the presence of a pregnant women on the work staff? A. Again, GE managers like GE employees generally run the gamut. We have some very, let's call them liberal managers, and we have some prudish managers. Generally speaking a company does not pick its managers in relation to their attitudes on this subject.

"Q. Do you have any specific facts on which you would base a statement as to the attitude of management? A. Well, just that I know the managers, at least a high percentage of them, and had conversations with them and you can't avoid getting some impression of a man's political, moral, even, in a sense, religious approach in those contexts.

"Q. Ever had discussions with any of them about a pregnant employee in the plant? A. I can't recall anything specific." (Emphasis supplied)

Even if grounded in fact, attitudes of other employees do not justify discrimination. The EEOC Guidelines on Discrimination Because of Sex, 29 CFR 1604.2(a)(1)(iii) provide that an employer cannot justify discrimination on the ground of the preferences of coworkers.

The essence of discrimination because of sex is action based on stereotyped concepts. Careful and objective collection of all pertinent facts is the regular procedure of business in deciding on the appropriate choice of alternatives. The grossly stereotyped nature of the thinking which went into GE's exclusion of pregnancy-related disabilities and into the insurance practice upon which GE relies, affords further support for the finding of discriminatory motivation (see Gilbert original brief, pp. 86-100).

The district court heard Thomas Hilbert, GE's Labor Relations Counsel, the only company representative called as a witness by GE, explain that GE decided where to spend benefit money on the same basis as Department of Defense, where it would "get the biggest bang for the buck" (II App. 645). The district court had before it minutes of negotiations where over the years (III, App. 1026-1028, 1036, 1037, 1041) including 1966 (III App. 1043-1044) and 1969 (III App. 1048-1049), GE had refused to discuss costs at the bargaining table because GE bargained only "level of benefits", it did only what was the "appropriate thing to do" (II App. 646-647, III App. 1036) and that it had "better uses for the money" than to pay for pregnancy-related disabilities (III App. 879). When the district court asked Hilbert why a female disabled by a latent disease which became active during pregnancy



does not get benefits, it received from Hilbert only the reply that it was because of "the language of the plan" (II App. 607).

Upon the basis of the entire record, the district court found that GE was motivated by a discriminatory attitude towards its female employees (Jt. Pet. 32a), that its discriminatory practices have "been deliberate and intentional" (Jt. Pet. 38a) and that there is "no rational distinction" between the coverage GE provides its male employees and the excluded disabilities of females (Jt. Pet. 37a). We urge that on the basis of these findings the judgment below should be affirmed leaving to the parties in future cases the burden of such further development of the law as is appropriate to their particular facts.

## VI.

### Adversely to Affect an Individual Because of Physiological Differences Peculiar to the Individual's Race, Sex or Religion Constitutes Prima Facie an Unlawful Employment Practice in Violation of Title VII

Proof that an employer gave blood tests to all applicants for employment and excluded those whose blood discloses a sickle cell trait would seem obviously sufficient to establish a prima facie case of discrimination because of race, since in the United States sickle cell disease affects from 7-14% of blacks but no Caucasians.[51] There is now pending in the district court in

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[51] "The disease may occur in two forms: A relatively benign form referred as a sickle cell trait; and the severe form, sickle cell anemia.

"Carriers of sickle cell trait typically do not experience ill effects from the disease except under conditions of extreme physical stress or diminished oxygen supply."

The sickle cell anemia is present in a smaller proportion of the black race although the extent is not known because there are

Louisiana a case which has been remanded by the Fifth Circuit for a determination of whether a discharge for sickle cell anemia violates Title VII.[52]

Large employers as a standard practice carefully screen all applicants for employment through medical tests designed to detect any physical defect which would make the applicant less than perfect physically. Employers seek thereby to avoid the likelihood of claims under the many fringe benefit programs—disability insurance, health and medical insurance, life insurance, workmen's compensation insurance.[53]

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no reliable statistics. Blood tests are used to determine the presence of sickle cell anemia and the sickle cell trait. Hearings on H.R. 11742 92nd Cong., etc. before the House Subcommittee on Public Health and Environment, Committee on Interstate and Foreign Commerce, 92nd Cong., 1st Sess., pp. 58, 97, November 12, 1971.

[52] *Smith* v. *Olin Mathieson Corp.*, 10 FEP Cases 62 (USWCWD La. 1974) rev'd in part and rem'd 535 F.2d 862 (5th Cir. 1976), where the district court noted that Olin Mathieson had not tested the plaintiff for sickle cell anemia either prior to or during his employment (10 FEP Cases at 63).

[53] The thoroughness of the preemployment test which GE gives all employees is evident from the preemployment medical history and physical examination forms here in evidence (Plfs. Exhs. 26 and 27, unprinted). Counsel for plaintiffs encountered the thoroughness and exclusionary character of GE's testing in settling the case of *Allen* v. *GE*, USDCED Tex. Tyler Div. Civ. Act No. 5452, which was discussed during the trial herein during the cross-examination of Hilbert, GE's Labor Counsel (II App. 632). After agreeing to hire all the plaintiffs who passed the physical examination GE reported that two black plaintiffs had been disqualified because X-rays taken by GE as part of the physical examination showed they had sacralization of the L-5 vertebrae, which means that the L-5 vertebrae was partially connected with the sacrum. Both women had worked for years without any health problems. As proof that this was not a pretext GE offered to show the plaintiffs records of 36 other applicants disqualified during the preceding year on the same basis. GE did not assert that this condition would cause any problem except that some persons with this condition found bending over difficult. Neither of these plaintiffs had any difficulty in bending and lifting.



The "grooming" cases upon which GE relies (Supp. Br. p. 13, fn. 7) assume a more serious character when the prohibition on a beard results in the loss of employment of a black because of a physiological condition peculiar to blacks which requires him to wear a beard.[54] The same district court which decided the instant case recently dismissed a suit brought under Title VII by a black employee who had a condition known as pseudofolliculitis bargae ("PFB") occurring only among the black race. His doctor prescribed a beard as a solution to the condition after a period of unsuccessful efforts to cure the condition by other means. The employee was discharged for violation of a rule prohibiting the wearing of a beard.

The impact of these practices upon the employment of blacks and Hispanics may prove to be greater than the impact of the neutral testing present in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 465 (1975).

The "lack of identity"[55] between applicants disqualified for employment and race under a policy of not hiring those with sickle cell traits, is parallel to the lack of identity between pregnancy and sex. Sickle cell trait is a race-linked trait just as pregnancy is a sex-linked trait. The legislative history of Title VII (pp. 33-34 *supra*) showing rejection of amendments to restrict discrimination to cases where race, sex, na-

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[54] *Woods* v. *Safeway Stores*, 13 FEP Cases 114 (USDCED Va. 1976).

[55] *Geduldig* v. *Aiello*, 417 U.S. 484, 496-497, fn. 20.

tionality or religion was the "sole" ground for the discrimination establishes that Congress intended to reach as discrimination "sex plus" and "race plus" discrimination. This Court's decision in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) applied the "sex plus" principle to hold that refusal to hire women with pre-school age children discriminated because of sex in violation of Title VII. The fact that only a portion of the class female was singled out for discrimination did not prevent the finding that the discrimination was "because" of "sex" within the meaning of Section 703(a).

The discrimination because of physical characteristics either exclusively or predominantly possessed by one sex race, nationality or religion, has had a long history in the field of insurance. Laws passed in various states, beginning in the 1870s, requiring insurance companies to insure the members of the black race at the same premium rate as white, resulted in the refusal of insurance companies to insure blacks. This history has been summarized as follows:[56]

> "Colored people became a factor in insurance in the 1870's. * * * At first Prudential issued policies on colored lives at the same rates as white. The Metropolitan did likewise. * * * By 1881, however, the fact that Negro lives were subject to a much greater mortality than white had become apparent. Metropolitan stopped writing insurance on colored lives entirely at the beginning of that year. In April, the Prudential began to charge higher premium rates for colored lives to

[56] Marquis James, The Metropolitan Life, A Study in Business Growth, Viking 1947 pp. 338-339 see also pp. 86-87. Cf. Raymond V. Carpenter, An Epoch in Life Insurance—33 Years of Metropolitan (1924) p. 9.



> cover the higher mortality, and the Metropolitan resumed writing them on a similar basis in November.[69]
>
> "This action, dictated entirely by actuarial findings, was misconstrued as racial discrimination. Massachusetts passed a law forbidding the charging of higher premium rates for colored than for white. After unavailing protests the companies discontinued soliciting Negro risks in that state. When several other states followed suit with similar laws,[70] Prudential went further and stopped doing business with Negroes everywhere.
>
> "Except in states with laws of the type mentioned, Metropolitan continued writing Negroes, but at higher rates than on whites. Careful selection was deemed necessary, however, with a full medical examination in every case."

"[69] *Metropolitan Industrial Rate Book,* Form 2898, November 1943, p. 72; Hoffman, op. cit., 137.

"[70] Connecticut, 1887; Ohio, 1889; New York, 1891; Michigan, 1893; Minnesota, 1895; New Jersey, 1902; Rhode Island had such a law by 1894 but repealed it some time before 1906."

The largest black business in the world was the result of the refusal of white companies to write policies on black lives in states outlawing the use of race segregated actuarial tables.[57]

The black life expectancy has continued over the years to differ as markedly from the white expectancy

[57] Winifred Octavus Byron, Jr., Negro Life Insurance Companies: A Comparative Analysis of the Operating and Financial Experience of Negroes' Legal Reserve Life Insurance Companies, Univ. of Pa., Philadelphia, 1948, pp. 7-8, which also reviews the various state laws; Robert C. Puth, Can Black Insurance Companies Survive, Challenge, May-June 1974, p. 51, 52.

as the difference between sexes.[58] The difference in days lost from work due to disability by blacks has always been substantially higher for blacks than for whites. In our discussion of the Congressional rejection of sex averaging or race averaging, when it amended the Railroad Unemployment Insurance Act to cover disabilities, we quoted the tables showing the number of days lost from disabling illness per thousand employees which in 1942 for white males was 122.1, for females 189.3 and for blacks 244.9 (see pp. 29-31, *supra*). In 1968 the number of days lost from work by a currently employed person was 5.1 per white and 8.1 per other races.[59]

The lower federal courts have uniformly held that differences in longevity between male and female do not serve as a defense to differentiate between the sexes in benefits under retirement plans (see cases collected p. 21, fn. 19). These cases have squarely held that discrimination because of life expectancy constituted discrimination because of sex. Under GE's analysis of longevity as a physiological condition similar to pregnancy, all these cases constitute precedent for the instant case. They correctly interpret the nondiscrimination principles of Title VII as applicable to discrimination because of physiological fact linked to one sex as opposed to the other.

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[58] See fn. 4, p. 2, *supra*.

[59] U.S. Dept. of Health, Education and Welfare, Public Health Service, Vital Health Statistics, Series 10, Number 71, Time Lost from Work Among the Currently Employed Population, United States 1968, (GPO April 1972), p. 19, Table 7.



## VII.

### Figures Now Available from the Three Years of Experience in Covering Pregnancy-Related Disabilities Under the Hawaii Temporary Disability Insurance Law and at Xerox Corporation Show That GE's Cost Estimates Are Grossly Exaggerated and That the Increase in Cost Will Only Be a Fraction of a Cent Per Hour Per Employee

GE in its supplemental brief, pp. 17-25, relies heavily on the allegedly great increase in cost which will result from affirmance. GE asserts that the cost per unit of benefit for a female employee under GE's existing insurance coverage, where no pregnancy benefit is provided, calculated by GE's sex averaging method, is 170 percent of that for a male employee (GE Supp. Br. p. 21). GE then argues that this 170 percent figure, "would rise to 210 percent were the six weeks maternity benefit to be provided, and to 300-330 per cent were full maternity coverage to be provided" (GE Supp. Br. p. 21, fn. 16). As set forth in our first brief (Gilbert original brief, pp. 139-146), GE did not plead any issue in the district court which made cost relevant, and introduced no evidence or even estimates as to the cost to GE of covering pregnancy-related disabilities in its sickness and accident benefit program. In the district court GE attempted to defend on the basis of the statistical estimates of the cost to other companies of paying disability benefits for absences due to pregnancy-related disabilities (II App. 536-569, 737-738, III App. 846-847), instead of presenting any evidence of what GE's costs would be. Both the district court (Jt. Pet. 30a-33a) and the court of appeals (Supp. Br. Jt. Pet. 10a-11a, fn. 23) held cost immaterial. The district court also found the statistical data presented by GE "to be of too specula-

tive a nature to be probative of actual future costs" (Jt. Pet. 25a).

GE's statistical estimates were based on the stereotyped assumptions of GE's actuary Jackson (discussed pp. 71-72, *supra*) that all women would be absent the maximum time permissible under a 13 week plan, 23 weeks under a 26 week plan and 26 weeks under a 52 week plan. None of GE's figures are supported by any actual experience with respect to the length of time a woman will be absent when she is not subject to mandatory maternity leave requirements, as GE's employees had always been prior to 1973 (see Gilbert original brief, pp. 40-41). None of GE's figures are supported by any actual experience in paying benefits for pregnancy-related disabilities. We now have available facts and figures based on actual experience from two sources. We have data from Hawaii as to its experience under the amendment (Section 392-3(5), to the Hawaii Temporary Disability Insurance Law, effective May 1, 1973, requiring all employers in Hawaii to provide full coverage for pregnancy-related disabilities, which data we have printed in Appendices C-N, pp. 9a-23a, *infra*. We have the experience of Xerox Corporation for 1974 and 1975, which we print as Appendix P hereto, pp. 24a-25a, *infra,* thus updating the experience of Xerox for 1973, which we printed in Appendix S, Gilbert original brief, pp. 76a-91a.

**A. Coverage of pregnancy-related disabilities under Hawaii's Temporary Disability Insurance Law has not increased costs. Some insurance companies have reduced, other raised, rates since the law became effective.**

The data from Hawaii establishes that GE's figures are grossly exaggerated. In Hawaii, of the seven insurance companies which write more than 80 per cent of



the disability insurance in the state, the rates charged by three of these companies were lower in 1973 than in 1975: Pacific Insurance charged $1.42 in 1973, 64 cents in 1973 per $100 in taxable wages; First Insurance charged 73 cents in 1973, 61 cents in 1975, and Travelers Insurance charged 69 cents in 1973, 59 cents in 1975 (pp. 17a-21a, *infra*); a fourth, Pacific Guardian, started with 60 cents in 1973, raised to 61 cents in 1974 and lowered to 60 cents in 1975 (pp. 17a-18a); a fifth, Hawaiian Insurance raised rates by one cent, from 56 cents to 57 cents (pp. 17a-18a, *infra*); a sixth, Industrial Indemnity, raised rates 20 cents, from 54 to 74 cents (pp. 17a-18a, *infra*) and no data was supplied for the seventh, Hawaiian Life.[60]

The Hawaiian Insurance law provides the same maximum duration for receipt of disability benefits as does the GE plan, 26 weeks.[61] The benefit is 55%

[60] Several of the amici supporting GE make statements about an alleged substantial increase in rates in Hawaii after pregnancy-related disabilities were covered. The Brief of American Society for Personnel Administration as Amicus Curiae, p. 7, asserts that the premium rate for female employees in Hawaii was 23% higher than the male rate before the pregnancy inclusion and 142% higher after. For this statement the only source cited is the Brief Amicus Curiae of American Mutual Insurance Alliance, et al filed in *Liberty Mutual Ins. Co.* v. *Wetzel,* No. 74-1245, p. 4 which in turn cites the Reply Brief in *Geduldig,* pp. 17-18. The Reply Brief of Appellant in *Geduldig,* pp. 17-18 states that the Hartford Insurance Co. had raised its premiums in Hawaii from $4.00 to $8.76 per month after the inclusion of pregnancy. The amicus brief of Liberty Mutual filed in the instant case, p. 8, fn. 10 makes the same statement also citing only the Geduldig Reply Brief. As appears from information supplied by the Hawaiian government, the Hartford Insurance Group is not among the seven companies which write 82 percent of the disability insurance under the Hawaiian statute (pp. 16a-18a, infra).

[61] Section 392-23.

of wages or salary [62] as compared with 60% under the GE plan.

**B. Xerox Corporation employees have on the average returned to work within less than eight weeks after childbirth over a three-year period.**

Xerox Corporation has a temporary disability plan which pays the full salary for a period of five to six months and a long term disability plan which takes over after 6 months and pays 70% of salary for two years. The average weekly benefit paid in 1973 to women absent due to pregnancy disability was $140 per week, in 1974, $165 per week, and in 1975, $203 per week.[63]

Xerox has permitted an employee to stop work at full salary four weeks before the expected birth date without any complications if the employee's attending doctor requests that she stop work. The covered employees include saleswomen who may drive as much as 125 miles a day and technical representatives who service the Xerox machines at the customer's place of business. Only upon the filing of a claim form containing the verification and narrative of complications by the attending obstetrician can an employee stop work earlier than 4 weeks preceding the expected delivery date.[64]

The Xerox experience shows with respect to absences for pregnancy, average disability time in 1973 of 10.7 weeks, in 1974 of 12 weeks and in 1975 of 11.5 weeks. The average days before delivery were 35 in 1975, 36.9

[62] Section 392-22.

[63] These figures were derived by dividing the total cost each year by the number of claims that year (p. 26a, infra).

[64] Information supplied by Margaret Hutchinson, RN, Manager, Medical Administration, Xerox Corporation.



in 1974 and 30.7 in 1973 (p. 25a, *infra*). These figures reflect the willingness of Xerox to pay pregnant employees their full salary without requiring them to work during the month preceding the expected date of delivery. The average days after delivery were 44 in 1973, 46.8 in 1974 and 45.7 in 1975 (p. 25a, *infra*).

The above figures show that in actual experience the assumption of GE that all women will be off 13 weeks under a 13 week plan and 23 weeks under a 26 week plan was not borne out, even under a plan in which the payment of full salary removes all financial incentive to return to work.[65] Under the pressure of the usual plan, such as GE's where benefits are only 60% of regular wages, there will be an incentive for employees to return earlier.

The rate of return of females to employment following childbirth at Xerox has increased dramatically, from 46% in 1973 to 59% in 1974 to 69% in 1975 (p. 25a, *infra*).

No employer is required to be as lenient as Xerox. There is no legal requirement that pregnant women be allowed to stop work and recover pay for a period before childbirth when not disabled. Therefore we believe that the Xerox experience as to days off prior to childbirth is not relevant. The figures with respect to days off after childbirth are relevant. The Xerox experience that employees return to work within approximately seven weeks after childbirth is in accord with the findings of the district court in this case, that in the absence of complication the period of disability would be from six to eight weeks (Jt. Pet. 20a).

[65] GE's actuary Jackson testified that it was standard insurance practice to fix the benefit at a low enough fraction of regular wages to provide a financial incentive to the employee to return to work (II App. 531).

### C. Providing disability benefits for pregnancy would cost GE a mere fraction of a cent per hour

GE's estimates about the astronomic increases in the cost of sickness and accident benefits of pregnancy disabilities should be read in the light of the fact that sickness and accident benefits at GE in 1972 amounted to only 1.8% of base pay (p. 31a, *infra*). An increase in the ratio of money expended in paying benefits to females as compared with males is obviously a very small increase in costs when figured within the framework of a total amount of sickness and accident constituting only 1.8% of base pay.

Although GE has never provided any figures as to what the cost to it of covering pregnancy would be, the record provides the basis for making such a calculation.

In 1970 GE employees had 3,548 pregnancies; in 1971, 2,781 (II App. 253). Taking GE's estimate of average duration of pregnancy absences as 13 weeks, which it used in the court below and which exceeds the highest average at Xerox (p. 26a, *infra*), the total cost, including the 2% correction as an added amount, would be $3,023,206, in 1971, $2,573,570. If figured on eight weeks' duration the total cost for females would have been, for 1970: $1,860,434; for 1971; $1,583,641. If figured on six weeks' duration the total cost for females would have been, for 1970: $1,396,835.76; in 1971: $1,157,308.25. Given the total sickness and accident payments to both males and females (I App. 198-199), the increase in total cost of the sickness and accident program for both male and female, figured at 13 weeks' duration for 1970, would have been 16%; for 1971, 10%; figured at 8 weeks' duration, for 1970 the increase would have been 9%; for 1971, 6%. Figured at 6 weeks' duration the increase in total cost for both males and females in 1970 would have been 7%; for 1971, 4%.



The average payment for weekly sickness and accident benefits, including the 2% correction as an added amount, for females in 1970 for 13 weeks would have been $848.02; for 8 weeks, $524.32; for 6 weeks, $393.24; in 1971, for 13 weeks, $925.34; for 8 weeks, $568,96; for 6 weeks, $427.08. Covering pregnancy-related disabilities in 1970 for 13 weeks would have cost 4/10 of a cent per hour; for 8 weeks, 2/10 cent per hour; for 6 weeks, 1/10 cent per hour. For 1971 for 13 weeks it would have been 3/10 cent per hour; for 8 weeks, 2/10 cent per hour; for 6 weeks 1/10 cent per hour.

The cost of the weekly sickness and accident program figured as an average cost per female, if the foregoing weekly benefit were figured in, would have amounted to, in 1970 for 13 weeks, $120.71; for 8 weeks, $103.29; for 6 weeks, $98.11; in 1971 for 13 weeks, $144.52; for 8 weeks, $132.41; for 6 weeks, $127.12.

These figures show that the cost of including coverage of pregnancy-related disabilities would be modest. These figures find support in the report of Kistler and McDonough of a survey of the practices of insurance companies regarding pregnancy practices both in writing policies and with respect to their own employees. They state:[66]

> "The authors conclude that introduction of paid maternity leave may represent a rational and defensible expansion of current fringe benefits programs. Cost arguments may have been over-

[66] Linda H. Kistler and Carol C. McDonough, Paid Maternity Leave-Benefits May Justify Costs, 26 Labor Law Journal 783 (December 1975).

emphasized in the past, and opportunities for cost reductions through lower labor turnover and training costs have not been fully evaluated.

"The authors believe that companies should begin serious evaluation of the cost of introducing paid maternity leave regardless of the ultimate outcome of current litigation. Perhaps an analysis of tangible benefits in the form of reduced labor turnover and intangible benefits from improved employee morale and company loyalty will convince responsible managements that paid maternity leave is both cost effective and socially responsible."

**D. Nationwide estimates computed for six or eight weeks of absence came to an increased cost of $150 million and $200 million respectively.**

GE introduced in evidence two nationwide cost estimates, one prepared by Paul H. Jackson (GE Exh. 42, II App. 846) and the other by Actuary Bailie (GE Exh. 13, II App. 737-738).

Bailie made estimates, assuming average duration of 20 weeks, 25 weeks and 30 weeks (II App. 737). Using Bailie's method of computation, but figuring for a duration of 6 weeks and 8 weeks respectively, would produce a total nationwide cost of $150 million and $275 million.[67]

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[67] Bailie assumed that 60% of the pregnant women already had coverage for pregnancy-related disabilities for six weeks at a cost of $225 million (I App. 737). To provide 6 weeks' coverage for pregnancy-related disabilities to the other 40% of pregnant women who are not now covered would cost 2/3 of $225 million or an additional cost of only $150 million. To provide an average benefit of 8 weeks would require 2 more weeks' coverage for the 60 percent already getting six weeks, which would come to $75 million more and 8 weeks for the remaining 40% would come to $200, or a total of $275 million additional cost nationwide.



Jackson computed only one figure which assumed that 45% of the women were under plans providing a maximum period of duration of 13 weeks and all these women would claim for the full 13 weeks; that 50% of the women were under a 26 week plan and would claim for 23 weeks; that 5% were under a 52 week plan and would claim for 30 weeks (GE Exh. No. 42 II App. 536, 546-549, 555, 846). Jackson assumed that 45% got benefits of $60 per week, 50% of $70 per week and 5% at $80 per week, or an average of $66 per week. Jackson assumed 1,463,000 births to working women of whom 40% had coverage for disability benefits. This would mean 585,200 women had coverage. He further assumed that 40% of these had coverage for pregnancy-related disabilities for 6 weeks (III App. 846). This is to be contrasted with Bailie's figure of 60% covered for 6 weeks for pregnancy-related disabilities (II App. 737). On the basis of Jackson's assumptions it would cost $139 million to provide 6 weeks' coverage for those not having it and $196 million to provide 8 weeks' coverage for all women.

Not only did Jackson assume the 13 week, 23 week and 30 week coverage durations, but he assumed that women were covered by sick leave plans which did not provide coverage for pregnancy, and estimated a $406 million dollar nationwide cost for sick leave. GE covers pregnancy-related absences under its sick leave plan, which provides sick leave on a graduated basis, beginning with one day a year for employees with one to four years' service and 5 days of sick leave a year for employees with 25 years or more (IV App. 1345). We know of no basis upon which it can be estimated how many employers cover pregnancy-related disabilities or number of days of maximum sick leave a year

available. Jackson's estimate of a cost of $406 million in sick leave pay, a figure more than half his estimated additional cost for disability benefits, seems out of line with the types of sick leave usually available.

Jackson's estimate that 5% of the women workers who give birth will claim permanent disability the rest of their lives is again without any support. The medical testimony and findings here negate any such estimate. The Social Security Administration has had so few, if any claims of permanent disability caused by childbirth or pregnancy that its statistics place such cases in the category of "other" rather than in a described diagnostic group (p. 28a, *infra*).

The district court viewed the pregnancy estimates by Bailie and Jackson as too conjectural to serve as evidence in this case (Jt. Pet. 25a). We have refigured their tables to illustrate how vastly overstated their figures are. We believe as the courts below held that costs are immaterial. Certainly if costs can ever rise to the status of a business necessity these do not (see Gilbert Original Brief p. 143). All estimates of costs by GE and its supporting amici should be disregarded.

## CONCLUSION

"Pregnancy * * * constitutes the *sine qua non* of most sex stereotypes which ultimately take the form of arbitrary limitations upon all aspects of women's lives." [68] Four circuit courts have directly ruled that denial of pregnancy-related disability benefits discriminates because of sex in violation of Title VII. Three other circuits have expressed the same view,

[68] G.M. Wells, Sex Discrimination and Title VII 53 UMK-C Rev. 273-290 (Spg. 1975).



though not ruling directly on the issue. Seventeen federal district judges, the highest courts of four states and 27 state FEP agencies have held the denial to constitute prohibited discrimination because of sex (see pp. 1a-5a, *infra*).

We respectfully urge this Court to put its mandate on this vast body of decisions of such great importance to women. The judgment below should be affirmed.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

**List of Decisions Holding that It Constitutes Prohibited Discrimination Because of Sex To Exclude Pregnancy-Related Disabilities from an Income Disability Program, Together with a List of Law Review Comments and Conforming Collective Bargaining Agreements.**

Subsequent to the original briefing numerous additional court decisions have issued, many of which were accompanied by opinions giving the issue careful and thorough analysis and upholding and applying the EEOC Sex Guidelines to require employers to maintain the income of employees disabled by pregnancy on the same basis as governs income maintenance when male employees are disabled. The count in the federal courts now stands: four circuits with holdings exactly in point[a]; three others distinguishing and holding, *Geduldig* v. *Aiello,* 417 U.S. 484 (1974) not controlling on this issue;[b] and seventeen federal district judges with decisions squarely deciding the issue in the same way as the courts below in this case.[c] The highest courts

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[a] *Wetzel* v. *Liberty Mutual Insurance Co.,* 511 F.2d 199 (3d Cir. 1975), judgment vacated 96 S. Ct. 1202; the Fourth Circuit in the instant case; *Farkas* v. *South Western City School District,* 506 F.2d 1400 (6th Cir. 1974); *Satty* v. *Nashville Gas Co.,* 11 FEP Cases 1 (6th Cir., 1975) pet. for cert. pending No. 75-536; *Hutchison* v. *Lake Oswego School District,* 519 F.2d 961, 11 FEP Cases 161 (9th Cir. 1975), petition for cert. pending, No. 75-568; *Berg* v. *Richmond Unified School District,* 528 F.2d 1208 (9th Cir. 1975), pet. for cert. pending No. 75-1069.

[b] *Communications Workers* v. *A. T. & T.,* 513 F.2d 1024 (2d Cir. 1975), pet. for cert. pending No. 74-1601; *Tyler* v. *Vickery,* 517 F.2d 1089, 1097-1099 (5th Cir. 1975); *Holthaus* v. *Compton & Sons Inc.,* 514 F.2d 651, 10 FEP Cases 601 (8th Cir., 1975).

[c] Judge Charles M. Allen in *Rowlett* v. *Jefferson County Bd. of Ed.* (USDCWD Ky. Sept. 29, 1975) and *Polston* v. *Metropolitan Life Insurance Co.,* 7 FEP Cases 388 (WD Ky. 1975); Judge Frank Battisti in *Lillo* v. *Plymouth Local Bd. of Ed.,* 8 FEP

of four states[d] and at least 27 FEP Agencies[e] have

Cases 21 (USDCND Oh. ED 1973); Judge Roger D. Farley in *Brauer* v. *Clark County School District* (USDCD Nev., Civil DV-74-184 RDF, Dec. 2, 1975; Judge Myron Gordon in *Guse* v. *J.C. Penney Co., Inc.*, 11 EPD ¶ 10,626 (USDCED Wis. 1976); Judge Edward J. McManus in *Sale* v. *Waverly-Shell Rock Bd. of Ed.*, 9 FEP Cases 138 (DCND Ia. 1975); Judge Clarence C. Newcomer in *Zichy* v. *City of Philadelphia*, 392 F. Supp. 338, 10 FEP Cases 853 (USDCED Pa. 1975; Judge William H. Orrick in *Vineyard* v. *Hollister School District*, 8 FEP Cases 1009 (USDCND Calif. 1974); Judge John K. Regan in *Liss* v. *School District of Ladue*, 11 FEP Cases 156 USDCED Mo., 1975) and *Valiant* v. *Bristol-Myers Co.*, USDCED Mo. Case No. 74-137-C(2); Judge Carl B. Rubin in *Farkas* v. *South City Western School District*, 8 FEP Cases 288 USDCSD Oh. 1974 aff'd., 506 F.2d 1400 (6th Cir. 1974); Judge Otto R. Skopil in *Hutchison* v. *Lake Oswego School District*, 519 F.2d 961, 11 FEP Cases 161 (9th Cir. 1975), pet. for cert. pending, No. 75-568; Judge Alfonso J. Zirpoli, Jr. in *Berg* v. *Richmond Unified School District*, 528 F.2d 1208, 11 FEP Cases 1285 9th Cir. Dec. 9, 1975; Judge Orman R. Smith in *Payne* v. *Travenol Laboratories Inc.*, 12 FEP Cases 770, 782-783, 785 (USDCND Miss. 1976); Judge William T. Sweigert in *Oakland Federation of Teachers* v. *Oakland Unified School District*, 11 FEP Cases 262 (USDCND Calif., 1975; Judge Robert L. Taylor in *Satty* v. *Nashville Gas Co.*, 522 F.2d 850, 11 FEP Cases 1 (6th Cir. 1975), Judge Clure Morton in *Satty* v. *Nashville Gas Co.*, 384 F. Supp. 765, 10 FEP Cases 73 (USDCND Tenn. 1974) aff'd. 522 F. 2d 850 (6th Cir. 1975); Judge Gerald J. Weber in *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F. Supp. 1146 (W.D. Pa. 1974), aff'd. 511 F.2d 199 (3rd Cir. 1975), vacated 96 S.Ct. 1202; Judge William H. Young in *Dessenberg* v. *American Metal Forming Co.*, 8 FEP Cases 290 (USDCND Oh. 1973).

[d] *Cedar Rapids Community School District* v. *Parr*, 12 FEP Cases 54, 227 NW 2d 486 (Ia. Sup. Ct. 1975); *Black* v. *School Committee of Malden*, 310 NE 2d 330 (Mass. Supt. Jud. Ct. 1974); *Ray-O-Vac Div. of ESB Inc.* v. *Wisconsin Dept. of Industry, Labor & Human Rel.*, 236 NW 2d 209, 12 FEP Cases 64 (Wis. Sup. Ct. 1975); *Union Free School Dis. No. 6 Town of Islip* v. *NY State Human Rights Appeals Bd.*, 35 NY 2d 371, 362 NYS 2d 139, 10 FEP Cases 428 (1973); *Wis. Tel. Co.* v. *Wisconsin Dept. of Industry, Labor & Human Relations*, 6 FEP Cases 45, 68 Wis. 2d 345, 228 NW 2d 649 (1975). See also *Leechburg Area School District* v. *Pennsylvania Human Relations Commission*, 11 EPD ¶ 10,719 (Pa. Commonwealth Ct. 1975), involving leave but not sick pay where the Court stated (at p. 6990) that "pregnancy is a physical



similarly construed state fair employment practice legislation. The law review comment has been extensive and overwhelmingly supports the decision below.[f]

In cases arising under Title VII presenting discrimination because of pregnancy in a wide variety of contexts, other than, or in addition income maintenance, there are many new decisions, in all of which the courts have uniformly held that discrimination because of pregnancy is discrimination because of sex within the meaning of Section 703(a)(1): discharge[g] or denial of medical benefits to unwed mothers[h]; discharge because

disability, though naturally limited to the female sex, which may not be treated differently from other long-term physical disabilities suffered by all employees."

[e] The 24 states listed in Gilbert original Brief pp. 4a-10a, plus Florida, Ohio and Vermont whose position in this respect appears in the amicus briefs they filed in *Wetzel* v. *Liberty Mutual* 96 S. Ct. 1202 (1976).

[f] Comment: Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination, 75 Columbia Law Rev. 440, 456-461 (1975); Eve Cary, Pregnancy Without Penalty, 1 Civ. Lib. Rev. 31 (1974); Comment: Pregnancy Disability Benefits Under State-Administered Insurance Programs, 24 Catholic Univ. Law. Rev. 263 (1973); G.M. Wells, Sex Discrimination and Title VII, 43 Univ. Mo.-K.C. Law Rev. 273 (1975); Comment: The Impact of *Geduldig* v. *Aiello* in EEOC Guidelines on Sex Discrimination, 50 Indiana Law Journal 592 (1975); Katherine T. Bartlett, Pregnancy and the Constitution: The Uniqueness Trap, 62 Calif. Law Rev. 1532 (1974) Comment, Waiting for the Other Shoe—Wetzel and Gilbert in the Sup. Ct., 25 Emory Law Journal 125 (1976); Comment, Liberty Mutual Ins. Co. v. Wetzel: New Rights for Pregnant Workers?, 11 New England Law Rev. 225 (1975); Linda H. Kinstler and Carol C. McDonough, Paid Maternity Leave—Benefits May Justify the Cost, 26 Labor Law Journal 782 (1975): 3 Hofstra Law Rev. 141 (1975); 1975 Brigham Young Law Rev. 171 (1975).

[g] *Doe* v. *Osteopathic Hospital of Wichita, Inc.*, 333 F.Supp. 1357, 3 FEP Cases 1128 (USDC D Kans. 1971); Oakland Federation of Teachers, supra, fn. c.

[h] *Guse* v. *J.C. Penney Co. Inc.*, 12 FEP Cases 9 USDCED Wis. 1976).

of pregnancy,[i] loss of seniority,[j] mandatory unpaid leave[k], and medical benefits for pregnancy-related disabilities lower than medical benefits for other conditions.[l] Arbitrators also have been issuing decisions applying the EEOC Guidelines to require that disabilities arising out of pregnancy receive income maintenance on the same basis as other disabilities.[m]

Employers increasingly are voluntarily entering into collective bargaining agreements with unions providing

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[i] *Holthaus, supra,* fn. b; *Satty, supra,* fn. e; *Air Line Stewards and Stewardesses Assn., Local 550, TWU, AFL-CIO, et al.,* v. *American Airlines, Inc.,* 12 FEP Cases 1463 (USDCND Ill. 1976); *Mitchell* v. *Board of Trustees of Pickens County School District,* 12 FEP Cases 169 (USDCSC 1976).

[j] *Burwell* v. *Eastern Air Lines, Inc.,* 10 FEP Cases 882 (USDC ED Va. 1975), 394 F.Supp 1361; *Oakland Federation of Teachers, supra,* fn c.

[k] *Singer* v. *Mahoning County Bd. of Mental Retardation,* 379 F. Supp. 986, 8 FEP Cases 489 (USDCND Oh. 1974).

[l] *Guse* v. *J. C. Penney Co. Inc.,* 409 F. Supp. 28, 12 FEP Cases 9 (USDCED Wis. 1976).

[m] *Pacific Gas & Electric Co.,* 65 LA 504 (Adolph M. Koven, arbitrator, 1975); *Kaiser-Permanent Medical Care Program,* 64 LA 245, 248 (Daniel J. Dykstra, arbitrator, 1975); *Walled Lake Consolidated Schools,* 64 LA 239 (James R. McCormick, arbitrator, 1974); *Chippewa-Valley Bd. of Ed.,* 62 LA 409 (James R. McCormick, arbitrator, 1974); *Clio Education Assn.,* 61 LA 37 (James R. McCormick, arbitrator, 1973); Goodyear Tire & Rubber Co. (award printed in Stone and Baderschneider, Arbitration of Discrimination Grievances, Am. Arb. Assn. 1974, p. 84, enf'd *sub. nom. Goodyear Tire & Rubber Co.* v. *Rubber Workers Local,* 200, 6 FEP Cases 1069 (Oh. Ct. App. 1974), aff'd 8 FEP Cases 128 (1975) (Oh. Sup. Ct. 1975), 10 FEP Cases 1351, 42 Oh. St. 2d 516, 330, 7 EPD ¶ 9073. See also *Georgia Pacific Corp.,* 206 AAA 4 (John F. Sembower, 1976); *Thornapple-Kellogg School District,* 60 LA 549 (M. David Keefe, arbitrator 1973); *Featherlite Mfg. Arkansas Inc.,* 53 LA 18 (J. Fred Holly, arbitrator 1969).



coverage of income maintenance for pregnancy-related disabilities on the same basis as for other disabilities.[n]

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[n] IUE, the union plaintiff in this case, has such contracts under the following employers with plans with 26 weeks' maximum duration: Heekin Can. Div. of Diamond International & Local 729; Wilco Corp. of Indianapolis, Ind. and Local 815; Wagner Electric Corp. and Local 1104; General Industries, Forrest City, Ark., and Local 1148, $70 per week, Central Industries, Lawrenceville, Ill.; TRW, Inc., Philadelphia Pa.; plans with 13 weeks' maximum duration with weekly benefit as indicated: Airco Speer Carbon Graphite, St. Mary's, Pa. ($55 but not in excess of 70% average weekly earnings); Chromalloy Corp., Midwest City, Okla, (60) Torch Tip, Pittsburgh, Pa.; Cooperative Services, Inc., Detroit, Mich., ($70 to $130); Duncan Electric Co., Lafayette, Ind. ($35 to $50); and ITT Electrical Optical Products Division, Roanoke, Va. ($50); KIRC Burlington Div. of TRW Electronics Group, Burlington, Ia. (50% of straight time wages but not less than $50 per week).

## APPENDIX B

**Excerpts from Testimony of Elizabeth M. Casey, Vice President, Marsh and McLennon Inc., During Hearings on OFCC Sex Discrimination Guidelines, Section 60-20.3(c), September 9, 1974.**

Pages 11, lines 1-9:

STATEMENT OF ELIZABETH M. CASEY,
VICE PRESIDENT, MARCH AND
MCLENNAN, INC.

Ms. CASEY: Good morning. I am Elizabeth Casey and I am an attorney from the Boston office of March & McLennan, Inc., a firm of consulting actuaries and insurance brokers. Marsh & McLennan is the actuary for several thousand pension plans throughout the country, covering well over a million employees.

Page 22, lines 10-23:

Ms. CASEY: Except for the first example that I gave you where the benefit would be based on putting in so much money each year, and buying what it would buy, which is very rare now, almost every pension plan is just based on giving the person the benefit of whatever it costs, based on salary or flat amounts. Everybody is going to get $200 a month or $3.00 for each year of service. So just about 95 percent, I would say, of all the plans in the country, men and women get the same benefits, regardless of cost.

MR. STEELE: You are saying then the general rule is equal benefits, men and women do get the same?

Ms. CASEY: The general rule is equal benefits. Men and women do get the same. There are just so few of the other types of plans around.



Page 23, line 11 to page 24, line 4:

Ms. SPINDLER: I guess I still don't understand the 95 percent figure very much. Does that 95 percent figure mean that women and men in 95 percent of the pension plans receive the same monthly benefits? Are you saying that the benefits are over so many more years?

Ms. CASEY: Before, I said the same monthly. I am saying they receive a pension based on the same formula, say half of their final earning.

Ms. SPINDLER: How many would you say receive the same exact monthly benefits?

Ms. CASEY: Oh, I have no idea. Almost all pensions are based on earnings.

MRS. RUBIN: When you are talking about the 95 percent getting the same benefits, you are talking, are you not, about the normal benefit and normal retirement date? Isn't that what you are talking about?

Ms. CASEY: Yes. When I say the same benefits,

Page 25, line 1 to p. 26, line 7:

Ms. CLAUS: Let me clarify Mrs. Rubin's and Ms. Spindler's questions to you. Do I understand you to be testifying that most plans do provide monthly benefits based on earnings and years of service, number one, most plans do that—and, number two, that would mean that if a man and woman had the same earnings and the same years of service, that under most plans today there would be equal monthly benefits?

Ms. CASEY: Yes. They don't really have a choice not to do that. Under the Internal Revenue Service

there is a code where the employer gets a deduction, and all of the plans must be honored on a non-discriminatory basis.

Ms. CLAUS: Then the only exception would be a money purchase plan?

Ms. CASEY: Right.

Ms. CLAUS: Is there some economic reason why some employers would have to use the money purchase plan as opposed to formula benefit plans?

Is there any reason why your clients could not switch from one form of plan to the other?

Ms. CASEY: Not that I know of.

Ms. CLAUS: Also, to follow up on one of Mr. Steele's and Mrs. Rubin's questions, do you know from your own experience that most insurance policies provide equal benefits for men and women, life insurance?

Ms. CASEY: I am not sure I know what your question is. When you say policies, do you mean if a company had a plan providing life insurance for employèes, would they have to be the same for males and females?

Ms. CLAUS: Yes.

Ms. CASEY: They do now. I think in the past they did not, until this law changed.



## APPENDIX C

**Letter received in response to form letter printed Gilbert original brief, pp. 47a-48a**

George R. Ariyoshi
Governor

Joshua C. Agsalud
Director

Robert C. Gilkey
Deputy Director

Orlando K. Watanabe
Administrator

STATE OF HAWAII

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION

825 MILILANI STREET
P. O. BOX 3769
HONOLULU, HAWAII 96812

November 11, 1975

Ms. Ruth Weyand
Attorney
International Union of Electrical,
Radio and Machine Workers
AFL-CIO and CLC
1126 16th Street, N. W.
Washington, D. C. 20036

Dear Ms. Weyand:

This is in response to your October 28, 1975 letter relating to questions of income maintenance for female employees disabled by pregnancy or childbirth.

Section 392-3(5) of the Hawaii Temporary Disability Insurance (TDI) Law defines disability as "total inability of an employee to perform the duties of his employment caused by sickness, *pregnancy, termination of pregnancy*, or accident other than a work injury as

defined in section 386-3 (underscoring added)." Hence, all employers subject to the TDI Law are required to pay TDI benefits to women who become disabled because of pregnancy or complication resulting from pregnancy as long as they meet the eligibility requirements of sections 392-25 and 392-26 (see enclosed lawbook). This no doubt will answer the three questions you raised in your letter.

If you have any other questions or desire further clarification regarding our pregnancy provision, please let us know.

Very truly yours,

/s/ JOSHUA C. AGSALUD
Joshua C. Agsalud, Director
Labor and Industrial Relations

Enc.



**APPENDIX D**

August 16, 1976

Mr. Orlando K. Watanabe
Administrator
Disability Compensation Division
825 Mililani Street, Room 201
Honolulu, Hawaii 96813

Re: General Electric Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, ea al.—
*U.S. Supreme Ct. Case Nos. 74-589, 74-590*

Dear Mr. Watanabe:

I am working with counsel for the Union in the above-entitled cases concerning the obligation of the employer to pay sickness and accident benefits to all female employees disabled by pregnancy or childbirth.

We are seeking the following information:

1. The name of all insurance companies which write coverage for purposes of the Hawaii TDI law, and the percentage of insurance coverage written by each; and

2. The number of pregnancy claims paid, and the percentage they constitute numerically, and by cost, of all claims paid.

We shall greatly appreciate your cooperation in supplying us with the foregoing information, to the extent that you have it.

Very truly yours,

/s/ BENJAMIN C. SIGAL

BCS:ih

## APPENDIX E

George R. Ariyoshi
Governor

Joshua C. Agsalud
Director

Robert C. Gilkey
Deputy Director

Orlando K. Watanabe
Administrator

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION
825 MILILANI STREET
P. O. BOX 3769
HONOLULU, HAWAII 96812

August 17, 1976

Mr. Benjamin C. Sigal
Shim, Sigal, Tam & Naito
Ste 800, 333 Queen Street
Honolulu, Hawaii 96813

Dear Mr. Sigal:

Attached are one copy each of 45 insurance carriers authorized to write temporary disability insurance in Hawaii, and data on TDI contributions and benefits paid during calendar years 1970 to 1975 inclusive.

We do not have a breakdown of pregnancy benefits. As you know, our law considers pregnancy as any other disability effective May 8, 1973.

Very truly yours,

/s/ ORLANDO K. WATANABE
Orlando K. Watanabe
Administrator

OKW/cy
Att.



## APPENDIX F

**Insurance companies authorized to write temporary disability insurance in Hawaii**

[Data supplied by Orlando K. Watanabe, Administrator, Disability Compensation Division, Department of Labor and Industrial Relations, Hawaii]

Aetna Life Insurance Co.
Bankers Life Co.
Cal-Farm Life Insurance Co.
Connecticut General Life Insurance Co.
Continental Assurance Co.
Employer's Insurance of Wausau
First Insurance Co. of Hawaii, Ltd.
General American Life Insurance Co.
Hawaiian Insurance Companies
Hawaiian Life Insurance Co., Ltd.
Hartford Insurance Group
Industrial Indemnity Co.
Insurance Company of North America
John Hancock Mutual Life Insurance Co.
Liberty Life Assurance Company of Boston
Lumberman's Mutual Casualty Co.
Massachusetts Mutual Life Insurance Co.
Metropolitan Life Insurance Co.
New England Mutual Life Insurance Co.
North American Co. for Life & Health
New York Life Insurance Co.

Occidental Life Insurance Co. of California
Pacific Guardian Life Insurance Co.
Pacific Insurance Co., Ltd.
The Equitable Life Assurance Society of the U.S.
The Mutual Benefit Life Insurance Co.
The Prudential Insurance Co. of America
The St. Paul Insurance Companies
Travelers Insurance Company
United Benefit Life Insurance Co.
West Coast Life Insurance Co.
Bankers National Life Insurance Co.
Crown Life Insurance Co.
Industrial Insurance Co. of Hawaii, Ltd.
Allstate Insurance Co.
Union Mutual Life Insurance Co.
Paul Revere Life Insurance Co.
Republic National Life Insurance Co.
Washington National Insurance Co.
Provident Life & Accident Insurance Co.
Northwestern National Life Insurance Co.
Central National Life Insurance Co. of Omaha
Old Security Life Insurance Co.
The Mutual Life Insurance Co. of New York
Pacific Mutual Life Insurance Co.

## APPENDIX G

**Data on contributions and benefits paid during calendar years 1970 to 1975 inclusive under Hawaii Temporary Disability (TDI) Law.**

[Data supplied by Orlando K. Watanobe]

TDI Contributions and Benefits Paid Experience
CY 1970-75 Inclusive

Based on Annual Reports Submitted by Employers and Insurance Carrier

| | 1 | 2 | 3 | 4 | 5 | 6 |
|---|---|---|---|---|---|---|
| | 1970 | 1971 | 1972 | 1973 | 1974 | *1975 |
| Total Contributions | 4,630,132 | 5,577,230 | 6,138,519 | 6,702,457 | 7,436,755 | 4,977,520 |
| Employer Share | 3,715,730 | 4,569,827 | 4,626,694 | 5,155,308 | 6,077,854 | 4,344,564 |
| Employee Share | 914,402 | 1,007,403 | 1,511,825 | 1,547,149 | 1,358,901 | 632,956 |
| Total Benefits Paid | 1,171,148 | 1,823,237 | 2,242,883 | 2,454,532 | 3,877,455 | 3,164,893 |
| Ins. Cos. Retained | 3,452,984 | 3,753,993 | 3,095,636 | 4,247,925 | 3,558,854 | 1,812,627 |
| No. Persons Paid | 3,474 | 6,752 | 5,860 | 6,332 | 8,954 | 9,054 |
| No. Weeks Paid | 22,783 | 31,424 | 36,268 | 44,679 | 52,871 | 45,107 |
| Ave. Total Benefits Paid Each Person | 337.12 | 270.02 | 382.74 | 384.64 | 433.04 | 349.56 |
| Ave. Weekly Ben. | 51.40 | 58.02 | 61.84 | 54.94 | 73.34 | 70.16 |
| Ave. Duration | 6.6 | 4.7 | 6.2 | 7.1 | 5.9 | 5.0 |

*Based on about 75% of annual reports.

## APPENDIX H

August 26, 1976

Mr. Orlando K. Watanabe
Administrator
Disability Compensation Division
825 Mililani Street, Room 201
Honolulu, Hawaii 96813

Dear Mr. Watanabe:

Thank you for your letter of August 17, 1976.

Enclosed herewith is a copy of four pages of a brief filed in the U.S. Supreme Court in the case of *Geduldig* v. *Aiello*, No. 73-640, which include some statements we wish to check out.

First, it states that the following insurance Companies have at least 90% of the TDI business in Hawaii:

> "Travelers Insurance Company, Industrial Indemnity Insurance Company, Pacific Insurance Company, Pacific Guardian Insurance Company, First Insurance of Hawaii, and Hawaii Insurance and Guarantee Company.

What is the exact percentage of TDI business in Hawaii these companies have at the present time?

Second, it states that only one of these companies, Industrial Indemnity, has raised its rates *at all* as a result of the amendment of May 8, 1973, requiring the inclusion of disabilities arising from normal pregnancy and childbirth. What are the facts on this point at the present time?

Your consideration is greatly appreciated.

Very truly yours,

BENJAMIN C. SIGAL

BCS:ih
encl.



## APPENDIX I

George R. Ariyoshi
Governor

Joshua C. Agsalud
Director

Robert C. Gilkey
Deputy Director

Orlando K. Watanabe
Administrator

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION
825 MILILANI STREET
P. O. BOX 3769
HONOLULU, HAWAII 96812

September 1, 1976

Benjamin C. Sigal, Esq.
Shim, Sigal, Tam & Naito
A Law Corporation
Ste 800, 333 Queen Street
Honolulu, Hawaii 96813

Dear Mr. Sigal:

Re: Temporary Disability Insurance Experience

In response to your letter of August 26, 1976, the TDI experience of the six insurance companies named in your letter plus Hawaiian Life is as follows:

1973 - 86.3%
1974 - 87.1%
1975 - 82.9%

With respect to the rates charged by the six named carriers, since different rates are charged to different employers, a composite rate of each company and by male-female breakdown was obtained by dividing the

total contributions paid by employers and employees by (taxable wages ÷ 100). Information is attached.

The above information was obtained from annual reports filed by TDI carriers.

Very truly yours,

/s/ ORLANDO K. WATANABE
Orlando K. Watanabe
Administrator

SS/cy
Att.



## APPENDIX J

**Average rates charged by six insurance companies writing the majority of disability insurance in Hawaii, 1973-1975, under Hawaii Temporary Disability Insurance (TDI) Law.**

[Data supplied by Orlando K. Watanabe]

RATES CHARGED PER $100 IN TAXABLE WAGES:

| | 1975 | 1974 | 1973 |
|---|---|---|---|
| First Insurance | $.61 | $.71 | $.73 |
| Male | .55 | .73 | .73 |
| Female | .68 | .69 | .70 |
| Hawaiian Insurance & Guaranty | .57 | .57 | .56 |
| Male | .55 | .55 | .56 |
| Female | .59 | .60 | .56 |
| Industrial Indemnity | .74 | .55 | .54 |
| Male | .71 | .54 | .52 |
| Female | .77 | .57 | .58 |
| Pacific Guardian | .60 | .61 | .60 |
| Male | .59 | .61 | .59 |
| Female | .61 | .61 | .62 |
| Pacific Insurance | .64 | .95 | 1.42 |
| Male | .61 | .94 | 1.22 |
| Female | .67 | .96 | 1.71 |
| Travelers Insurance | .59 | .62 | .69 |
| Male | .56 | .61 | .65 |
| Female | .65 | .65 | .76 |

## APPENDIX K

FIRST INSURANCE COMPANY OF HAWAII, LTD.

January 8, 1976

Mr. Ben C. Sigal, Attorney
333 Queen Street
Suite 800
Honolulu, Hawaii 96813

Dear Mr. Sigal:

This letter will confirm the fact that First Insurance Co.'s TDI rates were not increased because of the fact that pregnancies are now a covered disability.

If we can of further service, please call.

Warm regards,

/s/ IVAN H. MIYAMOTO
Ivan H. Miyamoto,
Superintendent
Health Insurance Department

IHM:lh



## APPENDIX L

FIRST INSURANCE COMPANY OF HAWAII, LTD.

January 13, 1976

Benjamin Sigal
333 Queen Street Suite 800
Honolulu, Hawaii 96813

Dear Mr. Sigal:

On January 1, 1975 the Temporary Disability Insurance Department lowered it's rate to become more competitive with other insurers. The rate reduction applied to both male and female, but the proportionate rate reduction for each sex is unknown.

Sincerely,

/s/ NOBUO KIWADA
Nobuo Kiwada
Temporary Disability
Insurance

## APPENDIX M

PACIFIC INSURANCE COMPANY, LIMITED

Joseph E. Maxfield
Vice President

841 Bishop Street
P.O. Box 1140
Honolulu, Hawaii 96807
Telephone: 546-7283

January 12, 1976

Mr. Benjamin C. Sigal
333 Queen Street
Honolulu, Hawaii 96813

Dear Mr. Sigal:

You recently inquired as to whether we increased our TDI rates as of the date that maternity benefits became a part of the TDI law (maternity benefits became effective May 8, 1973). At that time no change in rates took place; however, we did amend our rates upward effective January 1, 1975 as the result of poor overall loss experience during the previous year.

Very truly yours,

/s/ JOSEPH E. MAXFIELD

JEM/dls



## APPENDIX N

THE TRAVELERS

Group Department
Underwriting Division

January 27, 1976

International Union of Electrical,
Radio and Machine Workers
AFL-CIO
1126 16th St. N.W.
Washington, D.C. 20036

Re: Hawaii Temporary Disability Insurance

Dear Ms. Weyand:

In response to your inquiry date January 9, 1976, please be advised that there has been no increase in our TDI rates since 1970.

Should you have any further questions, please let me know.

Very truly yours,

/s/ REBECCA B. MORTLOCK
(Mrs.) Rebecca B. Mortlock
Assistant Underwriter
Group Underwriting
Division

## APPENDIX O

XEROX

September 2, 1976

Mrs. Ruth Weyand
Attorney At Law
1126 16th Street, N.W.
Washington, D.C. 20036

Dear Mrs. Weyand:

As a follow-up on our telephone conversation, a copy of my April 9, 1976 Pregnancy Disability Comparison report to my Medical Director is enclosed. As you can see it is much less detailed than our 1973 report was.

I am looking forward to reading the brief you prepared in the Gilbert vs. General Electric case in which you used our 1973 report.

Please feel free to call me if you have any questions about the report.

Sincerely,

/s/ MARGARET HUTCHINSON
Margaret Hutchinson, R.N.
Manager
Medical Administration

Encl.



## APPENDIX P

**Pregnancy disability—time duration and disability cost—1973-1975—Xerox Corporation**

INTERNAL MEMO

To
Craig Wright, M.D.

From
Margaret Hutchinson, R.N.
Manager Medical Administration
Xerox Square 003
Extension 33306

Subject
PREGNANCY DISABILITY EXPERIENCE COMPARISON

Date
April 9, 1976

| | 1973 | 1974 | 1975 |
|---|---|---|---|
| Claims closed | 178 | 209 | 244 |
| Average claims per month | 14.8 | 17.4 | 20.3 |
| Disability days—average | 74.8 (10.7 weeks) | 83.7 (12 weeks) | 80.7 (11.5 weeks) |
| Average days before delivery | 30.7 | 36.9 | 35.0 |
| Average days after delivery | 44.0 | 46.8 | 45.7 |
| Average cost per claim | $1,544 | $2,117 | $2,374 |
| Total claims cost | $274,830 | $442,469 | $579,252 |
| Number returned to work | 82 | 123 | 168 |
| % of total claims returned to work | 46% | 59% | 69% |
| Number terminated employment | 96 | 86 | 76 |
| % of total claims terminated employment | 54% | 41% | 31% |
| Dollar Increase per Claim is | | $573 | $257 |
| Total Dollar Claim Increase is | | $167,639 | $136,783 |

| Year | PM's | Non-Exempt Field Clerical 9 | Non-Exempt Tech Rep. 7 | Field Exempt 5 | Rochester Exempt 3 | Rochester Clerical Non-Exempt 2 | | Total |
|---|---|---|---|---|---|---|---|---|
| 1975 | | 164 | 0 | 19 | 9 | 52 | = | 244 |
| 1974 | | 107 | 1 | 5 | 12 | 84 | = | 209 |
| 1973 | | 83 | 0 | 0 | 1 | 94 | = | 178 |

## APPENDIX Q

**Social Security Disability Experience—graduated recovery termination rates for disability beneficiaries by sex, 1973-1974, unpublished data supplied by Office of the Actuary, Social Security Administration, September 9, 1976.**

GRADUATED RECOVERY TERMINATION RATES FOR OASDI MALE DISABILITY BENEFICIARIES, 1963-74
(Per Thousand)

| Calendar age [1] at Entitlement X [3] | $Q_{(X)}$ [2,4] | $Q_{(X)+1}$ | $Q_{(X)+2}$ | $Q_{(X)+3}$ | $Q_{(X)+4}$ | $Q_{(X)+5}$ |
|---|---|---|---|---|---|---|
| 50 | 20.1 | 40.4 | 17.3 | 8.5 | 4.7 | 2.3 |
| 51 | 17.6 | 36.2 | 15.0 | 7.4 | 4.1 | 2.1 |
| 52 | 15.5 | 32.2 | 12.9 | 6.4 | 3.6 | 1.8 |
| 53 | 13.5 | 28.6 | 11.1 | 5.5 | 3.2 | 1.7 |
| 54 | 11.7 | 25.2 | 9.6 | 4.9 | 2.8 | 1.5 |
| 55 | 10.0 | 22.0 | 8.3 | 4.3 | 2.5 | 1.5 |
| 56 | 8.5 | 19.1 | 7.2 | 3.8 | 2.4 | 1.4 |
| 57 | 7.3 | 16.7 | 6.5 | 3.5 | 2.3 | 1.4 |
| 58 | 6.1 | 14.5 | 5.9 | 3.2 | 2.3 | 1.4 |
| 59 | 5.0 | 12.7 | 5.5 | 3.1 | 2.2 | 1.3 |
| 60 | 4.1 | 11.2 | 5.1 | 3.1 | 2.2 | — |
| 61 | 3.2 | 10.1 | 5.0 | 3.0 | — | — |
| 62 | 2.5 | 9.5 | 5.0 | — | — | — |
| 63 | 2.0 | 9.0 | — | — | — | — |
| 64 | 1.7 | — | — | — | — | — |



GRADUATED DEATH TERMINATION RATES FOR OASDI FEMALE DISABILITY BENEFICIARIES, 1963-74
(Per Thousand)

| Calendar age [1] at Entitlement X [3] | $Q_{(X)}$ [2,4] | $Q_{(X)+1}$ | $Q_{(X)+2}$ | $Q_{(X)+3}$ | $Q_{(X)+4}$ | $Q_{(X)+5}$ |
|---|---|---|---|---|---|---|
| 50 | 63.4 | 47.4 | 35.7 | 29.9 | 28.3 | 23.4 |
| 51 | 63.4 | 47.5 | 36.1 | 30.7 | 29.1 | 29.0 |
| 52 | 63.3 | 47.6 | 36.5 | 31.6 | 30.1 | 29.8 |
| 53 | 63.2 | 47.7 | 37.7 | 32.6 | 31.1 | 30.3 |
| 54 | 62.9 | 47.6 | 37.4 | 33.4 | 32.3 | 32.0 |
| 55 | 62.3 | 47.5 | 37.7 | 34.2 | 33.4 | 33.3 |
| 56 | 61.3 | 47.2 | 37.9 | 35.0 | 34.5 | 34.8 |
| 57 | 60.1 | 46.8 | 38.2 | 35.7 | 35.4 | 36.2 |
| 58 | 58.8 | 45.6 | 38.6 | 36.3 | 36.1 | 37.2 |
| 59 | 57.8 | 46.5 | 39.1 | 36.6 | 36.4 | 37.4 |
| 60 | 57.6 | 46.8 | 39.7 | 36.9 | 36.4 | — |
| 61 | 58.5 | 47.8 | 40.5 | 37.7 | — | — |
| 62 | 60.9 | 49.5 | 41.5 | — | — | — |
| 63 | 64.0 | 51.5 | — | — | — | — |
| 64 | 57.8 | — | — | — | — | — |

[1] Calendar age is secured by taking the calendar year of disability and subtracting the calendar year of birth. The calendar age on the average will be a half a year higher than actual age.

[2] Q represents probability of termination.

[3] X represents calendar age.

[4] X in parenthesis means age at beginning of entitlement, which is 6.5 months after beginning of disability irrespective of when the award is made or when payments begin to be received.

## APPENDIX R

TABLE 122.—*Worker disability awards during year: Number and percentage distribution, by diagnostic group, age, and race, 1972.*[*]

| Diagnostic group | Total | Age attained during year | | | | | | Race | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | Under 20 | 20-29 | 30-44 | 45-49 | 50-54 | 55-59 | 60 and over | White | Black | Other |
| | Number | | | | | | | | | | |
| Total | 455,308 | 24,285 | 32,208 | 26,772 | 44,598 | 72,943 | 112,982 | 141,609 | 387,638 | 62,635 | 5,125 |
| Infective and parasitic | 8,627 | 644 | 1,094 | 900 | 1,230 | 1,554 | 1,899 | 1,606 | 5,800 | 2,603 | 224 |
| Neoplasms | 43,667 | 1,394 | 2,322 | 2,267 | 4,785 | 7,612 | 11,965 | 13,302 | 28,646 | 4,680 | 341 |
| Endocrine, nutritional, and metabolic | 17,352 | 843 | 935 | 763 | 1,746 | 3,063 | 4,397 | 8,885 | 13,784 | 3,243 | 325 |
| Blood and blood-forming organs | 1,155 | 138 | 164 | 78 | 128 | 170 | 154 | 303 | 716 | 415 | 24 |
| Mental disorders | 45,253 | 7,920 | 7,034 | 4,680 | 5,624 | 6,275 | 7,255 | 6,455 | 37,881 | 6,736 | 616 |
| Nervous system and sense organs | 28,216 | 2,715 | 3,132 | 2,300 | 2,606 | 4,221 | 6,191 | 7,151 | 24,233 | 3,653 | 328 |
| Circulatory system | 165,684 | 902 | 3,772 | 6,051 | 12,791 | 24,811 | 41,226 | 57,131 | 124,068 | 21,249 | 1,367 |
| Respiratory system | 33,038 | 95 | 847 | 787 | 2,114 | 5,066 | 10,375 | 14,054 | 30,226 | 2,659 | 153 |
| Digestive system | 13,369 | 358 | 789 | 1,058 | 1,802 | 2,413 | 3,383 | 3,566 | 11,636 | 1,589 | 104 |
| Genitourinary system | 4,304 | 375 | 576 | 290 | 480 | 653 | 815 | 1,115 | 3,301 | 943 | 60 |
| Skin and subcutaneous tissue | 1,766 | 142 | 194 | 99 | 217 | 285 | 384 | 435 | 1,403 | 316 | 37 |
| Musculoskeletal system | 75,923 | 2,302 | 6,144 | 4,811 | 7,143 | 12,269 | 19,525 | 23,729 | 64,802 | 10,022 | 1,079 |
| Congenital anomalies | 4,033 | 471 | 695 | 305 | 512 | 861 | 772 | 717 | 3,584 | 423 | 26 |
| Accidents | 31,723 | 6,253 | 4,771 | 2,462 | 3,265 | 3,913 | 4,866 | 6,098 | 27,171 | 4,122 | 435 |
| Other | 293 | 6 | 19 | 21 | 55 | 57 | 75 | 60 | 245 | 42 | 6 |
| | Percentage distribution | | | | | | | | | | |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| Infective and parasitic | 1.9 | 2.7 | 3.4 | 3.4 | 2.8 | 2.1 | 1.4 | 1.1 | 1.5 | 4.2 | 4.4 |
| Neoplasms | 9.6 | 5.7 | 7.3 | 8.5 | 10.7 | 10.4 | 10.6 | 9.4 | 10.0 | 7.5 | 6.7 |
| Endocrine, nutritional, and metabolic | 3.8 | 2.2 | 2.9 | 2.8 | 3.9 | 4.2 | 3.9 | 4.2 | 3.6 | 6.2 | 6.3 |
| Blood and blood-forming organs | .3 | .7 | .5 | .3 | .3 | .2 | .1 | .2 | .2 | .7 | .5 |
| Mental disorders | 9.9 | 32.7 | 21.8 | 17.5 | 12.6 | 8.6 | 6.4 | 4.6 | 9.8 | 10.8 | 12.0 |
| Nervous system and sense organs | 6.2 | 11.2 | 9.7 | 6.2 | 5.8 | 5.8 | 5.5 | 5.0 | 6.3 | 5.8 | 6.0 |
| Circulatory system | 32.2 | 3.7 | 11.7 | 22.6 | 26.7 | 34.0 | 36.5 | 40.3 | 32.0 | 33.9 | 26.7 |
| Respiratory system | 7.3 | .4 | 1.7 | 2.9 | 4.7 | 6.9 | 9.2 | 9.9 | 7.8 | 4.2 | 3.0 |
| Digestive system | 2.9 | 1.5 | 2.4 | 4.0 | 4.0 | 3.3 | 3.0 | 2.5 | 3.0 | 2.4 | 3.2 |
| Genitourinary system | .9 | 1.5 | 1.8 | 1.1 | 1.1 | 1.1 | .7 | .8 | .9 | 1.5 | 1.2 |
| Skin and subcutaneous tissue | .4 | .6 | .6 | .4 | .5 | .8 | .3 | .3 | .4 | .3 | .7 |
| Musculoskeletal system | 16.7 | 9.5 | 19.1 | 18.0 | 16.0 | 16.8 | 17.3 | 16.8 | 18.7 | 16.0 | 20.3 |
| Congenital anomalies | .9 | 1.9 | 2.2 | 1.1 | 1.1 | .8 | .7 | .7 | .9 | .7 | .5 |
| Accidents | 7.0 | 25.7 | 14.8 | 8.2 | 7.5 | 5.4 | 4.3 | 4.3 | 7.0 | 6.6 | 8.5 |
| Other | .1 | 0 | .1 | .1 | .1 | .1 | .1 | 0 | .1 | .2 | .1 |

[*] U.S. Dept. Health, Education and Welfare, Social Security Administration, Social Security Bulletin, Annual Statistical Supplement, 1974, p. 149.



## APPENDIX S

TABLE 123.—*Worker disability awards during year: Number and percentage distribution, by occupational division, sex, and race, 1972..*[*]

| Occupational division | Sex | | | Race | | |
|---|---|---|---|---|---|---|
| | Total | Men | Women | White | Black | Other |
| | Number | | | | | |
| Total | 455,308 | 329,720 | 125,678 | 387,638 | 62,635 | 5,125 |
| Professional, technical, and managerial | 51,389 | 36,394 | 14,995 | 48,719 | 2,350 | 320 |
| Professional and technical | 28,575 | 17,007 | 11,568 | 27,030 | 1,370 | 175 |
| Managerial | 22,814 | 19,387 | 3,427 | 21,689 | 980 | 145 |
| Clerical and sales | 61,151 | 27,926 | 33,225 | 57,665 | 3,072 | 414 |
| Clerical | 37,825 | 12,490 | 25,335 | 35,242 | 2,317 | 266 |
| Sales | 23,326 | 15,436 | 7,890 | 22,423 | 755 | 148 |
| Service | 71,030 | 33,381 | 37,669 | 60,559 | 19,397 | 1,074 |
| Domestic | 7,948 | 497 | 7,451 | 2,724 | 5,177 | 47 |
| Food and beverage | 22,639 | 9,220 | 31,419 | 18,258 | 3,957 | 424 |
| Apparel and furnishings | 5,452 | 1,924 | 3,528 | 3,307 | 2,086 | 59 |
| Police, fire, and military | 10,020 | 9,668 | 352 | 8,797 | 1,006 | 217 |
| Building maintenance | 10,276 | 8,044 | 2,232 | 6,209 | 3,928 | 139 |
| Other | 14,695 | 4,008 | 10,687 | 11,264 | 3,243 | 188 |
| Farming | 21,500 | 20,347 | 1,153 | 17,817 | 3,004 | 679 |
| Processing | 14,977 | 12,191 | 2,786 | 11,941 | 2,892 | 144 |
| Machine trades | 43,496 | 36,396 | 7,100 | 39,657 | 3,507 | 332 |
| Bench work | 28,980 | 13,395 | 15,585 | 25,814 | 2,788 | 378 |
| Structural work | 61,588 | 60,539 | 1,049 | 52,931 | 7,970 | 687 |
| Miscellaneous | 56,152 | 51,729 | 4,423 | 46,451 | 9,082 | 619 |
| Transportation | 28,329 | 27,779 | 550 | 23,296 | 4,765 | 268 |
| Packaging and handling | 16,824 | 13,486 | 3,338 | 13,189 | 3,351 | 284 |
| Mineral extraction | 5,680 | 5,626 | 54 | 5,395 | 260 | 25 |
| Other | 5,319 | 4,838 | 481 | 4,571 | 706 | 42 |
| Unknown | 45,135 | 37,442 | 7,693 | 36,084 | 8,573 | 478 |
| | Percentage distribution[1] | | | | | |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| Professional, technical, and managerial | 12.5 | 12.5 | 12.7 | 13.9 | 4.3 | 6.9 |
| Professional and technical | 7.0 | 5.8 | 9.8 | 7.7 | 2.5 | 3.8 |
| Managerial | 5.6 | 6.6 | 2.9 | 6.2 | 1.8 | 3.1 |
| Clerical and sales | 14.9 | 9.6 | 28.2 | 16.4 | 5.7 | 8.9 |
| Clerical | 9.2 | 4.3 | 21.5 | 10.0 | 4.3 | 5.7 |
| Sales | 5.7 | 5.3 | 6.7 | 6.4 | 1.4 | 3.2 |
| Service | 17.3 | 11.4 | 31.9 | 14.4 | 35.9 | 23.1 |
| Domestic | 1.9 | .2 | 6.3 | .8 | 9.6 | 1.0 |
| Food and beverage | 5.5 | 3.2 | 11.4 | 5.2 | 7.3 | 9.1 |
| Apparel and furnishings | 1.3 | .7 | 3.0 | .9 | 3.9 | 1.3 |
| Police, fire, and military | 2.4 | 3.3 | .3 | 2.5 | 1.9 | 4.7 |
| Building maintenance | 2.5 | 2.8 | 1.9 | 1.8 | 7.3 | 3.0 |
| Other | 3.6 | 1.4 | 9.1 | 3.2 | 6.0 | 4.0 |
| Farming | 5.2 | 7.0 | 1.0 | 5.1 | 5.6 | 14.6 |
| Processing | 3.7 | 4.2 | 2.4 | 3.4 | 5.3 | 3.1 |
| Machine trades | 10.6 | 12.5 | 6.0 | 11.3 | 6.5 | 7.1 |
| Bench work | 7.1 | 4.6 | 13.2 | 7.3 | 5.2 | 8.1 |
| Structural work | 15.0 | 20.7 | .9 | 15.1 | 14.7 | 14.8 |
| Miscellaneous | 13.7 | 17.7 | 3.7 | 13.2 | 16.8 | 13.3 |
| Transportation | 6.9 | 9.5 | .5 | 6.6 | 8.8 | 5.8 |
| Packaging and handling | 4.1 | 4.6 | 2.8 | 3.8 | 6.2 | 6.1 |
| Mineral extraction | 1.4 | 1.9 | 0 | 1.5 | .5 | .6 |
| Other | 1.3 | 1.7 | .4 | 1.3 | 1.3 | .9 |

[1] Excludes workers whose occupational status was unknown.

[*] U. S. Dept. Health, Education and Welfare, Social Security Bulletin, Annual Statistical Supplement, 1974, p. 150.

## APPENDIX T

TABLE 124.—*Worker disability awards during year: Number and percentage distribution, by age on birthday in year of onset of disability and by sex, 1972.**

| Age in year of onset of disability | Number | | | Percentage distribution | | |
|---|---|---|---|---|---|---|
| | Total | Men | Women | Total | Men | Women |
| Total ... | 455,398 | 329,720 | 125,678 | 100.0 | 100.0 | 100.0 |
| Under 25 .. | 19,680 | 15,129 | 4,551 | 4.3 | 4.6 | 3.6 |
| 25-29 ..... | 10,959 | 8,109 | 2,850 | 2.4 | 2.5 | 2.3 |
| 30-34 ..... | 14,678 | 11,012 | 3,666 | 3.2 | 3.3 | 2.0 |
| 35-39 ..... | 19,882 | 15,175 | 4,707 | 4.4 | 4.6 | 3.7 |
| 40-44 ..... | 29,775 | 21,589 | 8,186 | 6.5 | 6.5 | 6.5 |
| 45-49 ..... | 49,437 | 34,627 | 14,810 | 10.9 | 10.5 | 11.8 |
| 50-54 ..... | 77,819 | 53,264 | 24,555 | 17.1 | 16.2 | 19.5 |
| 55-59 ..... | 121,540 | 85,924 | 35,616 | 26.7 | 26.1 | 28.3 |
| 60-65 ..... | 111,628 | 84,891 | 26,737 | 24.5 | 25.7 | 21.3 |

* U. S. Dept. Health, Education and Welfare, Social Security Administration, Social Security Bulletin, Annual Statistical Supplement, 1974, p. 151.



## APPENDIX U

**Fringe benefits as percentage of total labor cost—General Electric, 1972—employees represented by IUE—data supplied to IUE May 1973 in response to IUE request.**

BASE YEAR BENEFIT EXPENDITURES
HOURLY AND SALARIED TANDEM REPRESENTED UNIT

| Included Benefits | Expense (in 000) | % of Pay Base |
|---|---|---|
| Shift Differentials | $35,652 | 3.4* |
| Overtime | 49,612 | 4.8* |
| Vacations | 64,614 | 6.2* |
| Holidays | 37,072 | 3.6* |
| Sick Leave | 7,084 | 0.7* |
| Other Leave | 6,313 | 0.6* |
| Bonuses | 0 | 0 |
| Severance (IEA) | 3,801 | 0.4* |
| Other Benefits | 4,014 | 0.4 |
| TOTAL | $208,162 | 20.0(1) |
| **Qualified Benefits** | | |
| Life Insurance | $21,547 | 2.1* |
| Sicknes & Accident | 18,648 | 1.8* |
| Group Insurance | 63,491 | 6.1 |
| Pensions | 40,571 | 3.9* |
| Other (S&S) | 10,053 | 1.0* |
| | $154,310 | 14.8(1) |

(1) Not Additive due to rounding.

* Wage related—current benefit cost will "roll-up" by applicable % of pay increases.

FOR ARGUMENT

Supreme Court, U. S.
FILED
SEP 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1589

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.

No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,
Petitioners,

v.

GENERAL ELECTRIC COMPANY.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

## BRIEF FOR AMICUS CURIAE

**School District of the City of Ladue**

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IN THE

# SUPREME COURT OF THE UNITED STATES

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Petitioners,

v.

GENERAL ELECTRIC COMPANY.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

## BRIEF FOR AMICUS CURIAE

**School District of the City of Ladue**

### INTEREST OF AMICUS CURIAE

School District of the City of Ladue, located in St. Louis County, Missouri, is a public school district organized, existing and operating pursuant to the laws of the State of Missouri.

Chapters 160-168 RSMo. The funds of the school district are derived from state aid and tax levies. Chapters 163 and 164 RSMo.

Pursuant to Section 168.122 RSMo.,[1] the school district has a sick leave policy which pays teachers their salaries while they are absent from work because of sickness or injury. The school district has never established a maternity leave policy. Teachers may leave work at any stage of pregnancy and may return to work whenever they feel able. Teachers are paid their salaries during absences caused by pregnancy-related illnesses, such as "morning" sickness, miscarriages or abortions. But absences during pregnancy and following childbirth which do not involve an illness or injury are not considered absences due to sickness or injury and, consequently, no salary is paid during such pregnancy-related absences.

The school district now has on appeal to the United States Court of Appeals for the Eighth Circuit the decision in *Liss v. School District of the City of Ladue*, 396 F.Supp. 1035 (1975). The district court found no difference between disabilities caused by illness and pregnancy-related disabilities not involving illness or injury, and held that the failure of the school district to pay the salary of Joy Liss, a school teacher, during her absence for birth of her child (she was not sick or injured) constituted sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964, as amended. The appeal was argued and submitted in November 1975.

This Court's decision in General Electric Company v. Gilbert undoubtedly will determine finally whether the exclusion of pregnancy-related disabilities from coverage under sick leave plans

---

[1] Section 168.122 RSMo. provides in part:

A board of education may establish policies for granting leave of absence, including sabbatical leave, maternity leave, sick leave, and military leave. * * *



constitutes sex discrimination proscribed by Title VII and, consequently, will control the decision in the *Liss* case, supra. The school district believes, therefore, that the interest of the public employer in the matter should be submitted for the Court's consideration and that the validity of E.E.O.C.'s extension of Title VII by guideline 1604.10 to pregnancy-related disabilities not involving sickness or injury should be dealt with specifically by the Court.

## ARGUMENT

### A. Interest of Public Employers.

The school district does not have any statistical information on the number of public employees now covered by health, temporary disability insurance or sick leave plans or the amount of public funds currently spent to finance those plans. However, we trust the Court will accept the fact that the numbers in both categories are large. If public employers are required to include maternity benefits in those plans the impact on public funds would be great. Public employers generally are restricted severely in raising operating funds and any public employer unable to obtain the additional necessary public funds to provide maternity benefits would have to abandon or curtail its existing employee sick leave or other plan. That would not be in the public interest because such plans have become an important and necessary ingredient of public employment in order to attract capable employees who usually can obtain larger incomes working for private business.

We hope, therefore, that the Court will want to find a strong and compelling justification for EEOC Guideline 1604.10 before permitting that guideline to impose its destructive effect on public employment and public employee benefit plans. And a much stronger justification than that provided by the deference courts usually give to administrative regulations and guidelines.[2]

---

[2] If deference is to be a factor, we urge the Court to consider the decision of the legislature of the State of Missouri in Section 168.122 RSMo. 1969 that a sick leave plan without maternity benefits can be adopted and financed with public funds.



### B. EEOC's Extension of Title VII to Require Coverage in Sick Leave Plans of Pregnancy-Related Disabilities, Not Involving Sickness or Injury, Is Unwarranted.

In order for this Court to decide that Title VII requires the inclusion in sick leave plans of pregnancy-related disabilities not involving sickness or injury, the Court must conclude that in Title VII Congress intended to create for women rights in addition to those guaranteed by the Fourteenth Amendment to the United States Constitution.

We know that the Fourteenth Amendment does not require the inclusion of such disabilities in sick leave plans in order to avoid sex discrimination. *Geduldig v. Aiello,* 417 U.S. 484. And we could find nothing in the legislative history of Title VII to indicate that Congress had anything in mind other than to provide an additional remedy to enforce rights guaranteed by the Thirteenth and Fourteenth Amendments to the Constitution. See House Report 92-238, 92d Cong., 2d Sess., U.S. Code Cong. and Admis. News, p. 2137, at p. 2154.[3]

Viewing Title VII as a remedial statute to enforce constitutional protection from discrimination, this Court needs to go no farther than its decision in *Geduldig v. Aiello,* supra, to strike down EEOC guideline 1604.10 insofar as it deals with pregnancy-related disabilities not involving a sickness or injury.

---

[3] The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.

Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes that an appropriate remedy has been fashioned in the bill.

Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination perpetuated 'under color of state law' as embodied in the Civil Rights Act of 1871, 42 U.S.C. section 1983.

## CONCLUSION

We urge the Court to consider the interest of public employers in this important matter and to conclude that pregnancy-related disabilities, at least those which do not involve a sickness or injury, are not required to be covered by sick leave plans in order to avoid the sex discrimination proscribed by Title VII of the Civil Rights Act of 1964, as amended.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

SUPREME COURT OF THE UNITED STATES

| | |
|---|---|
| Martha V. Gilbert, et al., petitioner and respondent, v. General Electric Company, respondent and petitioner. | Nos. 74-1589; 74-1590 |

**Consent to File Amicus Curiae Brief**

Martha V. Gilbert, et al. hereby consent to the filing of an amicus curiae brief by School District of the City of Ladue, a public school district located in St. Louis County, Missouri.

/s/ RUTH WEYAND
Attorney for Martha V. Gilbert, et al.
1126 16th Street, N.W.
Washington, D. C. 20036

Dated: July 8, 1976

## APPENDIX B

SUPREME COURT OF THE UNITED STATES

| | |
|---|---|
| Martha V. Gilbert, et al., petitioner and respondent,<br><br>v.<br><br>General Electric Company, respondent and petitioner. | Nos. 74-1589; 74-1590 |

**Consent to File Amicus Curiae Brief**

General Electric Company hereby consents to the filing of an amicus curiae brief held by School District of the City of Ladue, a public school district located in St. Louis County, Missouri.

STANLEY R. STRAUSS, Esq.
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Dated: July 6, 1976

FOR ARGUMENT.

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976.

**Nos. 74-1589 and 74-1590**

GENERAL ELECTRIC COMPANY,
*vs.* *Petitioner,*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL., *Respondents.*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL., *Petitioners,*

*vs.*

GENERAL ELECTRIC COMPANY,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

## SUPPLEMENTAL BRIEF AMICUS CURIAE ON BEHALF OF LIBERTY MUTUAL INSURANCE COMPANY.

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*Liberty Mutual Ins. Co.* v. *Wetzel*, ..... U. S. ....., 96 S. Ct. 1202 (1975) ..... 2

*Washington, et al.* v. *Davis*, ..... U. S. ....., 96 S. Ct. 2040 (1976) .....2, 3, 4


*Federal Statutes.*


Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.* (1974) ....3, 4, 5

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Brief *Amicus Curiae* on Behalf of Liberty Mutual Insurance Company, *General Electric Company* v. *Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al.; Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al.* v. *General Electric Company*, U. S. Sup. Ct. Nos. 74-1589 and 74-1590 ..... 2, 3, 5

Brief of General Electric Company, *General Electric Company* v. *Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al.; Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al.* v. *General Electric Company*, U. S. Sup. Ct. Nos. 74-1589 and 74-1590 ..... 4

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976.

**Nos. 74-1589 and 74-1590**

GENERAL ELECTRIC COMPANY,
*Petitioner,*

*vs.*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL.,
*Respondents.*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL.,
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*vs.*

GENERAL ELECTRIC COMPANY,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

## SUPPLEMENTAL BRIEF AMICUS CURIAE ON BEHALF OF LIBERTY MUTUAL INSURANCE COMPANY

## INTEREST OF THE AMICUS CURIAE[1]

Liberty Mutual Insurance Company (hereafter "Liberty") was the petitioner in a case originally argued in tandem with the instant case, *Liberty Mutual Insurance Company* v. *Sandra Wetzel, et al.* (hereafter "*Liberty Mutual*"), No. 74-1245, which was remanded by this Court and is now pending in the Court of Appeals for the Third Circuit. See ..... U. S. ....., 96 S. Ct. 1202.[2] As the parties herein represented to this Court, "the same question" is presented in both cases.[3] Liberty filed, and this Court accepted, a brief *amicus curiae* prior to the original argument in the instant case. Liberty seeks herein only to supplement its brief *amicus curiae*, specifically addressing the applicability of *Washington, et al.* v. *Davis*, ..... U. S. ....., 96 S. Ct. 2040 (June 7, 1976) which was issued after the original oral argument in the instant case. Liberty's full position is set forth in both its original brief *amicus curiae* and its briefs filed with this Court in *Liberty Mutual*, Case No. 74-1245, and will not be duplicated herein.

## ARGUMENT

In its previous briefs Liberty demonstrated that in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), this Court resolved the threshold question presented herein, *i.e.*, that a pregnancy exclusion in an employer's disability income plan does not, standing alone, constitute discrimination based on gender *per se*. See

1. This brief is filed with the consent of all parties in accordance with Rule 42(2) of this Court.

2. On March 23, 1976, this Court vacated the judgment of the Third Circuit for want of an appealable order and instructed the Court of Appeals to dismiss the appeal. On April 30, 1976, the appeal was dismissed by the Court of Appeals. On August 24, 1976, in response to a motion by plaintiff Wetzel the District Court issued a prospective injunction from which Liberty has appealed to the Third Circuit where the case is now pending.

3. Joint Petition of All Parties for a Writ of Certiorari, p. 7.



Liberty's principal brief in *Liberty Mutual*, pp. 7-15, and Liberty's brief *amicus curiae*, pp. 6-7. Liberty acknowledged, however, that even if such a pregnancy exclusion does not automatically constitute unlawful discrimination within the meaning of Title VII,[4] it may still be necessary to evaluate individual insurance programs to determine whether any particular program is structured to disfavor one gender or another class protected by Title VII. Hence Liberty also proposed the appropriate standard against which any employer's income insurance policy could and should be measured under Title VII. See Liberty's principal brief in *Liberty Mutual*, pp. 21-24, and Liberty's brief *amicus curiae*, pp. 6-7. The decision issued by this Court in *Washington* v. *Davis, supra*, does not in any way modify the aforementioned threshold conclusion that this Court in *Geduldig* rejected Respondent Gilbert's position that the exclusion of pregnancy-related disabilities from insurance coverage can, without additional evidence, establish a discriminatory employment practice within the meaning of Title VII. That threshold conclusion and the standard proposed by Liberty to be used to evaluate the multitude of employers' insurance policies remain valid and are correct.

1. Albeit *Washington* v. *Davis, supra*, and *Geduldig* v. *Aiello, supra*, both arose from allegations that certain conduct violated constitutional due process and equal protection standards, the issues presented to and resolved by this Court in those two cases were markedly different. In *Washington* this Court confronted the validity of a written personnel test which had " 'a highly discriminatory impact in screening out black candidates' " (96 S. Ct. 2045, citing *Davis* v. *Washington*, 348 F. Supp. 15, 16 (D. C. 1972)) applying for police jobs with the District of Columbia Police Department. The question resolved by this Court in *Washington* was not whether discrimination *per se* existed, but whether this apparently neutral "barrier to employment" (*Griggs* v. *Duke Power Co.*, 401

4. Section 703 of Title VII of the Civil Rights Act of 1964, as amended (42 U. S. C. § 2000e, *et seq.*).

U. S. 424, 431 (1971)) was permissible under the Due Process Clause. In the absence of "a discriminatory purpose" underlying the use of the test, this Court held that the test, with its discriminatory impact, was permissible. The District of Columbia was not required to provide a "justification [for discrimination] . . . beyond what would be necessary to justify most other legislative classifications." *Washington* v. *Davis, supra,* 96 S. Ct. at 2050. *Geduldig,* by contrast, presented a basic question, not at issue in *Washington,* which, as stated by Judge Widener below, was "whether the exclusion of pregnancy-related disability from the disability benefits plan is sex discrimination." *Gilbert* v. *General Electric Company,* 519 F. 2d 661, 668. If it is not sex discrimination, it is immaterial whether the plan is measured against Title VII or a constitutional standard; there would be no violation of either standard. Hence, the presentation set forth by Liberty in its prior briefs, referred to above, and by General Electric in its principal brief (pp. 26-34), demonstrating that the exclusion of pregnancy from the risks insured under an employer's benefit program does constitute discrimination based on gender *per se,* is unaffected by *Washington* v. *Davis, supra.* Succinctly, as this Court recognized in *Geduldig,* there is no "identity between the excluded disability [pregnancy] and gender as such. . . ." 417 U. S. at 496-497 n. 20.

2. Notwithstanding *Washington* v. *Davis, supra,* the significant question confronting this Court is still what analytical framework should be utilized to evaluate the multitude of differing employer insurance programs under Title VII. As Liberty has already explained, where, as here, all employees are insured for all the included and covered risks without regard to gender, the appropriate analysis requires that the employer's entire insurance plan be considered. See Liberty brief *amicus curiae,* pp. 6-7. An evaluation limited to a single risk exclusion within an insurance policy, as sought by plaintiff Gilbert, "is of minimal value in assessing the neutrality" (*Washington* v. *Davis,* 96 S. Ct. at 2055 (Stevens J., concurring)) of the



employer's policy, *i.e.,* the equality of the benefits and compensation offered to employees of both genders. Such a limited perspective, if used, would reach too far and invalidate the exclusion of almost every medical risk except those few that affect males and females identically. Accordingly, it is necessary that a meritorious attack upon the "underinclusiveness of the set of risks" (*Geduldig* v. *Aiello,* 417 U. S. at 494) for which protection is offered, must, unlike here, be founded upon "evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable [protected] group or class in terms of the aggregate risk protection. . . ." *Geduldig* v. *Aiello,* 417 U. S. at 496-497. The record, however, clearly establishes that General Electric provides at least proportional benefits on an aggregate basis to its female employees. See Liberty brief *amicus curiae,* pp 7-9. Plaintiffs have not demonstrated, as it is submitted they must, that General Electric inequitably distributed either insurance premiums or benefit dollars, or that the pregnancy disability exclusion was pretextual or skewed in favor of males. The "plain fact of the matter is that [General Electric's plan] does not discriminate against [female employees]." *Espinoza* v. *Farah Manufacturing Company,* 414 U. S. 86, 92-3 (1973). To conclude otherwise would not insure equality—the only objective of Title VII—but would require instead that a greater economic benefit be provided. The propriety of such preferential or compensatory treatment is a political question for Congress.

## CONCLUSION

For the reasons set forth above, in Liberty's principal brief *amicus curiae*, and in Liberty's briefs in *Liberty Mutual*, Case No. 74-1245, as well as those presented by General Electric, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
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IN THE

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GENERAL ELECTRIC COMPANY,
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## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## BRIEF OF AMICUS CURIAE STATE OF OHIO

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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1975**

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NO. 74-1589

GENERAL ELECTRIC COMPANY,
Petitioner,

vs.

MARTHA V. GILBERT, et al.,
Respondents.

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NO. 74-1590

MARTHA V. GILBERT, et al.,
Petitioners,

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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## BRIEF OF AMICUS CURIAE STATE OF OHIO

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## INTEREST OF STATE OF OHIO

The laws of the State of Ohio prohibit discrimination on the basis of sex in employment. Ohio Revised Code § 4112.02 (A). Pursuant to this statute, the State is cur-

rently litigating several cases which may be affected by the decision in this case. For this reason, the State of Ohio, by its Attorney General, respectfully submits this brief as *amicus curiae* pursuant to Rule 42, Part IV of the Revised Rules of the Supreme Court of the United States.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 519 F.2d 661 (1975), *Gilbert* v. *General Electric Company*.

The opinion of the District Court for the Eastern District of Virginia is reported at 375 F.Supp. 367 (1974). Earlier opinions of the District Court with respect to venue, class certification and joinder of third party defendants are reported respectively at 347 F.Supp. 1058, 59 F.R.D. 267 and 59 F.R.D. 273.

## JURISDICTIONAL STATEMENT

The decision of the Court of Appeals for the Fourth Circuit affirming the judgment of the District Court of the Eastern District of Virginia was entered on June 27, 1975. The petition for writ of certiorari was granted on October 14, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

## STATUTE INVOLVED

Section 703 (a) (1) of Title VII of the Civil Rights Act of 1964, Act of July 2, 1964, 78 Stat. 253, 42 U.S.C. § 2000e-2 (a) (1).



## QUESTION PRESENTED

Whether the adoption of a disability income protection plan which admittedly treats women differently than men by excluding coverage of disabilities due to pregnancy is sex discrimination prohibited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (a) (1).

## STATEMENT OF FACTS

General Electric Company is a manufacturing company with plants throughout the country. General Electric provides weekly benefit payments for non-occupational sickness and accidents to all of its employees. The amount of such payments is equal to sixty (60) percent of an employees straight time weekly wage up to a maximum benefit of one hundred and fifty dollars ($150.00) per week for each week the employee is absent and unable to work because of disability which results from a non-occupational sickness or accident. The benefit payments will be made for up to twenty-six (26) weeks for any one continuous period of disability or successive periods of disability due to the same or related cause. The only exception to the benefits plan is that sickness or other disabilities arising from pregnancy, miscarriage or childbirth are not included.

The District Court for the Eastern District of Virginia held that the denial of pregnancy-related disability benefits violated Title VII of the Civil Rights Act of 1964, as amended. *Gilbert* v. *General Electric Company*, 375 F. Supp. 367 (1974). This decision was affirmed by the Court of Appeals for the Fourth Circuit. *Gilbert* v. *General Electric Company*, 519 F.2d 661 (1975).

For a further statement of facts, the stipulated facts set out by the District Court in *Gilbert*, *supra*, at 369-375 are adopted herein.

## SUMMARY OF ARGUMENT

General Electric Company's disability income plan violates Title VII because it provides dissimilar treatment for men and women who are similarly situated. While it is true that all women workers are not pregnant at any given time, women in the labor force are susceptible to becoming pregnant. It is not necessary that all women be adversely affected by the policy in issue; it is only necessary that women are affected by the policy at a differential rate than men in order to trigger Title VII review.

Where a policy is demonstrated to have discriminatory effects, it can only be justified by business necessity. General Electric Company's only business justification for the challenged policy, increased costs of the benefits plan if pregnancy disabilities are included, does not meet the strict requirements of the business necessity test.

Finally, it is essential in this case to keep the issue in focus: the question is not whether the Equal Protection Clause of the Fourteenth Amendment requires inclusion of disabilities relating to pregnancy within a disability insurance program, but whether Title VII of the Civil Rights Act of 1964 requires such inclusion. Reliance by petitioners on *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), is misplaced because the case at bar concerns statutory interpretation rather than constitutional analysis found in *Aiello.*

Title VII of the Civil Rights Act of 1964 makes unlawful as sex discrimination, petitioner's exclusion of pregnancy disabilities from its disability insurance program even though a similar insurance program of a government body might not be violative of the Equal Protection Clause of the Fourteenth Amendment.

The Constitution does not set outside limits on what discriminatory acts may be made unlawful. Rather, it sets



lower limits on what discriminatory acts are unconstitutional and cannot be made lawful. Thus, while Congress cannot make lawful those actions forbidden by the Fourteenth Amendment, Congress can make unlawful, actions which are not violative of the Fourteenth Amendment itself.

## I. GENERAL ELECTRIC'S FAILURE TO COVER DISABILITY DUE TO PREGNANCY IS UNLAWFUL SEX DISCRIMINATION IN VIOLATION OF TITLE VII.

The decision of this Court in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), makes it clear that, under Title VII, "what is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification". *Id.* at 431. Providing a male employee disabled from heart disease or prostrate surgery, with insurance benefits, but denying a female employee, disabled from pregnancy, those same benefits is certainly arbitrary. It is also unlawful due to the disparate effect which such a policy has on women employees.

Dissimilar treatment for men and women who are similarly situated has been held unlawful under Title VII in a variety of contexts in addition to pregnancy disability benefits. *Phillips* v. *Martin-Marietta Corp.,* 400 U.S. 542 (1971) (held that company could not exclude women with pre-school age children from employment opportunities unless they also exclude men with pre-school age children); *Sprogis* v. *United Airlines, Inc.,* 444 F.2d 1194 (7th Cir. 1971) (held that it was illegal to apply "no marriage" rule solely to stewardesses and not to male employees and that

this regulation could not be justified as a BFOQ because of customer preference) ; *Bartmess* v. *Drewrys, U.S.A., Inc.,* 444 F.2d 1186 (7th Cir. 1971) (discrimination with regard to "fringe benefits" such as retirement plans which set different compulsory ages for retirement for men and women are prohibited by Title VII) ; *Weeks* v. *Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228 (5th Cir. 1969) (held that refusal to consider or hire women for jobs as switchmen was unlawful) . *See also Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969) .

General Electric's disability benefits plan protects male employees from the financial strain occasioned by virtually all planned or unplanned physical disabilities which they are likely to encounter. In contrast, female employees who are uniquely susceptible to disability due to pregnancy are not covered by the plan during their period of physical disability. Therefore, the impact of the plan is adverse to women employees and discriminates on the basis of sex.

While it is true that all women workers are not pregnant at any given time, women in the labor force are susceptible to becoming pregnant.[1] It is not necessary that all women be adversely affected by the policy in issue; it is only necessary that women are affected by the policy at a differential rate than men in order to trigger Title VII review.

A similar situation was presented to this Court when it considered the so-called "grandfather clauses" which exempted from the required literacy test for voting, all per-

[1] In recent years the most rapid gains in labor force participation rates of women have occurred among wives under age 35, and especially among those with children under six. Waldman & Whitmore, *Children of Working Mothers, March 1973,* 97 Monthly Labor Rev. 50, 52 (May, 1974). Since 1940, the proportion of working women who are married has increased from 30 to 60 percent. Waldman & McEaddy, *Where Women Work — An Analysis by Industry and Occupation,* 97 Monthly Labor Rev. 3 (1974).



sons entitled to vote on a given date, prior to ratification of the Fifteenth Amendment or those whose ancestors were then entitled to vote. While all black persons were not disenfranchised by these clauses, a significant, though by no means *absolute,* number of blacks were harmed, although the policy was neutral on its face. However, a differential rate of black persons were, like the women employees in the instant case, susceptible to being harmed by it. Thus, this Court, finding that no purpose was served by the "grandfather clauses" other than to evade the commands of the Fifteenth Amendment declared "grandfather clauses" invalid. *Guinn* v. *United States,* 238 U.S. 347 (1915) . *See also Myers* v. *Anderson,* 238 U.S. 368 (1915) .

Under Title VII, as in the "grandfather clause" cases, courts have not required that all members of a class be discriminated against to render a practice unlawful. What is required is that the policy affects a disproportionate number of members of such class. Thus, unlawful discrimination in employment was found under Title VII on the basis of excessive garnishment, *Johnson* v. *Pike Corporation of America,* 332 F.Supp. 490 (D.C. Calif. 1971) , parenthood of illegitimate children, *Davis* v. *American National Bank of Terrell, Texas,* Civ. Case No. CA3-4512 (N.D. Tex. — F.Supp. —, 1971) , and relationship to current employees or union members; *United States* v. *Sheet Metal Workers' International Assoc., Local No. 36 and IBEW Local No. 1, AFL-CIO,* 416 F.2d 123 (8th Cir. 1969) .

Further, the exclusion of pregnancy disability under the disability benefits plan at issue undermines the spirit and letter of Title VII. As Congress has indicated in its most recent consideration of equal employment opportunity, "discrimination against women is no less serious than other

forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination". House Report on Equal Employment Opportunity Enforcement Act of 1972, 2 U.S. Code Cong. and Admin. News 2140 (92nd Cong., 2nd Sess. 1972).

Finally, the guidelines promulgated by the Equal Employment Opportunity Commission support this view. 29 C.F.R. § 1604.10 (b) provides:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availablity or extension, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

The Court below accorded deference to the EEOC guidelines in reaching its decision and found them to be consistent with Congressional intent, unlike the guidelines considered in this Court's opinion in *Espinoza* v. *Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973). The guidelines should be given deference because it is the Equal Employment Opportunity Commission which is charged with the enforcement of the statute. *Griggs* v. *Duke Power Co., supra*; *Phillips* v. *Martin-Marietta Corp., supra*; and *Satty* v. *Nashville Gas Company*, 522 F.2d 850 (6th Cir. 1975).



It is apparent that General Electric has offended the policy and requirements of Title VII by treating female employees differently from male employees and by excluding disability due to pregnancy from its disability benefits plan, which exclusion has an adverse impact on women workers who are susceptible to becoming pregnant.

Under either the "adverse impact" or the "disparate treatment" tests, General Electric's policy of excluding disability due to pregnancy from its disability benefits plan is sex discrimination.

## II. GENERAL ELECTRIC HAS NOT OVERCOME THE SEXUAL IMPACT OF ITS POLICY BY REASONS OF BUSINESS NECESSITY.

If an employer implements a policy or practice which has an adverse impact upon a protected class of employees, this fact in itself does not render the policy or practice illegal under Title VII.[2] Upon a showing of an adverse impact on a protected class of employees, the burden shifts to the employer to justify its policy or practice by reasons of a business necessity to negate the illegal policy or practice. *Griggs* v. *Duke Power Co., supra*; *Robinson* v. *Lorillard Corporation*, 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1971); *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC* v. *United States*, 416 F.2d 980 (5th Cir. 1969).

The business necessity test was mandated by Congressional intent as a reasonable standard to maintain an employer's policies and practices which discriminate against

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[2] Should this Court find that the policy at issue herein is outright disparate treatment based on sex, however, the business necessity [illegible] would not apply and there would be no defense to the Title [illegible] violation.

a protected class of employees but which are absolutely necessary to continue the operation of the business. *Robinson* v. *Lorillard Corp., supra.* If business necessity cannot be shown, the policy or practice must fall. In *Griggs,* this Court succinctly stated the rule:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operated to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. 401 U.S. at 424.

Although General Electric "makes no claim for relief under this [business necessity] exception", *Gilbert,* 519 F. 2d 661 at 667, and thus application of the business necessity rule to this case is unnecessary, the Company did adduce evidence of increased costs to explain the policy. While cost projection analysis and statistical studies introduced by Petitioner and Respondents were found by the District Court in *Gilbert, supra,* at 379, to be too speculative in nature to be probative of actual future costs, the Court did find that inclusion of pregnancy disability benefits into the present plan would increase General Electric's costs.

Increased cost alone does not constitute a business necessity defense. Such a defense is premised upon a showing that the discriminatory conduct is necessary to the safe and efficient operation of the business. *Jones* v. *Lee Way Motor Freight,* 431 F.2d 245 (10th Cir. 1970). One court has stated that "[N]ecessity connotes an irresistible demand". *United States* v. *Bethlehem Steel Corporation,* 446 F.2d 562 (2d Cir. 1971). The situation here does not even come close to these business necessity standards.

Any costs incurred by General Electric under the disability benefits plan are incurred by virtue of its contractual obligations with its unions. "The rights assured by



Title VII are not rights which can be bargained away — either by a union, by an employer, or by both acting in concert". *Robinson* v. *Lorillard Corp., supra,* at 799.

Assuming *arguendo* that exorbitant costs will result if pregnancy-related disabilities are covered by General Electric's plan, the question remains whether the plan can be altered to meet the Title VII proscriptions without an increase in costs. In *Robinson* v. *Lorillard, supra,* the Court of Appeals for the Fourth Circuit found that the employer who has a practice which has an adverse impact upon a protected class of employees must explore alternatives to determine whether there exists an acceptable alternative which accomplishes the business purpose advanced and which has a lesser impact. The Court stated:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business . . . there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

In this case, the Company's business purpose is to adopt a plan which provides disability benefits to its employees. That plan may change from time to time due to the economy, laws, internal employment policies, and other forces. If this Court finds that General Electric's policy of excluding pregnancy-related disabilities violates Title VII, the Company could amend the policy to either account for or offset any increased costs resulting from complying with the law.[3] In any event, the plan finally implemented must meet the legal requirements of Title VII.

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[3] For example, the State of Ohio has adopted a state employee disability income protection plan which provides a maximum of three years benefits to all employees and covers pregnancy-related disabilities.

## III. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PROHIBITS ALL SEX DISCRIMINATION IN CONDITIONS OF EMPLOYMENT AND MAKES UNLAWFUL SEX DISCRIMINATION WHICH MAY NOT BE UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

It is essential in this case to keep the issue in focus: the question is not whether the Equal Protection Clause of the Fourteenth Amendment requires inclusion of disabilities relating to pregnancy within a disability insurance program, but whether Title VII of the Civil Rights Act of 1964 requires such inclusion. Reliance by General Electric on *Geduldig* v. *Aiello, supra,* is misplaced because the case at bar concerns statutory interpretation rather than constitutional analysis found in *Aiello.*

Implicit in the Company's reliance on *Aiello, supra,* is the premise that Congress, in legislating against discrimination, cannot make *unlawful* as sex discrimination that which is not *unconstitutional* as sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

Aside from any factual distinctions between this case and *Aiello,* it is clear that such a premise is unfounded. Congress can remedy problems as they perceive them and make unlawful, actions which are, nonetheless, constitutional.

General Electric's argument:

> . . . presupposes that the lawful scope of employment policies under the former Act [Title VII] is coextensive with the latter constitutional provision [Fourteenth Amendment]. We believe that the better approach permits Title VII under the Commerce Clause to extend beyond the reach of the Equal Protection Clause. *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294. Otherwise, Title VII's effective reach would be limited by the decisions of the Supreme Court, a result effectively curtailing its implementation. *Satty* v. *Nashville Gas Co., supra* at 855.



In *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), the Attorney General of the State of New York argued that the Voting Rights Act of 1965 "could not be sustained as appropriate legislation to enforce the equal protection clause unless the judiciary decides that the state action prohibited by the act of Congress is forbidden by the equal protection clause itself. This Court disagreed with the New York State Attorney General stating at page 653 that:

> . . . it was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.

Thus, the Voting Rights Act of 1965 made certain actions on the part of the State of New York unlawful, even though such actions were not unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Similarly, herein, Title VII of the Civil Rights Act of 1964 makes unlawful as sex discrimination General Electric's exclusion of pregnancy-disabilities from its disability insurance program even though a similar insurance program of a government body might not be violative of the Equal Protection Clause of the Fourteenth Amendment.

In a related vein, even though there may be no constitutional duty to act under the Fourteenth Amendment to undo *de facto* school segregation, because such discrimination may not be unconstitutional, state legislatures can pass legislation making it unlawful and school boards can take action to eliminate such segregation. *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 16 (1971); *Offermann* v. *Nitkowski,* 378 F.2d 22 (1967); *Porcelli* v. *Titus,* 431 F.2d 1254 (3d Cir. 1970); *Tometz* v. *Board of Education,* 39 Ill. 2d 593, 237 N.E.2d 498 (1968); *Addabbo* v. *Donovan,* 16 N.Y.2d 619, 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), *cert. denied,* 382 U.S. 905 (1965).

The lesson of these cases is that the Constitution does not set outside limits on what discriminatory acts may be made unlawful. Rather, it sets lower limits on what discriminatory acts are unconstitutional and cannot be made lawful. Thus, while Congress cannot make lawful those actions forbidden by the Fourteenth Amendment, Congress can make unlawful, actions which are not violative of the Fourteenth Amendment itself.

Comparing the difference between statutory interpretation and constitutional analysis, the Court of Appeals below stated:

> There is a well-recognized difference of approach in applying *constitutional* standards under the Equal Protection Clause as in *Aiello* and in the statutory construction of the "sex-blind" mandate of Title VII. To satisfy constitutional Equal Protection standards, a discrimination need only be "rationally supportable" and that was the situation in *Aiello,* as well as in *Reed* and *Frontiero.* The test in those cases was legislative reasonableness. Title VII, however, authorized no such "rationality" tests in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in conditions of employment. (Emphasis in original). 519 F.2d 661 at 667.



All of the Circuit Courts of Appeal which have considered this question, and the majority of the District Courts as well, have recognized the difference between applying constitutional standards on the one hand, and statutory construction on the other, and such courts have held that *Aiello, supra,* is not dispositive of a claim for pregnancy disability benefits under Title VII. *Satty* v. *Nashville Gas Company, supra*; *Wetzel* v. *Liberty Mutual Ins. Co.,* 511 F.2d 199 (3d Cir. 1975), *vacated,* 44 U.S.L.W. 4350 (March 23, 1976); *Communications Workers* v. *American T. & T. Co.,* 513 F.2d 1024 (2d Cir. 1975). *See also Holthaus* v. *Compton & Sons,* 514 F.2d 651 (8th Cir. 1975); *Zichy* v. *City of Philadelphia,* 392 F.Supp. 338 (E.D. Pa. 1975; *Sale* v. *Board of Education,* 390 F.Supp. 784 (N.D. Iowa 1975); *Vineyard* v. *Hollister Elementary School District,* 64 F.R.D. 580 (N.D. Cal. 1974).

Nor would affirming the decision of the Court of Appeals below impose a different standard upon private, as opposed to public, employers. *Aiello* concerned requirements imposed by the Equal Protection Clause of the Fourteenth Amendment, not those imposed by Title VII. Title VII, as amended by Congress in 1972, applies to state and local governments as well as to private employers. The prohibitions and requirements of the act, whatever they are determined to be, will be equally applicable to the public and private sectors.

## CONCLUSION

The State of Ohio respectfully requests the Court to affirm the lower court's decision on the basis of the record in this case and the legal arguments presented herein.

Respectfully submitted,

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